

2008-2009

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

As passed by both Houses

**Trade Practices Amendment (Cartel
Conduct and Other Measures) Bill 2009**

No. , 2009

**A Bill for an Act to amend the *Trade Practices Act
1974*, and for other purposes**

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1 **A Bill for an Act to amend the *Trade Practices Act***
2 ***1974, and for other purposes***

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Trade Practices Amendment (Cartel*
6 *Conduct and Other Measures) Act 2009*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent.	
3. Schedule 2, items 1 to 49	The 28th day after the day on which this Act receives the Royal Assent.	
4. Schedule 2, items 50 and 51	The day after this Act receives the Royal Assent.	
5. Schedule 2, items 52 and 53	The 28th day after the day on which this Act receives the Royal Assent.	

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

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

7 **3 Schedule(s)**

8 Each Act that is specified in a Schedule to this Act is amended or
9 repealed as set out in the applicable items in the Schedule
10 concerned, and any other item in a Schedule to this Act has effect
11 according to its terms.
12

1 **Schedule 1—Amendments relating to cartel**
2 **conduct etc.**
3

4 ***Proceeds of Crime Act 2002***

5 **1 Section 338 (after paragraph (ec) of the definition of serious**
6 **offence)**

7 Insert:

- 8 (ed) an offence against either of the following sections of the
9 *Trade Practices Act 1974*:
10 (i) section 44ZZRF (making a contract etc. containing a
11 cartel provision);
12 (ii) section 44ZZRG (giving effect to a cartel provision); or

13 ***Telecommunications (Interception and Access) Act 1979***

14 **2 After subsection 5D(5A)**

15 Insert:

16 *Cartel offences*

- 17 (5B) An offence is also a *serious offence* if it is:
18 (a) an offence against section 44ZZRF or 44ZZRG of the *Trade*
19 *Practices Act 1974*; or
20 (b) an offence under subsection 79(1) of the *Trade Practices Act*
21 *1974* that relates to an offence covered by paragraph (a); or
22 (c) an offence against section 44ZZRF or 44ZZRG of the text set
23 out in Part 1 of the Schedule to the *Trade Practices Act 1974*,
24 so far as that section applies as a law of a State, the Northern
25 Territory or the Australian Capital Territory; or
26 (d) an offence under subsection 79(1) of the *Trade Practices Act*
27 *1974* (so far as that subsection applies as a law of a State, the
28 Northern Territory or the Australian Capital Territory) that
29 relates to an offence covered by paragraph (c).

30 Note: Offences covered by paragraph (c) or (d) form part of the Competition
31 Code of the State or Territory concerned.

1 ***Trade Practices Act 1974***

2 **3 Subsection 4(1)**

3 Insert:

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

5 **4 Subsection 5(1)**

6 Repeal the subsection, substitute:

7 (1) Each of the following provisions:

8 (a) Part IV;

9 (b) Part IVA;

10 (c) Part V (other than Division 1AA);

11 (d) Part VB;

12 (e) Part VC;

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

16 extends to the engaging in conduct outside Australia by:

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

19 (h) Australian citizens; or

20 (i) persons ordinarily resident within Australia.

21 Note: The heading to section 5 is altered by omitting “**and VC**” and substituting “, **VC etc.**”.

22 **5 Subsection 5(4)**

23 Omit “or the Commission”, substitute “, the Commission or the Director
24 of Public Prosecutions”.

25 **6 At the end of paragraph 6(2)(a)**

26 Add “and”.

27 **7 Paragraph 6(2)(b)**

28 Omit “sections 45”, substitute “sections 44ZZRF, 44ZZRG, 44ZZRJ,
29 44ZZRK, 45”.

30 **8 At the end of paragraph 6(2)(b)**

31 Add “and”.

1 **9 At the end of paragraph 6(2)(c)**

2 Add “and”.

3 **10 At the end of paragraph 6(2)(d)**

4 Add “and”.

5 **11 At the end of paragraph 6(2)(e)**

6 Add “and”.

7 **12 At the end of paragraph 6(2)(ea)**

8 Add “and”.

9 **13 At the end of paragraph 6(2)(eb)**

10 Add “and”.

11 **14 After subsection 6(2B)**

12 Insert:

13 (2C) In addition to the effect that this Act (other than Parts IIIA, VIIA
14 and X) has as provided by another subsection of this section, this
15 Act (other than Parts IIIA, VIIA and X) has, by force of this
16 subsection, the effect it would have if:

- 17 (a) the reference in paragraph 44ZZRD(2)(c) to goods or
18 services supplied, or likely to be supplied, were, by express
19 provision, confined to goods or services supplied, or likely to
20 be supplied, to corporations or classes of corporations; and
21 (b) the reference in paragraph 44ZZRD(2)(d) to goods or
22 services acquired, or likely to be acquired, were, by express
23 provision, confined to goods or services acquired, or likely to
24 be acquired, from corporations or classes of corporations; and
25 (c) the reference in paragraph 44ZZRD(2)(e) to goods or
26 services re-supplied, or likely to be re-supplied, were, by
27 express provision, confined to goods or services re-supplied,
28 or likely to be re-supplied, to corporations or classes of
29 corporations; and
30 (d) the reference in paragraph 44ZZRD(2)(f) to goods or services
31 likely to be re-supplied were, by express provision, confined
32 to goods or services likely to be re-supplied to corporations
33 or classes of corporations; and

- 1 (e) the following paragraphs were added at the end of subsection
2 44ZZRD(2):
3 “; or (g) goods or services re-supplied, or likely to be re-supplied, by
4 corporations or classes of corporations to whom those goods
5 or services were supplied by any or all of the parties to the
6 contract, arrangement or understanding; or
7 (h) goods or services likely to be re-supplied by corporations or
8 classes of corporations to whom those goods or services are
9 likely to be supplied by any or all of the parties to the
10 contract, arrangement or understanding.”; and
11 (f) the reference in subparagraph 44ZZRD(3)(a)(i) to the
12 production, or likely production, of goods were, by express
13 provision, confined to the production, or likely production, of
14 goods for supply to corporations or classes of corporations;
15 and
16 (g) the reference in subparagraph 44ZZRD(3)(a)(ii) to the supply
17 of services were, by express provision, confined to the supply
18 of services to corporations or classes of corporations; and
19 (h) each reference in subparagraphs 44ZZRD(3)(a)(iii), (b)(i)
20 and (ii) to persons or classes of persons were, by express
21 provision, confined to corporations or classes of
22 corporations; and
23 (i) the reference in subparagraph 44ZZRD(3)(b)(iii) to the
24 geographical areas in which goods or services are supplied,
25 or likely to be supplied, were, by express provision, confined
26 to the geographical areas in which goods or services are
27 supplied, or likely to be supplied, to corporations or classes
28 of corporations; and
29 (j) the reference in subparagraph 44ZZRD(3)(b)(iv) to the
30 geographical areas in which goods or services are acquired,
31 or likely to be acquired, were, by express provision, confined
32 to the geographical areas in which goods or services are
33 acquired, or likely to be acquired, from corporations or
34 classes of corporations; and
35 (k) the reference in paragraph 44ZZRD(3)(c) to the supply or
36 acquisition of goods or services were, by express provision,
37 confined to supply of goods or services to, or the acquisition
38 of goods or services from, corporations or classes of
39 corporations; and

- 1 (l) the reference in paragraph 44ZZRD(4)(e) to paragraph (2)(e)
2 or (f) included a reference to paragraph (2)(g) or (h); and
3 (m) section 44ZZRD also provided that it is immaterial whether
4 the identities of the corporations referred to in subsection (2)
5 or (3) of that section can be ascertained; and
6 (n) each reference in the following provisions of this Act:
7 (i) Division 1 of Part IV (other than section 44ZZRD);
8 (ii) any other provision (other than section 4, 44ZZRD,
9 151AE or 151AJ or this subsection or subsection (5A))
10 to the extent to which it relates to Division 1 of Part IV;
11 to a corporation included a reference to a person not being a
12 corporation.

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

- 15 (2D) In addition to the effect that this Act (other than Parts IIIA, VIIA
16 and X) has as provided by another subsection of this section, this
17 Act (other than Parts IIIA, VIIA and X) has, by force of this
18 subsection, the effect it would have if:
19 (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK were, by
20 express provision, confined in their operation to engaging in
21 conduct to the extent to which the conduct involves the use
22 of, or relates to, a postal, telegraphic, telephonic or other like
23 service within the meaning of paragraph 51(v) of the
24 Constitution; and
25 (b) each reference in the following provisions of this Act:
26 (i) Division 1 of Part IV;
27 (ii) any other provision (other than section 4, 151AE or
28 151AJ or this subsection or subsection (5A)) to the
29 extent to which it relates to Division 1 of Part IV;
30 to a corporation included a reference to a person not being a
31 corporation.

- 32 (2E) In addition to the effect that this Act (other than Parts IIIA, VIIA
33 and X) has as provided by another subsection of this section, this
34 Act (other than Parts IIIA, VIIA and X) has, by force of this
35 subsection, the effect it would have if:
36 (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK were, by
37 express provision, confined in their operation to engaging in
38 conduct to the extent to which the conduct takes place in, or
39 relates to:
-

- 1 (i) a Territory; or
2 (ii) a Commonwealth place (within the meaning of the
3 *Commonwealth Places (Application of Laws) Act 1970*);
4 and
5 (b) each reference in the following provisions of this Act:
6 (i) Division 1 of Part IV;
7 (ii) any other provision (other than section 4, 151AE or
8 151AJ or this subsection or subsection (5A)) to the
9 extent to which it relates to Division 1 of Part IV;
10 to a corporation included a reference to a person not being a
11 corporation.

12 **15 Subsection 6(3)**

13 Omit “subsection (2)”, substitute “another subsection of this section”.

14 **16 Subsection 6(4)**

15 Omit “subsections (2) and (3)”, substitute “another subsection of this
16 section”.

17 **17 After subsection 6(5)**

18 Insert:

19 (5A) Despite anything in section 44ZZRF or 44ZZRG, if a body
20 corporate other than a corporation is convicted of an offence
21 against that section (as that section applies because of this section),
22 the offence is taken to be punishable on conviction as if the body
23 corporate were a corporation.

24 (5B) Despite anything in section 44ZZRF or 44ZZRG, if a person other
25 than a body corporate is convicted of an offence against that
26 section (as that section applies because of this section), the offence
27 is taken to be punishable on conviction by a term of imprisonment
28 not exceeding 10 years or a fine not exceeding 2,000 penalty units,
29 or both.

30 **18 Subsection 6AA(2)**

31 Omit “or Division 7 of Part XIB”, substitute “, Division 7 of Part XIB,
32 or section 44ZZRF or 44ZZRG”.

33 **19 Part IV (after heading)**

1 Insert:

2 **Division 1—Cartel conduct**

3 **Subdivision A—Introduction**

4 **44ZZRA Simplified outline**

5 The following is a simplified outline of this Division:

- 6 • This Division sets out parallel offences and civil penalty
7 provisions relating to cartel conduct.
- 8 • A corporation must not make, or give effect to, a contract,
9 arrangement or understanding that contains a cartel provision.
- 10 • A cartel provision is a provision relating to:
- 11 (a) price-fixing; or
- 12 (b) restricting outputs in the production and supply
13 chain; or
- 14 (c) allocating customers, suppliers or territories; or
- 15 (d) bid-rigging;
- 16 by parties that are, or would otherwise be, in competition with
17 each other.

18 **44ZZRB Definitions**

19 In this Division:

20 **annual turnover**, of a body corporate during a 12-month period,
21 means the sum of the values of all the supplies that the body
22 corporate, and any body corporate related to the body corporate,
23 have made, or are likely to make, during the 12-month period,
24 other than:

- 25 (a) supplies made from any of those bodies corporate to any
26 other of those bodies corporate; or

- 1 (b) supplies that are input taxed; or
2 (c) supplies that are not for consideration (and are not taxable
3 supplies under section 72-5 of the *A New Tax System (Goods
4 and Services Tax) Act 1999*); or
5 (d) supplies that are not made in connection with an enterprise
6 that the body corporate carries on; or
7 (e) supplies that are not connected with Australia.

8 Expressions used in this definition that are also used in the *A New
9 Tax System (Goods and Services Tax) Act 1999* have the same
10 meaning as in that Act.

11 **benefit** includes any advantage and is not limited to property.

12 **bid** includes:

- 13 (a) tender; and
14 (b) the taking, by a potential bidder or tenderer, of a preliminary
15 step in a bidding or tendering process.

16 **evidential burden**, in relation to a matter, means the burden of
17 adducing or pointing to evidence that suggests a reasonable
18 possibility that the matter exists or does not exist.

19 **likely**, in relation to any of the following:

- 20 (a) a supply of goods or services;
21 (b) an acquisition of goods or services;
22 (c) the production of goods;
23 (d) the capacity to supply services;

24 includes a possibility that is not remote.

25 **obtaining** includes:

- 26 (a) obtaining for another person; and
27 (b) inducing a third person to do something that results in
28 another person obtaining.

29 **party** has a meaning affected by section 44ZZRC.

30 **production** includes manufacture, processing, treatment, assembly,
31 disassembly, renovation, restoration, growing, raising, mining,
32 extraction, harvesting, fishing, capturing and gathering.

1 **44ZZRC Extended meaning of *party***

2 For the purposes of this Division, if a body corporate is a party to a
3 contract, arrangement or understanding (otherwise than because of
4 this section), each body corporate related to that body corporate is
5 taken to be a *party* to that contract, arrangement or understanding.

6 **44ZZRD Cartel provisions**

- 7 (1) For the purposes of this Act, a provision of a contract, arrangement
8 or understanding is a *cartel provision* if:
9 (a) either of the following conditions is satisfied in relation to the
10 provision:
11 (i) the purpose/effect condition set out in subsection (2);
12 (ii) the purpose condition set out in subsection (3); and
13 (b) the competition condition set out in subsection (4) is satisfied
14 in relation to the provision.

15 *Purpose/effect condition*

- 16 (2) The purpose/effect condition is satisfied if the provision has the
17 purpose, or has or is likely to have the effect, of directly or
18 indirectly:
19 (a) fixing, controlling or maintaining; or
20 (b) providing for the fixing, controlling or maintaining of;
21 the price for, or a discount, allowance, rebate or credit in relation
22 to:
23 (c) goods or services supplied, or likely to be supplied, by any or
24 all of the parties to the contract, arrangement or
25 understanding; or
26 (d) goods or services acquired, or likely to be acquired, by any or
27 all of the parties to the contract, arrangement or
28 understanding; or
29 (e) goods or services re-supplied, or likely to be re-supplied, by
30 persons or classes of persons to whom those goods or
31 services were supplied by any or all of the parties to the
32 contract, arrangement or understanding; or
33 (f) goods or services likely to be re-supplied by persons or
34 classes of persons to whom those goods or services are likely
35 to be supplied by any or all of the parties to the contract,
36 arrangement or understanding.
-

1 Note 1: The purpose/effect condition can be satisfied when a provision is
2 considered with related provisions—see subsection (8).

3 Note 2: **Party** has an extended meaning—see section 44ZZRC.

4 *Purpose condition*

5 (3) The purpose condition is satisfied if the provision has the purpose
6 of directly or indirectly:

7 (a) preventing, restricting or limiting:

8 (i) the production, or likely production, of goods by any or
9 all of the parties to the contract, arrangement or
10 understanding; or

11 (ii) the capacity, or likely capacity, of any or all of the
12 parties to the contract, arrangement or understanding to
13 supply services; or

14 (iii) the supply, or likely supply, of goods or services to
15 persons or classes of persons by any or all of the parties
16 to the contract, arrangement or understanding; or

17 (b) allocating between any or all of the parties to the contract,
18 arrangement or understanding:

19 (i) the persons or classes of persons who have acquired, or
20 who are likely to acquire, goods or services from any or all
21 of the parties to the contract, arrangement or
22 understanding; or

23 (ii) the persons or classes of persons who have supplied, or
24 who are likely to supply, goods or services to any or all
25 of the parties to the contract, arrangement or
26 understanding; or

27 (iii) the geographical areas in which goods or services are
28 supplied, or likely to be supplied, by any or all of the
29 parties to the contract, arrangement or understanding; or

30 (iv) the geographical areas in which goods or services are
31 acquired, or likely to be acquired, by any or all of the
32 parties to the contract, arrangement or understanding; or

33 (c) ensuring that in the event of a request for bids in relation to
34 the supply or acquisition of goods or services:

35 (i) one or more parties to the contract, arrangement or
36 understanding bid, but one or more other parties do not;
37 or

- 1 (ii) 2 or more parties to the contract, arrangement or
2 understanding bid, but at least 2 of them do so on the
3 basis that one of those bids is more likely to be
4 successful than the others; or
- 5 (iii) 2 or more parties to the contract, arrangement or
6 understanding bid, but not all of those parties proceed
7 with their bids until the suspension or finalisation of the
8 request for bids process; or
- 9 (iv) 2 or more parties to the contract, arrangement or
10 understanding bid and proceed with their bids, but at
11 least 2 of them proceed with their bids on the basis that
12 one of those bids is more likely to be successful than the
13 others; or
- 14 (v) 2 or more parties to the contract, arrangement or
15 understanding bid, but a material component of at least
16 one of those bids is worked out in accordance with the
17 contract, arrangement or understanding.

- 18 Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a
19 roster for the supply of after-hours medical services if the roster does
20 not prevent, restrict or limit the supply of services.
- 21 Note 2: The purpose condition can be satisfied when a provision is considered
22 with related provisions—see subsection (9).
- 23 Note 3: *Party* has an extended meaning—see section 44ZZRC.

24 *Competition condition*

- 25 (4) The competition condition is satisfied if at least 2 of the parties to
26 the contract, arrangement or understanding:
- 27 (a) are or are likely to be; or
28 (b) but for any contract, arrangement or understanding, would be
29 or would be likely to be;
30 in competition with each other in relation to:
- 31 (c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or
32 likely supply, of goods or services—the supply of those
33 goods or services; or
34 (d) if paragraph (2)(d) or (3)(b) applies in relation to an
35 acquisition, or likely acquisition, of goods or services—the
36 acquisition of those goods or services; or
37 (e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or
38 likely re-supply, of goods or services—the supply of those
39 goods or services to that re-supplier; or
-

- 1 (f) if subparagraph (3)(a)(i) applies in relation to preventing,
2 restricting or limiting the production, or likely production, of
3 goods—the production of those goods; or
4 (g) if subparagraph (3)(a)(ii) applies in relation to preventing,
5 restricting or limiting the capacity, or likely capacity, to
6 supply services—the supply of those services; or
7 (h) if subparagraph (3)(a)(iii) applies in relation to preventing,
8 restricting or limiting the supply, or likely supply, of goods
9 or services—the supply of those goods or services; or
10 (i) if paragraph (3)(c) applies in relation to a supply of goods or
11 services—the supply of those goods or services; or
12 (j) if paragraph (3)(c) applies in relation to an acquisition of
13 goods or services—the acquisition of those goods or services.

14 Note: *Party* has an extended meaning—see section 44ZZRC.

15 *Immaterial whether identities of persons can be ascertained*

- 16 (5) It is immaterial whether the identities of the persons referred to in
17 paragraph (2)(e) or (f) or subparagraph (3)(a)(iii), (b)(i) or (ii) can
18 be ascertained.

19 *Recommending prices etc.*

- 20 (6) For the purposes of this Division, a provision of a contract,
21 arrangement or understanding is not taken:
22 (a) to have the purpose mentioned in subsection (2); or
23 (b) to have, or be likely to have, the effect mentioned in
24 subsection (2);
25 by reason only that it recommends, or provides for the
26 recommending of, a price, discount, allowance, rebate or credit.

27 *Immaterial whether particular circumstances or particular
28 conditions*

- 29 (7) It is immaterial whether:
30 (a) for the purposes of subsection (2), subparagraph (3)(a)(iii)
31 and paragraphs (3)(b) and (c)—a supply or acquisition
32 happens, or a likely supply or likely acquisition is to happen,
33 in particular circumstances or on particular conditions; and

- 1 (b) for the purposes of subparagraph (3)(a)(i)—the production
2 happens, or the likely production is to happen, in particular
3 circumstances or on particular conditions; and
4 (c) for the purposes of subparagraph (3)(a)(ii)—the capacity
5 exists, or the likely capacity is to exist, in particular
6 circumstances or on particular conditions.

7 *Considering related provisions—purpose/effect condition*

- 8 (8) For the purposes of this Division, a provision of a contract,
9 arrangement or understanding is taken to have the purpose, or to
10 have or be likely to have the effect, mentioned in subsection (2) if
11 the provision, when considered together with any or all of the
12 following provisions:
13 (a) the other provisions of the contract, arrangement or
14 understanding;
15 (b) the provisions of another contract, arrangement or
16 understanding, if the parties to that other contract,
17 arrangement or understanding consist of or include at least
18 one of the parties to the first-mentioned contract,
19 arrangement or understanding;
20 has that purpose, or has or is likely to have that effect.

21 *Considering related provisions—purpose condition*

- 22 (9) For the purposes of this Division, a provision of a contract,
23 arrangement or understanding is taken to have the purpose
24 mentioned in a paragraph of subsection (3) if the provision, when
25 considered together with any or all of the following provisions:
26 (a) the other provisions of the contract, arrangement or
27 understanding;
28 (b) the provisions of another contract, arrangement or
29 understanding, if the parties to that other contract,
30 arrangement or understanding consist of or include at least
31 one of the parties to the first-mentioned contract,
32 arrangement or understanding;
33 has that purpose.

34 *Purpose/effect of a provision*

- 35 (10) For the purposes of this Division, a provision of a contract,
36 arrangement or understanding is not to be taken not to have the
-

- 1 purpose, or not to have or to be likely to have the effect, mentioned
2 in subsection (2) by reason only of:
3 (a) the form of the provision; or
4 (b) the form of the contract, arrangement or understanding; or
5 (c) any description given to the provision, or to the contract,
6 arrangement or understanding, by the parties.

7 *Purpose of a provision*

- 8 (11) For the purposes of this Division, a provision of a contract,
9 arrangement or understanding is not to be taken not to have the
10 purpose mentioned in a paragraph of subsection (3) by reason only
11 of:
12 (a) the form of the provision; or
13 (b) the form of the contract, arrangement or understanding; or
14 (c) any description given to the provision, or to the contract,
15 arrangement or understanding, by the parties.

16 **44ZZRE Meaning of expressions in other provisions of this Act**

17 In determining the meaning of an expression used in a provision of
18 this Act (other than this Division, subsection 6(2C), paragraph
19 76(1A)(aa) or subsection 93AB(1A)), this Division is to be
20 disregarded.

21 **Subdivision B—Offences etc.**

22 **44ZZRF Making a contract etc. containing a cartel provision**

23 *Offence*

- 24 (1) A corporation commits an offence if:
25 (a) the corporation makes a contract or arrangement, or arrives at
26 an understanding; and
27 (b) the contract, arrangement or understanding contains a cartel
28 provision.

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

- 31 (2) The fault element for paragraph (1)(b) is knowledge or belief.

1 *Penalty*

- 2 (3) An offence against subsection (1) is punishable on conviction by a
3 fine not exceeding the greater of the following:
4 (a) \$10,000,000;
5 (b) if the court can determine the total value of the benefits that:
6 (i) have been obtained by one or more persons; and
7 (ii) are reasonably attributable to the commission of the
8 offence;
9 3 times that total value;
10 (c) if the court cannot determine the total value of those
11 benefits—10% of the corporation's annual turnover during
12 the 12-month period ending at the end of the month in which
13 the corporation committed, or began committing, the offence.

14 *Indictable offence*

- 15 (4) An offence against subsection (1) is an indictable offence.

16 **44ZZRG Giving effect to a cartel provision**

17 *Offence*

- 18 (1) A corporation commits an offence if:
19 (a) a contract, arrangement or understanding contains a cartel
20 provision; and
21 (b) the corporation gives effect to the cartel provision.

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

- 24 (2) The fault element for paragraph (1)(a) is knowledge or belief.

25 *Penalty*

- 26 (3) An offence against subsection (1) is punishable on conviction by a
27 fine not exceeding the greater of the following:
28 (a) \$10,000,000;
29 (b) if the court can determine the total value of the benefits that:
30 (i) have been obtained by one or more persons; and
31 (ii) are reasonably attributable to the commission of the
32 offence;
-

- 1 3 times that total value;
2 (c) if the court cannot determine the total value of those
3 benefits—10% of the corporation's annual turnover during
4 the 12-month period ending at the end of the month in which
5 the corporation committed, or began committing, the offence.

6 *Pre-commencement contracts etc.*

- 7 (4) Paragraph (1)(a) applies to contracts or arrangements made, or
8 understandings arrived at, before, at or after the commencement of
9 this section.

10 *Indictable offence*

- 11 (5) An offence against subsection (1) is an indictable offence.

12 **44ZZRH Determining guilt**

- 13 (1) A corporation may be found guilty of an offence against
14 section 44ZZRF or 44ZZRG even if:
15 (a) each other party to the contract, arrangement or
16 understanding is a person who is not criminally responsible;
17 or
18 (b) subject to subsection (2), all other parties to the contract,
19 arrangement or understanding have been acquitted of the
20 offence.

21 Note: *Party* has an extended meaning—see section 44ZZRC.

- 22 (2) A corporation cannot be found guilty of an offence against
23 section 44ZZRF or 44ZZRG if:
24 (a) all other parties to the contract, arrangement or understanding
25 have been acquitted of such an offence; and
26 (b) a finding of guilt would be inconsistent with their acquittal.

27 **44ZZRI Court may make related civil orders**

28 If a prosecution against a person for an offence against
29 section 44ZZRF or 44ZZRG is being, or has been, heard by a
30 court, the court may:

- 31 (a) grant an injunction under section 80 against the person in
32 relation to:

- 1 (i) the conduct that constitutes, or is alleged to constitute,
2 the offence; or
3 (ii) other conduct of that kind; or
4 (b) make an order under section 86C, 86D, 86E or 87 in relation
5 to the offence.

6 **Subdivision C—Civil penalty provisions**

7 **44ZZRJ Making a contract etc. containing a cartel provision**

- 8 A corporation contravenes this section if:
9 (a) the corporation makes a contract or arrangement, or arrives at
10 an understanding; and
11 (b) the contract, arrangement or understanding contains a cartel
12 provision.

13 Note: For enforcement, see Part VI.

14 **44ZZRK Giving effect to a cartel provision**

- 15 (1) A corporation contravenes this section if:
16 (a) a contract, arrangement or understanding contains a cartel
17 provision; and
18 (b) the corporation gives effect to the cartel provision.

19 Note: For enforcement, see Part VI.

- 20 (2) Paragraph (1)(a) applies to contracts or arrangements made, or
21 understandings arrived at, before, at or after the commencement of
22 this section.

23 **Subdivision D—Exceptions**

24 **44ZZRL Conduct notified**

- 25 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply to
26 a corporation in relation to a contract, arrangement or
27 understanding containing a cartel provision, in so far as:
28 (a) the cartel provision:
29 (i) has the purpose, or has or is likely to have the effect,
30 mentioned in subsection 44ZZRD(2); or

- 1 (ii) has the purpose mentioned in a paragraph of subsection
2 44ZZRD(3) other than paragraph (c); and
3 (b) the corporation has given the Commission a collective
4 bargaining notice under subsection 93AB(1A) setting out
5 particulars of the contract, arrangement or understanding; and
6 (c) the notice is in force under section 93AD.

7 Note: A defendant bears an evidential burden in relation to the matter in
8 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
9 subsection (2) of this section).

- 10 (2) A person who wishes to rely on subsection (1) in relation to a
11 contravention of section 44ZZRJ or 44ZZRK bears an evidential
12 burden in relation to that matter.

13 **44ZZRM Cartel provision subject to grant of authorisation**

- 14 (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the
15 making of a contract that contains a cartel provision if:
16 (a) the contract is subject to a condition that the provision will
17 not come into force unless and until the corporation is
18 granted an authorisation to give effect to the provision; and
19 (b) the corporation applies for the grant of such an authorisation
20 within 14 days after the contract is made.

21 Note: A defendant bears an evidential burden in relation to the matter in
22 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
23 subsection (2) of this section).

- 24 (2) A person who wishes to rely on subsection (1) in relation to a
25 contravention of section 44ZZRJ bears an evidential burden in
26 relation to that matter.

27 **44ZZRN Contracts, arrangements or understandings between**
28 **related bodies corporate**

- 29 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
30 relation to a contract, arrangement or understanding if the only
31 parties to the contract, arrangement or understanding are bodies
32 corporate that are related to each other.

33 Note: A defendant bears an evidential burden in relation to the matter in
34 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
35 subsection (2) of this section).

- 1 (2) A person who wishes to rely on subsection (1) in relation to a
2 contravention of section 44ZZRJ or 44ZZRK bears an evidential
3 burden in relation to that matter.

4 **44ZZRO Joint ventures—prosecution**

- 5 (1) Sections 44ZZRF and 44ZZRG do not apply in relation to a
6 contract containing a cartel provision if:
7 (a) the cartel provision is for the purposes of a joint venture; and
8 (b) the joint venture is for the production and/or supply of goods
9 or services; and
10 (c) in a case where subparagraph 4J(a)(i) applies to the joint
11 venture—the joint venture is carried on jointly by the parties
12 to the contract; and
13 (d) in a case where subparagraph 4J(a)(ii) applies to the joint
14 venture—the joint venture is carried on by a body corporate
15 formed by the parties to the contract for the purpose of
16 enabling those parties to carry on the activity mentioned in
17 paragraph (b) jointly by means of:
18 (i) their joint control; or
19 (ii) their ownership of shares in the capital;
20 of that body corporate.

21 Note 1: A defendant bears an evidential burden in relation to the matter in
22 subsection (1) (see subsection 13.3(3) of the *Criminal Code*).

23 Note 2: For example, if a joint venture formed for the purpose of research and
24 development provides the results of its research and development to
25 participants in the joint venture, it may be a joint venture for the
26 supply of services.

- 27 (1A) Section 44ZZRF does not apply in relation to an arrangement or
28 understanding containing a cartel provision if:
29 (a) the arrangement or understanding is not a contract; and
30 (b) when the arrangement was made, or the understanding was
31 arrived at, each party to the arrangement or understanding:
32 (i) intended the arrangement or understanding to be a
33 contract; and
34 (ii) reasonably believed that the arrangement or
35 understanding was a contract; and
36 (c) the cartel provision is for the purposes of a joint venture; and
37 (d) the joint venture is for the production and/or supply of goods
38 or services; and
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- 1 (e) in a case where subparagraph 4J(a)(i) applies to the joint
2 venture—the joint venture is carried on jointly by the parties
3 to the arrangement or understanding; and
- 4 (f) in a case where subparagraph 4J(a)(ii) applies to the joint
5 venture—the joint venture is carried on by a body corporate
6 formed by the parties to the arrangement or understanding for
7 the purpose of enabling those parties to carry on the activity
8 mentioned in paragraph (d) jointly by means of:
- 9 (i) their joint control; or
10 (ii) their ownership of shares in the capital;
11 of that body corporate.
- 12 Note 1: A defendant bears an evidential burden in relation to the matter in
13 subsection (1A) (see subsection 13.3(3) of the *Criminal Code*).
- 14 Note 2: For example, if a joint venture formed for the purpose of research and
15 development provides the results of its research and development to
16 participants in the joint venture, it may be a joint venture for the
17 supply of services.
- 18 (1B) Section 4ZZRG does not apply in relation to giving effect to a
19 cartel provision contained in an arrangement or understanding if:
- 20 (a) the arrangement or understanding is not a contract; and
21 (b) when the arrangement was made, or the understanding was
22 arrived at, each party to the arrangement or understanding:
- 23 (i) intended the arrangement or understanding to be a
24 contract; and
25 (ii) reasonably believed that the arrangement or
26 understanding was a contract; and
- 27 (c) when the cartel provision was given effect to, each party to
28 the arrangement or understanding reasonably believed that
29 the arrangement or understanding was a contract; and
- 30 (d) the cartel provision is for the purposes of a joint venture; and
31 (e) the joint venture is for the production and/or supply of goods
32 or services; and
- 33 (f) in a case where subparagraph 4J(a)(i) applies to the joint
34 venture—the joint venture is carried on jointly by the parties
35 to the arrangement or understanding; and
- 36 (g) in a case where subparagraph 4J(a)(ii) applies to the joint
37 venture—the joint venture is carried on by a body corporate
38 formed by the parties to the arrangement or understanding for

1 the purpose of enabling those parties to carry on the activity
2 mentioned in paragraph (e) jointly by means of:

- 3 (i) their joint control; or
4 (ii) their ownership of shares in the capital;
5 of that body corporate.

6 Note 1: A defendant bears an evidential burden in relation to the matter in
7 subsection (1B) (see subsection 13.3(3) of the *Criminal Code*).

8 Note 2: For example, if a joint venture formed for the purpose of research and
9 development provides the results of its research and development to
10 participants in the joint venture, it may be a joint venture for the
11 supply of services.

12 *Notice to prosecutor*

13 (2) A person is not entitled to rely on subsection (1), (1A) or (1B) in a
14 trial for an offence unless, within 28 days after the day on which
15 the person is committed for trial, the person gives the prosecutor:

16 (a) a written notice setting out:

17 (i) the facts on which the person proposes to rely for the
18 purpose of discharging the evidential burden borne by
19 the person in relation to the matter in subsection (1),
20 (1A) or (1B), as the case may be; and

21 (ii) the names and address of any witnesses whom the
22 person proposes to call for the purpose of discharging
23 the evidential burden borne by the person in relation to
24 the matter in subsection (1), (1A) or (1B), as the case
25 may be; and

26 (b) certified copies of any documents which the person proposes
27 to adduce or point to for the purpose of discharging the
28 evidential burden borne by the person in relation to the
29 matter in subsection (1), (1A) or (1B), as the case may be.

30 (3) If the trial of a person for an offence is being, or is to be, held in a
31 court, the court may, by order:

32 (a) exempt the person from compliance with subsection (2); or

33 (b) extend the time within which the person is required to
34 comply with subsection (2).

35 (4) For the purposes of paragraph (2)(b), a *certified copy* of a
36 document is a copy of the document certified to be a true copy by:

37 (a) a Justice of the Peace; or

1 (b) a commissioner for taking affidavits.

2 **44ZZRP Joint ventures—civil penalty proceedings**

- 3 (1) Sections 44ZZRJ and 44ZZRK do not apply in relation to a
4 contract containing a cartel provision if:
5 (a) the cartel provision is for the purposes of a joint venture; and
6 (b) the joint venture is for the production and/or supply of goods
7 or services; and
8 (c) in a case where subparagraph 4J(a)(i) applies to the joint
9 venture—the joint venture is carried on jointly by the parties
10 to the contract; and
11 (d) in a case where subparagraph 4J(a)(ii) applies to the joint
12 venture—the joint venture is carried on by a body corporate
13 formed by the parties to the contract for the purpose of
14 enabling those parties to carry on the activity mentioned in
15 paragraph (b) jointly by means of:
16 (i) their joint control; or
17 (ii) their ownership of shares in the capital;
18 of that body corporate.

19 Note: For example, if a joint venture formed for the purpose of research and
20 development provides the results of its research and development to
21 participants in the joint venture, it may be a joint venture for the
22 supply of services.

- 23 (1A) Section 44ZZRJ does not apply in relation to an arrangement or
24 understanding containing a cartel provision if:
25 (a) the arrangement or understanding is not a contract; and
26 (b) when the arrangement was made, or the understanding was
27 arrived at, each party to the arrangement or understanding:
28 (i) intended the arrangement or understanding to be a
29 contract; and
30 (ii) reasonably believed that the arrangement or
31 understanding was a contract; and
32 (c) the cartel provision is for the purposes of a joint venture; and
33 (d) the joint venture is for the production and/or supply of goods
34 or services; and
35 (e) in a case where subparagraph 4J(a)(i) applies to the joint
36 venture—the joint venture is carried on jointly by the parties
37 to the arrangement or understanding; and

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- (f) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (d) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; of that body corporate.

Note: For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services.

- (1B) Section 4ZZRK does not apply in relation to giving effect to a cartel provision contained in an arrangement or understanding if:
 - (a) the arrangement or understanding is not a contract; and
 - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
 - (i) intended the arrangement or understanding to be a contract; and
 - (ii) reasonably believed that the arrangement or understanding was a contract; and
 - (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
 - (d) the cartel provision is for the purposes of a joint venture; and
 - (e) the joint venture is for the production and/or supply of goods or services; and
 - (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
 - (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (e) jointly by means of:
 - (i) their joint control; or
 - (ii) their ownership of shares in the capital; of that body corporate.

1 Note: For example, if a joint venture formed for the purpose of research and
2 development provides the results of its research and development to
3 participants in the joint venture, it may be a joint venture for the
4 supply of services.

5 (2) A person who wishes to rely on subsection (1), (1A) or (1B) bears
6 an evidential burden in relation to that matter.

7 **44ZZRQ Covenants affecting competition**

8 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
9 relation to a contract containing a cartel provision, in so far as the
10 cartel provision constitutes a covenant to which section 45B
11 applies or, but for subsection 45B(9), would apply.

12 Note: A defendant bears an evidential burden in relation to the matter in
13 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
14 subsection (2) of this section).

15 (2) A person who wishes to rely on subsection (1) in relation to a
16 contravention of section 44ZZRJ or 44ZZRK bears an evidential
17 burden in relation to that matter.

18 **44ZZRR Resale price maintenance**

19 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
20 relation to a contract, arrangement or understanding containing a
21 cartel provision, in so far as the cartel provision relates to:

22 (a) conduct that contravenes section 48; or

23 (b) conduct that would contravene section 48 but for the
24 operation of subsection 88(8A); or

25 (c) conduct that would contravene section 48 if this Act defined
26 the acts constituting the practice of resale price maintenance
27 by reference to the maximum price at which goods or
28 services are to be sold or supplied or are to be advertised,
29 displayed or offered for sale or supply.

30 Note: A defendant bears an evidential burden in relation to the matter in
31 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
32 subsection (2) of this section).

33 (2) A person who wishes to rely on subsection (1) in relation to a
34 contravention of section 44ZZRJ or 44ZZRK bears an evidential
35 burden in relation to that matter.

1 **44ZZRS Exclusive dealing**

- 2 (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the
3 making of a contract, arrangement or understanding that contains a
4 cartel provision, in so far as giving effect to the cartel provision
5 would, or would but for the operation of subsection 47(10) or 88(8)
6 or section 93, constitute a contravention of section 47.

7 Note: A defendant bears an evidential burden in relation to the matter in
8 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
9 subsection (3) of this section).

- 10 (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the
11 giving effect to a cartel provision by way of:
12 (a) engaging in conduct that contravenes, or would but for the
13 operation of subsection 47(10) or 88(8) or section 93
14 contravene, section 47; or
15 (b) doing an act by reason of a breach or threatened breach of a
16 condition referred to in subsection 47(2), (4), (6) or (8), being
17 an act done by a person at a time when:
18 (i) an authorisation under subsection 88(8) is in force in
19 relation to conduct engaged in by that person on that
20 condition; or
21 (ii) by reason of subsection 93(7), conduct engaged in by
22 that person on that condition is not to be taken to have
23 the effect of substantially lessening competition within
24 the meaning of section 47; or
25 (iii) a notice under subsection 93(1) is in force in relation to
26 conduct engaged in by that person on that condition.

27 Note: A defendant bears an evidential burden in relation to the matter in
28 subsection (2) (see subsection 13.3(3) of the *Criminal Code* and
29 subsection (3) of this section).

- 30 (3) A person who wishes to rely on subsection (1) or (2) in relation to
31 a contravention of section 44ZZRJ or 44ZZRK bears an evidential
32 burden in relation to that matter.

33 **44ZZRT Dual listed company arrangement**

- 34 (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the
35 making of a contract, arrangement or understanding that contains a
36 cartel provision, in so far as:

- 1 (a) the contract, arrangement or understanding is a dual listed
2 company arrangement; and
3 (b) the making of the contract, arrangement or understanding
4 would, or would apart from subsection 88(8B), contravene
5 section 49.

6 Note: A defendant bears an evidential burden in relation to the matter in
7 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
8 subsection (3) of this section).

- 9 (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the
10 giving effect to a cartel provision, in so far as:
11 (a) the cartel provision is a provision of a dual listed company
12 arrangement; and
13 (b) the giving effect to the cartel provision would, or would apart
14 from subsection 88(8B), contravene section 49.

15 Note: A defendant bears an evidential burden in relation to the matter in
16 subsection (2) (see subsection 13.3(3) of the *Criminal Code* and
17 subsection (3) of this section).

- 18 (3) A person who wishes to rely on subsection (1) or (2) in relation to
19 a contravention of section 44ZZRJ or 44ZZRK bears an evidential
20 burden in relation to that matter.

21 **44ZZRU Acquisition of shares or assets**

- 22 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
23 relation to a contract, arrangement or understanding containing a
24 cartel provision, in so far as the cartel provision provides directly
25 or indirectly for the acquisition of:
26 (a) any shares in the capital of a body corporate; or
27 (b) any assets of a person.

28 Note: A defendant bears an evidential burden in relation to the matter in
29 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
30 subsection (2) of this section).

- 31 (2) A person who wishes to rely on subsection (1) in relation to a
32 contravention of section 44ZZRJ or 44ZZRK bears an evidential
33 burden in relation to that matter.

1 **44ZZRV Collective acquisition of goods or services by the parties to**
2 **a contract, arrangement or understanding**

3 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
4 relation to a contract, arrangement or understanding containing a
5 cartel provision, in so far as:

6 (a) the cartel provision has the purpose, or has or is likely to
7 have the effect, mentioned in subsection 44ZZRD(2); and

8 (b) either:

9 (i) the cartel provision relates to the price for goods or
10 services to be collectively acquired, whether directly or
11 indirectly, by the parties to the contract, arrangement or
12 understanding; or

13 (ii) the cartel provision is for the joint advertising of the
14 price for the re-supply of goods or services so acquired.

15 Note: A defendant bears an evidential burden in relation to the matter in
16 subsection (1) (see subsection 13.3(3) of the *Criminal Code* and
17 subsection (2) of this section).

18 (2) A person who wishes to rely on subsection (1) in relation to a
19 contravention of section 44ZZRJ or 44ZZRK bears an evidential
20 burden in relation to that matter.

21 **Division 2—Other provisions**

22 **20 Subsection 45(3)**

23 Omit “and section 45A”.

24 **21 Section 45A**

25 Repeal the section.

26 **22 At the end of subparagraph 76(1)(a)(i)**

27 Add “(other than section 44ZZRF or 44ZZRG)”.

28 **23 Before paragraph 76(1A)(a)**

29 Insert:

30 (aa) for each act or omission to which this section applies that
31 relates to section 44ZZRJ or 44ZZRK—the greatest of the
32 following:

33 (i) \$10,000,000;

- 1 (ii) if the court can determine the total value of the benefits
2 that have been obtained (within the meaning of
3 Division 1 of Part IV) by one or more persons and that
4 are reasonably attributable to the act or omission—3
5 times that total value;
- 6 (iii) if the Court cannot determine the total value of those
7 benefits—10% of the annual turnover (within the
8 meaning of Division 1 of Part IV) of the body corporate
9 during the period (the *turnover period*) of 12 months
10 ending at the end of the month in which the act or
11 omission occurred; and

12 **24 Subsection 76(3)**

13 After “Part IV”, insert “(other than section 44ZZRF or 44ZZRG)”.

14 **25 Subsection 76(4)**

15 Omit “the 2 limits in paragraphs (1A)(a) and (b) apply is an amount up
16 to the higher”, substitute “2 or more of the limits in
17 paragraphs (1A)(aa), (a) and (b) apply is an amount up to the highest”.

18 **26 Subsection 76B(1) (definition of *contravention*)**

19 After “section” (wherever occurring), insert “or Part”.

20 Note: The heading to section 76B is altered by inserting “Part IV or” before
21 “section 75AYA”.

22 **27 Subsections 76B(2), (3), (4) and (5)**

23 Before “section 75AYA”, insert “Part IV or”.

24 **28 At the end of section 76B**

25 Add:

26 (6) In this section:

27 *offence* means an offence against a law of the Commonwealth, a
28 State or a Territory.

29 **29 Section 76D**

30 Repeal the section.

31 **30 Subparagraph 78(a)(i)**

1 Repeal the subparagraph, substitute:

2 (i) a provision of Part IV (other than section 44ZZRF or
3 44ZZRG);

4 (ia) a provision of Part V (other than section 65Q or 65R or
5 subsection 65F(9));

6 **31 Before paragraph 79(1)(a)**

7 Insert:

8 (aa) attempts to contravene; or

9 Note: The heading to section 79 is altered by inserting “**section 44ZZRF or 44ZZRG or**”
10 after “**against**”.

11 **32 Subsection 79(1)**

12 Before “a provision of”, insert “a cartel offence provision or”.

13 **33 Subsection 79(1)**

14 Omit “punishable accordingly.”, substitute:

15 punishable:

16 (e) in a case where:

17 (i) the provision is a cartel offence provision; and

18 (ii) the person is not a body corporate;

19 by a term of imprisonment not exceeding 10 years or a fine
20 not exceeding 2,000 penalty units, or both; or

21 (f) in any other case—accordingly.

22 **34 After subsection 79(1)**

23 Insert:

24 (1AA) For the purposes of the application of subsection (1) to a case
25 where:

26 (a) the provision is a cartel offence provision; and

27 (b) the person is a body corporate other than a corporation;

28 assume that each reference in paragraph 44ZZRF(3)(c) or
29 44ZZRG(3)(c) to a corporation were read as a reference to a body
30 corporate.

31 (1AB) Subsections 11.1(2) to (6) (inclusive) of the *Criminal Code* apply
32 in relation to paragraph (1)(aa) in the same way that they apply in

1 relation to the offence of attempt under subsection 11.1(1) of the
2 *Criminal Code*.

3 **35 Subsection 79(5)**

4 Before “a provision of”, insert “a cartel offence provision or”.

5 **36 At the end of section 79**

6 Add:

7 (7) In this section:

8 *cartel offence provision* means section 44ZZRF or 44ZZRG.

9 **37 Subsection 79A(1)**

10 Omit “section 65Q”, substitute “section 44ZZRF, 44ZZRG, 65Q”.

11 **38 Subparagraph 79B(a)(ii)**

12 After “under”, insert “section 44ZZRF or 44ZZRG or”.

13 **39 At the end of section 80**

14 Add:

15 (9) If the Director of Public Prosecutions makes an application to the
16 Court for the grant of an injunction under this section in relation to:

17 (a) a person’s contravention, or proposed contravention, of
18 section 44ZZRF or 44ZZRG; or

19 (b) a person’s involvement, or proposed involvement, in a
20 contravention of section 44ZZRF or 44ZZRG;

21 the Court must not require the Director of Public Prosecutions or
22 any other person, as a condition of granting an interim injunction,
23 to give any undertakings as to damages.

24 **40 Section 83**

25 After “offence against”, insert “section 44ZZRF or 44ZZRG or”.

26 **41 Subsection 84(1)**

27 Repeal the subsection, substitute:

28 (1) If, in:

- 1 (a) a prosecution for an offence against section 44ZZRF or
2 44ZZRG in respect of conduct engaged in by a body
3 corporate; or
4 (b) a proceeding under this Part in respect of conduct engaged in
5 by a body corporate, being conduct in relation to which
6 section 44ZZRJ, 44ZZRK, 46 or 46A or Part IVA, IVB, V,
7 VB or VC applies;
8 it is necessary to establish the state of mind of the body corporate,
9 it is sufficient to show that:
10 (c) a director, employee or agent of the body corporate engaged
11 in that conduct; and
12 (d) the director, employee or agent was, in engaging in that
13 conduct, acting within the scope of his or her actual or
14 apparent authority; and
15 (e) the director, employee or agent had that state of mind.

16 Note: The heading to section 84 is altered by omitting “servants” and substituting
17 “employees”.

18 **42 Subsection 84(2)**

19 Omit “servant” (wherever occurring), substitute “employee”.

20 **43 Subsection 84(3)**

21 Repeal the subsection, substitute:

- 22 (3) If, in:
23 (a) a prosecution for an offence against section 44ZZRF or
24 44ZZRG in respect of conduct engaged in by a person other
25 than a body corporate; or
26 (b) a proceeding under this Part in respect of conduct engaged in
27 by a person other than a body corporate, being conduct in
28 relation to which section 44ZZRJ or 44ZZRK or Part IVA,
29 IVB, V, VB or VC applies;
30 it is necessary to establish the state of mind of the person, it is
31 sufficient to show that:
32 (c) an employee or agent of the person engaged in that conduct;
33 and
34 (d) the employee or agent was, in engaging in that conduct,
35 acting within the scope of his or her actual or apparent
36 authority; and
37 (e) the employee or agent had that state of mind.
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1 **44 Paragraph 84(4)(a)**

2 Omit “a servant”, substitute “an employee”.

3 **45 Paragraph 84(4)(a)**

4 Omit “the servant”, substitute “the employee”.

5 **46 Paragraph 84(4)(b)**

6 Omit “a servant”, substitute “an employee”.

7 **47 Paragraph 84(4)(b)**

8 Omit “the servant”, substitute “the employee”.

9 **48 After subsection 84(4)**

10 Insert:

11 (4A) If:

- 12 (a) a person other than a body corporate is convicted of an
13 offence; and
- 14 (b) subsection (3) or (4) applied in relation to the conviction on
15 the basis that the person was the person first mentioned in
16 that subsection; and
- 17 (c) the person would not have been convicted of the offence if
18 that subsection had not been enacted;
- 19 the person is not liable to be punished by imprisonment for that
20 offence.

21 **49 Subsection 86(1AA)**

22 Omit “Part or Division” (wherever occurring), substitute “Part, Division
23 or section”.

24 **50 After subsection 86(3)**

25 Insert:

- 26 (3A) The Supreme Court of a State is invested with federal jurisdiction
27 with respect to any matter in respect of which a civil proceeding
28 covered by section 44ZZRI is instituted in that Court.
- 29 (3B) Subject to the Constitution, the Supreme Court of a Territory is
30 conferred with jurisdiction with respect to any matter in respect of

1 which a civil proceeding covered by section 44ZZRI is instituted in
2 that Court.

3 **51 After paragraph 86(4)(b)**

4 Insert:

- 5 (ba) the jurisdiction of the Supreme Courts of the States under
6 subsection (3A); and
7 (bb) the jurisdiction of the Supreme Courts of the Territories
8 under subsection (3B); and

9 **52 After subsection 86C(1)**

10 Insert:

- 11 (1A) The Court may, on application by the Director of Public
12 Prosecutions, make one or more of the orders mentioned in
13 subsection (2) in relation to a person who has engaged in
14 contravening conduct that is:
15 (a) a contravention of section 44ZZRF or 44ZZRG; or
16 (b) an involvement in a contravention of section 44ZZRF or
17 44ZZRG.

18 **53 Paragraph 86D(1)(b)**

19 Omit “under”, substitute “against section 44ZZRF or 44ZZRG or”.

20 **54 After subsection 86D(1)**

21 Insert:

- 22 (1A) The Court may, on application by the Director of Public
23 Prosecutions, make an adverse publicity order in relation to a
24 person who is guilty of an offence against section 44ZZRF or
25 44ZZRG.

26 **55 After subsection 86E(1)**

27 Insert:

- 28 (1A) On application by the Director of Public Prosecutions, the Court
29 may make an order disqualifying a person from managing
30 corporations for a period that the Court considers appropriate if:
31 (a) the Court is satisfied that the person has contravened or has
32 been involved in a contravention of section 44ZZRF or
33 44ZZRG; and
-

1 (b) the Court is satisfied that the disqualification is justified.

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

6 **56 Subsection 86E(2)**

7 After “determining”, insert “under subsection (1) or (1A)”.

8 **57 Subsection 86E(3)**

9 Omit “this section”, substitute “subsection (1)”.

10 **58 After subsection 86E(3)**

11 Insert:

12 (3A) The Director of Public Prosecutions must notify ASIC if the Court
13 makes an order under subsection (1A). The Director of Public
14 Prosecutions must give ASIC a copy of the order.

15 Note: ASIC must keep a register of persons who have been disqualified from
16 managing corporations—see section 1274AA of the *Corporations Act*
17 *2001*.

18 **59 Subsection 87(1)**

19 After “offence against”, insert “section 44ZZRF or 44ZZRG or”.

20 **60 At the end of paragraph 87(1A)(b)**

21 Add “or”.

22 **61 After paragraph 87(1A)(b)**

23 Insert:

24 (ba) on the application of the Director of Public Prosecutions in
25 accordance with subsection (1BA) on behalf of one or more
26 persons who have suffered, or who are likely to suffer, loss or
27 damage by conduct of another person that was engaged in in
28 contravention of section 44ZZRF or 44ZZRG;

29 **62 After subsection 87(1B)**

30 Insert:

1 (1BA) The Director of Public Prosecutions may make an application
2 under paragraph (1A)(ba) on behalf of one or more persons
3 identified in the application who:

4 (a) have suffered, or are likely to suffer, loss or damage by
5 conduct of another person that was engaged in in
6 contravention of section 44ZZRF or 44ZZRG; and

7 (b) have, before the application is made, consented in writing to
8 the making of the application.

9 **63 Section 87D (after paragraph (a) of the definition of**
10 ***plaintiff*)**

11 Insert:

12 (aa) if the proceeding is a proceeding that the Director of Public
13 Prosecutions commences under paragraph 87(1A)(ba)—a
14 person on whose behalf the Director of Public Prosecutions
15 commences the proceeding; or

16 **64 Before subsection 88(1)**

17 Insert:

18 (1A) Subject to this Part, the Commission may, upon application by or
19 on behalf of a corporation, grant an authorisation to the
20 corporation:

21 (a) to make a contract or arrangement, or arrive at an
22 understanding, if a provision of the proposed contract,
23 arrangement or understanding would be, or might be, a cartel
24 provision; or

25 (b) to give effect to a provision of a contract, arrangement or
26 understanding if the provision is, or may be, a cartel
27 provision;

28 and, while such an authorisation remains in force:

29 (c) in the case of an authorisation to make a contract or
30 arrangement, or to arrive at an understanding—
31 sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not
32 prevent the corporation from making the contract or
33 arrangement, or arriving at the understanding, in accordance
34 with the authorisation; or

35 (d) in the case of an authorisation to give effect to a provision of
36 a contract, arrangement or understanding—sections 44ZZRG

1 and 44ZZRK do not prevent the corporation from giving
2 effect to the provision in accordance with the authorisation.

3 **65 Subsection 88(10)**

4 Omit “subsection (1)”, substitute “subsection (1A) or (1)”.

5 **66 After subsection 90(5)**

6 Insert:

7 (5A) The Commission must not make a determination granting an
8 authorisation under subsection 88(1A) in respect of a provision of a
9 proposed contract, arrangement or understanding that would be, or
10 might be, a cartel provision, unless the Commission is satisfied in
11 all the circumstances:

- 12 (a) that the provision would result, or be likely to result, in a
13 benefit to the public; and
14 (b) that the benefit would outweigh the detriment to the public
15 constituted by any lessening of competition that would result,
16 or be likely to result, if:
17 (i) the proposed contract or arrangement were made, or the
18 proposed understanding were arrived at; and
19 (ii) the provision were given effect to.

20 (5B) The Commission must not make a determination granting an
21 authorisation under subsection 88(1A) in respect of a provision of a
22 contract, arrangement or understanding that is or may be a cartel
23 provision, unless the Commission is satisfied in all the
24 circumstances:

- 25 (a) that the provision has resulted, or is likely to result, in a
26 benefit to the public; and
27 (b) that the benefit outweighs or would outweigh the detriment to
28 the public constituted by any lessening of competition that
29 has resulted, or is likely to result, from giving effect to the
30 provision.

31 **67 Subsection 91A(4)**

32 Omit “90(6)”, substitute “90(5A), (5B), (6)”.

33 **68 Subsection 91B(5)**

34 Omit “90(6)”, substitute “90(5A), (5B), (6)”.

1 **69 Subsection 91C(7)**

2 Omit “90(6)”, substitute “90(5A), (5B), (6)”.

3 **70 Section 93AA (definition of *collective bargaining notice*)**

4 Omit “93AB(1)”, substitute “93AB(1A) or (1)”.

5 **71 Before subsection 93AB(1)**

6 Insert:

7 *Notice to Commission—cartel provisions*

8 (1A) A corporation that:

- 9 (a) has made, or proposes to make, a contract (the *initial*
10 *contract*) that contains a cartel provision that:
11 (i) has the purpose; or
12 (ii) has or is likely to have the effect;
13 mentioned in subsection 44ZZRD(2); or
14 (b) has made, or proposes to make, a contract (the *initial*
15 *contract*) that contains a cartel provision that has the purpose
16 mentioned in a paragraph of subsection 44ZZRD(3) other
17 than paragraph (c); or
18 (c) proposes to give effect to a provision of a contract (the *initial*
19 *contract*) where the provision is a cartel provision that:
20 (i) has the purpose; or
21 (ii) has or is likely to have the effect;
22 mentioned in subsection 44ZZRD(2); or
23 (d) proposes to give effect to a provision of a contract (the *initial*
24 *contract*) where the provision is a cartel provision that has
25 the purpose mentioned in a paragraph of subsection
26 44ZZRD(3) other than paragraph (c);
27 may give the Commission a notice (the *collective bargaining*
28 *notice*) setting out particulars of the contract or proposed contract,
29 but only if the 3 requirements set out in subsections (2), (3) and (4)
30 are satisfied.

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

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

1 **72 Subsection 93AB(1)**

2 Omit “following 3 requirements”, substitute “3 requirements set out in
3 subsections (2), (3) and (4)”.

4 Note: The heading to subsection 93AB(1) is altered by adding at the end “—*per se and*
5 *competition provisions*”.

6 **73 Before subsection 93AB(11)**

7 Insert:

8 *Purpose/effect of a provision*

9 (10B) Subsections 44ZZRD(6), (7), (8) and (10) apply for the purposes of
10 paragraphs (1A)(a) and (c) in a corresponding way to the way in
11 which they apply for the purposes of Division 1 of Part IV.

12 *Purpose of a provision*

13 (10C) Subsections 44ZZRD(7), (9) and (11) apply for the purposes of
14 paragraphs (1A)(b) and (d) in a corresponding way to the way in
15 which they apply for the purposes of Division 1 of Part IV.

16 **74 Subsection 93AC(1)**

17 Omit “a collective bargaining notice in relation to”.

18 **75 Before paragraph 93AC(1)(a)**

19 Insert:

20 (aa) a collective bargaining notice under subsection 93AB(1A) in
21 relation to a contract, or proposed contract, containing a
22 cartel provision of the kind referred to in that subsection; or

23 Note: The heading to subsection 93AC(1) is altered by inserting “*cartel provisions or*” before
24 “*per se provisions*”.

25 **76 Paragraph 93AC(1)(a)**

26 Before “a contract”, insert “a collective bargaining notice under
27 subsection 93AB(1) in relation to”.

28 **77 Paragraph 93AC(1)(a)**

29 Omit “provisions); or”, substitute “provisions);”.

30 **78 Paragraph 93AC(1)(b)**

1 Repeal the paragraph.

2 **79 Subsection 93AC(2)**

3 After “collective bargaining notice”, insert “under subsection
4 93AB(1)”.

5 **80 Subsection 93AC(2)**

6 Omit “(other than a price fixing provision)”.

7 **81 Subsection 93AC(6)**

8 Repeal the subsection.

9 **82 After section 93AE**

10 Insert:

11 **93AEA Only 1 collective bargaining notice under subsection**
12 **93AB(1A) may be given**

13 If:

14 (a) a corporation gives the Commission a collective bargaining
15 notice under subsection 93AB(1A) in relation to a contract or
16 proposed contract; and

17 (b) either:

18 (i) the Commission gives the corporation an objection
19 notice in relation to the contract or proposed contract; or

20 (ii) the collective bargaining notice is taken to be withdrawn
21 under subsection 93AE(3);

22 then a further collective bargaining notice under subsection
23 93AB(1A) cannot be given by any person in relation to the same
24 contract or proposed contract or in relation to a contract or
25 proposed contract to the like effect.

26 **83 Paragraph 93AF(a)**

27 After “a collective bargaining notice”, insert “under subsection
28 93AB(1)”.

29 Note: The heading to section 93AF is altered by inserting “**under subsection 93AB(1)**” after
30 “notice”.

31 **84 Section 93AF**

1 After “further collective bargaining notice”, insert “under subsection
2 93AB(1)”.

3 **85 Subsection 93A(12)**

4 Omit “93AB(1)”, substitute “93AB(1A) or (1)”.

5 **86 Subsection 101(1A)**

6 Omit “90(6)”, substitute “90(5A), (5B), (6)”.

7 **87 Subsection 101(2)**

8 Omit “90(6)”, substitute “90(5A), (5B), (6)”.

9 **88 Section 10.01 A**

10 Omit:

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- If the conference agreement is registered, the parties will be given partial and conditional exemptions from section 45 (contracts etc. that restrict dealings or affect competition) and section 47 (exclusive dealing).

15 substitute:

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- If the conference agreement is registered, the parties will be given partial and conditional exemptions from:
 - (a) sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK (cartel conduct); and
 - (b) section 45 (contracts etc. that restrict dealings or affect competition); and
 - (c) section 47 (exclusive dealing).

23 **89 Before paragraph 10.08(1)(a)**

24 Insert:

- 25 (aa) that is a provision where the following conditions are
- 26 satisfied in relation to the provision:
- 27 (i) the purpose/effect condition set out in subsection
- 28 44ZZRD(2);
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- 1 (ii) the competition condition set out in subsection
2 44ZZRD(4); or
3 (ab) that is a provision where the following conditions are
4 satisfied in relation to the provision:
5 (i) the purpose condition set out in subsection 44ZZRD(3);
6 (ii) the competition condition set out in subsection
7 44ZZRD(4); or

8 **90 Subsection 10.08(1)**

9 Omit “an exclusionary provision or has or is likely to have that effect”,
10 substitute “covered by paragraph (aa), (ab), (a) or (b)”.

11 **91 Subsection 10.17(1)**

12 Omit “Section 45 does”, substitute “Sections 44ZZRF, 44ZZRJ and 45
13 do”.

14 Note: The heading to section 10.17 is altered by omitting “**section 45**” and substituting
15 “**sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45**”.

16 **92 Subsection 10.17(2)**

17 Omit “Section 45 does”, substitute “Sections 44ZZRG, 44ZZRK and 45
18 do”.

19 **93 Subsections 10.17A(1) and (2)**

20 Omit “Section 45 does”, substitute “Sections 44ZZRF, 44ZZRJ and 45
21 do”.

22 Note: The heading to section 10.17A is altered by omitting “**section 45**” and substituting
23 “**sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45**”.

24 **94 Subsections 10.17A(3) and (4)**

25 Omit “Section 45 does”, substitute “Sections 44ZZRG, 44ZZRK and 45
26 do”.

27 **95 Subsection 10.19(1)**

28 Omit “Section 45 does”, substitute “Sections 44ZZRF, 44ZZRJ and 45
29 do”.

30 Note: The heading to section 10.19 is altered by omitting “**section 45**” and substituting
31 “**sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK and 45**”.

32 **96 Subsection 10.19(2)**

1 Omit “Section 45 does”, substitute “Sections 44ZZRG, 44ZZRK and 45
2 do”.

3 **97 Subsection 10.24(1)**

4 After “Sections”, insert “44ZZRF, 44ZZRJ”.

5 Note: The heading to section 10.24 is altered by inserting “**44ZZRF, 44ZZRG, 44ZZRJ,**
6 **44ZZRK,**” after “sections”.

7 **98 Subsection 10.24(2)**

8 After “Sections”, insert “44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK”.

9 **99 Subsection 10.24A(1)**

10 Omit “Section 45 does”, substitute “Sections 44ZZRF, 44ZZRJ and 45
11 do”.

12 Note: The heading to section 10.24A is altered by inserting “**44ZZRF, 44ZZRG, 44ZZRJ,**
13 **44ZZRK,**” after “sections”.

14 **100 Subsection 10.24A(2)**

15 After “Sections”, insert “44ZZRG, 44ZZRK”.

16 **101 Subsections 10.24A(3)**

17 After “Sections”, insert “44ZZRF, 44ZZRJ”.

18 **102 Paragraph 10.45(3)(a)**

19 Repeal the paragraph, substitute:

20 (a) the agreement includes a provision that is covered by
21 paragraph 10.08(1)(aa) or (b); and

22 **103 Paragraph 151AJ(3)(a)**

23 After “section”, insert “44ZZRJ, 44ZZRK”.

24 **104 Subsection 151AJ(4)**

25 After “section”, insert “44ZZRJ, 44ZZRK”.

26 **105 Subsection 151AJ(4)**

27 Omit all the words after “48,”, substitute:

28 the following assumptions are to be made:

29 (a) the assumption that each reference to a corporation in:

30 (i) those sections; and

- 1 (ii) sections 44ZZRL and 44ZZRM;
2 included a reference to a carrier, or a carriage service
3 provider, that is not a corporation;
4 (b) the assumption that subsections 45(8) and 47(12) and
5 section 44ZZRN had not been enacted.

6 **106 Subsection 151AJ(7)**

7 Omit “section 45”, substitute “section 44ZZRJ, 44ZZRK, 45”.

8 **107 Paragraph 151AJ(7)(b)**

9 After “subsection”, insert “44ZZRL(1) or”.

10 **108 Paragraph 151AJ(7)(b)**

11 Omit “93.”, substitute “93; or”.

12 **109 At the end of subsection 151AJ(7)**

13 Add:

- 14 (c) because of the operation of subsection 45(9); or
15 (d) because of the operation of subsection 45B(8); or
16 (e) because of the operation of section 44ZZRM.

17 **110 Paragraph 151AY(1)(b)**

18 Omit “93AB(1)”, substitute “93AB(1A) or (1)”.

19 **111 At the end of section 151BZ**

20 Add:

- 21 (3) To avoid doubt, subsection (1) does not apply in relation to
22 proceedings for an offence against section 44ZZRF or 44ZZRG.

23 **112 Subsection 157(1)**

24 Omit “Where:”, substitute “Subject to subsection (1A), if:”.

25 **113 After subsection 157(1)**

26 Insert:

1 *Protected cartel information—Commission may refuse to comply*
2 *with request*

3 (1A) If a request under subsection (1) relates to a document containing
4 protected cartel information, the Commission may refuse to
5 comply with the request.

6 (1B) In exercising its powers under subsection (1A), the Commission
7 must have regard to the following matters:

8 (a) the fact that the protected cartel information was given to the
9 Commission in confidence;

10 (b) Australia’s relations with other countries;

11 (c) the need to avoid disruption to national and international
12 efforts relating to law enforcement, criminal intelligence and
13 criminal investigation;

14 (d) in a case where the protected cartel information was given by
15 an informant:

16 (i) the protection or safety of the informant or of persons
17 associated with the informant; and

18 (ii) the fact that the production of a document containing
19 protected cartel information, or the disclosure of
20 protected cartel information, may discourage informants
21 from giving protected cartel information in the future;

22 (e) the legitimate interests of the corporation which, or the
23 person who, made the request under subsection (1);

24 (f) such other matters (if any) as the Commission considers
25 relevant.

26 **114 Subsection 157(2)**

27 After “subsection (1)”, insert “otherwise than because of a refusal under
28 subsection (1A)”.

29 Note: The following heading to subsection 157(2) is inserted “*Court order*”.

30 **115 At the end of section 157**

31 Add:

32 *Definition*

33 (6) In this section:

1 *protected cartel information* has the same meaning as in
2 section 157B.

3 **116 After section 157A**

4 Insert:

5 **157B Disclosure of protected cartel information to a court or**
6 **tribunal**

7 *Commission or a Commission official not required to disclose*
8 *protected cartel information*

- 9 (1) The Commission or a Commission official is not to be required:
10 (a) to produce to a court or tribunal a document containing
11 protected cartel information; or
12 (b) to disclose protected cartel information to a court or tribunal;
13 except with the leave of the court or tribunal.
- 14 (2) In exercising its powers to grant leave under subsection (1), the
15 court or tribunal must have regard to the following matters:
16 (a) the fact that the protected cartel information was given to the
17 Commission in confidence;
18 (b) Australia's relations with other countries;
19 (c) the need to avoid disruption to national and international
20 efforts relating to law enforcement, criminal intelligence and
21 criminal investigation;
22 (d) in a case where the protected cartel information was given by
23 an informant:
24 (i) the protection or safety of the informant or of persons
25 associated with the informant; and
26 (ii) the fact that the production of a document containing
27 protected cartel information, or the disclosure of
28 protected cartel information, may discourage informants
29 from giving protected cartel information in the future;
30 (e) in the case of a court—the interests of the administration of
31 justice;
32 (f) in the case of a tribunal—the interests of securing the
33 effective performance of the tribunal's functions;
34 and must not have regard to any other matters.

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- (3) If:
- (a) a document is produced; or
 - (b) information is disclosed;
to a court or tribunal in accordance with leave granted under subsection (1) in relation to particular proceedings, the document or information must not be adduced in other proceedings before the court or tribunal except:
 - (c) in accordance with leave granted under subsection (1) in relation to the other proceedings; or
 - (d) as a result of an exercise of power under subsection (4) in relation to the other proceedings.

Commission or a Commission official may disclose protected cartel information

- (4) The Commission or a Commission official may:
- (a) produce to the court or tribunal a document containing protected cartel information; or
 - (b) disclose protected cartel information to the court or tribunal.
- (5) In exercising the powers conferred by subsection (4), the Commission or Commission official must have regard to the following matters:
- (a) the fact that the protected cartel information was given to the Commission in confidence;
 - (b) Australia's relations with other countries;
 - (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
 - (d) in a case where the protected cartel information was given by an informant:
 - (i) the protection or safety of the informant or of persons associated with the informant; and
 - (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
 - (e) in the case of production or disclosure to a court—the interests of the administration of justice;

1 (f) in the case of production or disclosure to a tribunal—the
2 interests of securing the effective performance of the
3 tribunal’s functions;
4 and must not have regard to any other matters.

5 (6) If:
6 (a) a document is produced; or
7 (b) information is disclosed;
8 to a court or tribunal as a result of an exercise of power under
9 subsection (4) in relation to particular proceedings, the document
10 or information must not be adduced in other proceedings before the
11 court or tribunal except:
12 (c) in accordance with leave granted under subsection (1) in
13 relation to the other proceedings; or
14 (d) as a result of an exercise of power under subsection (4) in
15 relation to the other proceedings.

16 *Definitions*

17 (7) In this section:

18 *Commission official* means:

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

22 *disclose* means divulge or communicate.

23 *protected cartel information* means information that:

- 24 (a) was given to the Commission in confidence; and
25 (b) relates to a breach, or a possible breach, of section 44ZZRF,
26 44ZZRG, 44ZZRJ or 44ZZRK.

27 **157C Disclosure of protected cartel information to a party to court**
28 **proceedings etc.**

29 *Commission or Commission official not required to make discovery*
30 *of documents containing protected cartel information etc.*

31 (1) If:
32 (a) a person is a party to proceedings before a court; and

- 1 (b) the Commission is not a party to the proceedings;
2 the Commission or a Commission official is not to be required, in
3 connection with the proceedings, to:
4 (c) make discovery (however described) to the person of a
5 document containing protected cartel information; or
6 (d) produce to the person a document containing protected cartel
7 information.

8 (2) If:

- 9 (a) a person is considering instituting proceedings before a court;
10 and
11 (b) the proceedings have not yet been instituted;
12 the Commission or a Commission official is not to be required, in
13 connection with the prospective proceedings, to:
14 (c) make discovery (however described) to the person of a
15 document containing protected cartel information; or
16 (d) produce to the person a document containing protected cartel
17 information.

18 *Commission or Commission official may disclose protected cartel*
19 *information*

20 (3) If:

- 21 (a) a person is a party to proceedings before a court; and
22 (b) the Commission is not a party to the proceedings;
23 the Commission or a Commission official may, on application by
24 the person:
25 (c) make a copy of a document containing protected cartel
26 information; and
27 (d) give the copy to the person.

28 (4) If:

- 29 (a) a person is considering instituting proceedings before a court;
30 and
31 (b) the proceedings have not yet been instituted;
32 the Commission or a Commission official may, on application by
33 the person:
34 (c) make a copy of a document containing protected cartel
35 information; and
36 (d) give the copy to the person.
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- (5) In exercising the powers conferred by subsection (3) or (4), the Commission or Commission official must have regard to the following matters:
 - (a) the fact that the protected cartel information was given to the Commission in confidence;
 - (b) Australia's relations with other countries;
 - (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
 - (d) in a case where the protected cartel information was given by an informant:
 - (i) the protection or safety of the informant or of persons associated with the informant; and
 - (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
 - (e) the interests of the administration of justice;and must not have regard to any other matters.

- (6) If a copy of a document is given to a party, or prospective party, to proceedings before a court as a result of an exercise of power under subsection (3) or (4), the copy must not be adduced in other proceedings before:
 - (a) the court; or
 - (b) another court; or
 - (c) a tribunal;except:
 - (d) as a result of an exercise of power under subsection (3) or (4) in relation to the other proceedings; or
 - (e) in accordance with leave granted under subsection 157B(1) in relation to the other proceedings; or
 - (f) as a result of an exercise of power under subsection 157B(4) in relation to the other proceedings.

Definitions

- (7) In this section:

Commission official means:

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

4 ***protected cartel information*** means information that:

- 5 (a) was given to the Commission in confidence; and
6 (b) relates to a breach, or a possible breach, of section 44ZZRF,
7 44ZZRG, 44ZZRJ or 44ZZRK.

8 **157D General powers of a court**

9 *Power of a court in a criminal or civil proceeding*

- 10 (1) The power of a court to control the conduct of a criminal or civil
11 proceeding, in particular with respect to abuse of process, is not
12 affected by section 157B or 157C, except so far as that section
13 expressly or impliedly provides otherwise.

14 *Stay order—criminal proceeding*

- 15 (2) A refusal by a court to grant leave under subsection 157B(1) does
16 not prevent the court from later ordering that a criminal proceeding
17 be stayed on the ground that the refusal would have a substantial
18 adverse effect on a defendant's right to receive a fair hearing.

19 *Stay order—civil proceeding*

- 20 (3) A refusal by a court to grant leave under subsection 157B(1) does
21 not prevent the court from later ordering that a civil proceeding be
22 stayed on the ground that the refusal would have a substantial
23 adverse effect on the hearing in the proceeding.

- 24 (4) In deciding whether to order a stay of the civil proceeding, the
25 court must consider:

- 26 (a) the extent of any financial loss that a party would suffer as a
27 result of the proceeding being stayed; and
28 (b) whether a party has reasonable prospects of obtaining a
29 remedy in the proceeding; and
30 (c) any other matter the court considers relevant.

31 **117 Subsection 163(2)**

32 Repeal the subsection, substitute:

- 1 (2) In so far as this section has effect as a law of the Commonwealth,
2 the Federal Court has jurisdiction in any matter in respect of which
3 a criminal proceeding is instituted for an offence to which
4 subsection (1) applies, and that jurisdiction is exclusive of the
5 jurisdiction of any other court other than:
- 6 (a) the jurisdiction of a Supreme Court of a State or Territory
7 under section 68 of the *Judiciary Act 1903* with respect to
8 any matter in respect of which a criminal proceeding is
9 instituted for an offence against section 44ZZRF or 44ZZRG;
10 and
11 (b) the jurisdiction of a court under section 68 of the *Judiciary*
12 *Act 1903* with respect to the examination and commitment
13 for trial on indictment of a person who is charged with an
14 indictable offence; and
15 (c) the jurisdiction of the High Court under section 75 of the
16 Constitution.

17 **118 Application—subsection 163(2) of the *Trade Practices***
18 ***Act 1974***

19 Despite the repeal of subsection 163(2) of the *Trade Practices Act 1974*
20 by this Schedule, that subsection continues to apply, in relation to
21 prosecutions instituted before the commencement of this item, as if that
22 repeal had not happened.

23 **119 Before paragraph 163(4)(a)**

24 Insert:
25 (aa) the Director of Public Prosecutions; or

26 **120 At the end of paragraph 163(4)(a)**

27 Add “or”.

28 **121 At the end of section 163**

29 Add:
30 (6) Despite subsection (2), the Federal Court does not have jurisdiction
31 in any matter in respect of which a criminal proceeding is instituted
32 for an offence against section 44ZZRF or 44ZZRG if the
33 proceeding is instituted before the commencement of Schedule 1 to
34 the *Federal Court of Australia Amendment (Criminal Jurisdiction)*
35 *Act 2009*.

1 **122 Subsection 163A(3A)**

2 Omit “In”, substitute “Subject to subsections (4B) and (4C), in”.

3 Note 1: The following heading to subsection 163A(1) is inserted “*Declarations and orders*”.

4 Note 2: The following heading to subsection 163A(2) is inserted “*When Minister may institute,*
5 *or intervene in, proceedings*”.

6 Note 3: The following heading to subsection 163A(3) is inserted “*When Commission may*
7 *institute proceedings*”.

8 Note 4: The following heading to subsection 163A(3A) is inserted “*Jurisdiction of Federal*
9 *Court*”.

10 **123 After subsection 163A(4)**

11 Insert:

12 *Jurisdiction of State/Territory Supreme Courts etc.*

13 (4A) In so far as this section has effect as a law of the Commonwealth,
14 the Supreme Court of a State or Territory does not have
15 jurisdiction to hear and determine proceedings under this section
16 otherwise than in accordance with subsection (4B) or (4C). This
17 subsection has effect despite any other law, including section 39 of
18 the *Judiciary Act 1903*.

19 (4B) If a decision to prosecute a person for an offence against
20 section 44ZZRF or 44ZZRG has been made and the prosecution is
21 proposed to be commenced in the Supreme Court of a State or
22 Territory:

23 (a) the Federal Court does not have jurisdiction with respect to
24 any matter in which a person seeks the making of a
25 paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in
26 relation to that decision; and

27 (b) if the Supreme Court is the Supreme Court of a State—in so
28 far as this section has effect as a law of the Commonwealth,
29 the Supreme Court is invested with federal jurisdiction with
30 respect to any such matter; and

31 (c) if the Supreme Court is the Supreme Court of a Territory,
32 then:

33 (i) in so far as this section has effect as a law of the
34 Commonwealth; and

35 (ii) subject to the Constitution;

1 the Supreme Court is conferred with jurisdiction with respect
2 to any such matter.

3 (4C) Subject to subsection (4D), at any time when:

- 4 (a) a prosecution for an offence against section 44ZZRF or
5 44ZZRG is before the Supreme Court of a State or Territory;
6 or
7 (b) an appeal arising out of such a prosecution is before the
8 Supreme Court of a State or Territory;

9 the following apply:

- 10 (c) the Federal Court does not have jurisdiction with respect to
11 any matter in which the person who is or was the defendant
12 in the prosecution seeks the making of a paragraph (1)(aa)
13 declaration, or a paragraph (1)(b) order, in relation to a
14 related criminal justice process decision;
15 (d) if the Supreme Court is the Supreme Court of a State—in so
16 far as this section has effect as a law of the Commonwealth,
17 the Supreme Court is invested with federal jurisdiction with
18 respect to any such matter;
19 (e) if the Supreme Court is the Supreme Court of a Territory,
20 then:
21 (i) in so far as this section has effect as a law of the
22 Commonwealth; and
23 (ii) subject to the Constitution;
24 the Supreme Court is conferred with jurisdiction with respect
25 to any such matter.

26 (4D) Subsection (4C) does not apply if, before the commencement of a
27 prosecution for an offence against section 44ZZRF or 44ZZRG, a
28 person seeks the making of a paragraph (1)(aa) declaration, or a
29 paragraph (1)(b) order, in relation to a related criminal justice
30 process decision.

31 (4E) If subsection (4D) applies, the prosecutor may apply to the Federal
32 Court for a permanent stay of the paragraph (1)(aa) or (b)
33 proceedings referred to in that subsection, and the Federal Court
34 may grant such a stay if the Federal Court determines that:

- 35 (a) the matters the subject of the proceedings are more
36 appropriately dealt with in the criminal justice process; and
37 (b) a stay of proceedings will not substantially prejudice the
38 person.

1 Note: The following heading to subsection 163A(5) is inserted “*Definitions*”.

2 **124 At the end of section 163A**

3 Add:

4 (6) In this section:

5 *related criminal justice process decision* has the same meaning as
6 in section 39B of the *Judiciary Act 1903*.

7 **125 After Part XII**

8 Insert:

9 **Part XIII—Application and transitional provisions**
10 **relating to the competition provisions**

11 **Division 1—Cartel conduct**

12 **174 Definitions**

13 In this Division:

14 *commencement time* means the commencement of Division 1 of
15 Part IV.

16 **175 Giving effect after the commencement time to a cartel provision**
17 **in existence before that time**

18 The following provisions of this Act:

19 (a) paragraph 88(1A)(b);

20 (b) paragraph 93AB(1A)(c);

21 (c) paragraph 93AB(1A)(d);

22 apply in relation to a contract or arrangement made, or an
23 understanding arrived at, before, at or after the commencement
24 time.

25 **176 Proceedings relating to price-fixing contraventions taking place**
26 **before the commencement time**

27 Despite the repeal of section 76D by the *Trade Practices*
28 *Amendment (Cartel Conduct and Other Measures) Act 2009*, that

1 section continues to apply, in relation to proceedings (whether
2 instituted before or after the commencement time) in relation to a
3 contravention that took place before the commencement time, as if
4 that repeal had not happened.

5 **177 Authorisations in force before the commencement time**

6 (1) This section applies if:

- 7 (a) an authorisation (the *pre-commencement authorisation*) was
8 granted to a person to give effect to a provision of a contract,
9 arrangement or understanding; and
10 (b) the provision is a cartel provision; and
11 (c) the authorisation was in force immediately before the
12 commencement time.

13 (2) This Act has effect, after the commencement time, as if:

- 14 (a) the Commission had, at the commencement time, granted to
15 the person an authorisation under subsection 88(1A) to give
16 effect to the cartel provision; and
17 (b) the day specified in the subsection 88(1A) authorisation as
18 the day the authorisation comes into force were the day on
19 which Division 1 of Part IV commenced; and
20 (c) if, immediately before the commencement time, the
21 pre-commencement authorisation was expressed to be in
22 force for a period (the *initial period*) specified in that
23 authorisation—the subsection 88(1A) authorisation were
24 expressed to be in force for a period specified in the
25 subsection 88(1A) authorisation, and that period were the
26 period:
27 (i) starting at the commencement time; and
28 (ii) ending at the end of the initial period; and
29 (d) any requirements for the granting of the subsection 88(1A)
30 authorisation were satisfied.

31 (3) Subsection (2) does not prevent the subsection 88(1A)
32 authorisation from being varied, revoked or set aside in accordance
33 with this Act.

34 **178 Notifications in force before the commencement time**

35 (1) This section applies if:

- 1 (a) a person gave the Commission a collective bargaining notice
2 under subsection 93AB(1) in relation to a proposal to give
3 effect to a provision of a contract, arrangement or
4 understanding; and
5 (b) the provision is a cartel provision of the kind referred to in
6 paragraph 93AB(1A)(c) or (d); and
7 (c) the subsection 93AB(1) notice is in force immediately before
8 the commencement time.
- 9 (2) This Act has effect, after the commencement time, as if:
- 10 (a) the person had, at the commencement time, given the
11 Commission a collective bargaining notice under subsection
12 93AB(1A) in relation to a proposal to give effect to the cartel
13 provision; and
14 (b) despite subsections 93AD(1) and (2), the subsection
15 93AB(1A) notice had come into force at the commencement
16 time; and
17 (c) despite paragraph 93AD(3)(c), the period applicable to the
18 subsection 93AB(1A) notice for the purposes of paragraph
19 93AD(3)(c) were the period:
- 20 (i) starting at the commencement time; and
21 (ii) ending at the end of the period of 3 years starting on the
22 day the person gave the subsection 93AB(1) notice to
23 the Commission; and
24 (d) any requirements for the giving of the subsection 93AB(1A)
25 notice were satisfied.
- 26 (3) Subsection (2) does not prevent the subsection 93AB(1A) notice
27 from ceasing to be in force in accordance with this Act.

28 **126 Before section 45 of the Schedule**

29 Insert:

30 **Division 1—Cartel conduct**

31 **Subdivision A—Introduction**

32 **44ZZRA Simplified outline**

33 The following is a simplified outline of this Division:

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- This Division sets out parallel offences and civil penalty provisions relating to cartel conduct.
 - A person must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
 - A cartel provision is a provision relating to:
 - (a) price-fixing; or
 - (b) restricting outputs in the production and supply chain; or
 - (c) allocating customers, suppliers or territories; or
 - (d) bid-rigging;
- by parties that are, or would otherwise be, in competition with each other.

44ZZRB Definitions

In this Division:

annual turnover, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

- (a) supplies made from any of those bodies corporate to any other of those bodies corporate; or
- (b) supplies that are input taxed; or
- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on; or
- (e) supplies that are not connected with Australia.

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

1 **benefit** includes any advantage and is not limited to property.

2 **bid** includes:

3 (a) tender; and

4 (b) the taking, by a potential bidder or tenderer, of a preliminary
5 step in a bidding or tendering process.

6 **evidential burden**, in relation to a matter, means the burden of
7 adducing or pointing to evidence that suggests a reasonable
8 possibility that the matter exists or does not exist.

9 **knowledge** has the same meaning as in the *Criminal Code*.

10 **likely**, in relation to any of the following:

11 (a) a supply of goods or services;

12 (b) an acquisition of goods or services;

13 (c) the production of goods;

14 (d) the capacity to supply services;

15 includes a possibility that is not remote.

16 **obtaining** includes:

17 (a) obtaining for another person; and

18 (b) inducing a third person to do something that results in
19 another person obtaining.

20 **party** has a meaning affected by section 44ZZRC.

21 **production** includes manufacture, processing, treatment, assembly,
22 disassembly, renovation, restoration, growing, raising, mining,
23 extraction, harvesting, fishing, capturing and gathering.

24 **44ZZRC Extended meaning of party**

25 For the purposes of this Division, if a body corporate is a party to a
26 contract, arrangement or understanding (otherwise than because of
27 this section), each body corporate related to that body corporate is
28 taken to be a **party** to that contract, arrangement or understanding.

29 **44ZZRD Cartel provisions**

30 (1) For the purposes of this Act, a provision of a contract, arrangement
31 or understanding is a **cartel provision** if:

- 1 (a) either of the following conditions is satisfied in relation to the
2 provision:
3 (i) the purpose/effect condition set out in subsection (2);
4 (ii) the purpose condition set out in subsection (3); and
5 (b) the competition condition set out in subsection (4) is satisfied
6 in relation to the provision.

7 *Purpose/effect condition*

- 8 (2) The purpose/effect condition is satisfied if the provision has the
9 purpose, or has or is likely to have the effect, of directly or
10 indirectly:
11 (a) fixing, controlling or maintaining; or
12 (b) providing for the fixing, controlling or maintaining of;
13 the price for, or a discount, allowance, rebate or credit in relation
14 to:
15 (c) goods or services supplied, or likely to be supplied, by any or
16 all of the parties to the contract, arrangement or
17 understanding; or
18 (d) goods or services acquired, or likely to be acquired, by any or
19 all of the parties to the contract, arrangement or
20 understanding; or
21 (e) goods or services re-supplied, or likely to be re-supplied, by
22 persons or classes of persons to whom those goods or
23 services were supplied by any or all of the parties to the
24 contract, arrangement or understanding; or
25 (f) goods or services likely to be re-supplied by persons or
26 classes of persons to whom those goods or services are likely
27 to be supplied by any or all of the parties to the contract,
28 arrangement or understanding.

29 Note 1: The purpose/effect condition can be satisfied when a provision is
30 considered with related provisions—see subsection (8).

31 Note 2: *Party* has an extended meaning—see section 44ZZRC.

32 *Purpose condition*

- 33 (3) The purpose condition is satisfied if the provision has the purpose
34 of directly or indirectly:
35 (a) preventing, restricting or limiting:

- 1 (i) the production, or likely production, of goods by any or
2 all of the parties to the contract, arrangement or
3 understanding; or
4 (ii) the capacity, or likely capacity, of any or all of the
5 parties to the contract, arrangement or understanding to
6 supply services; or
7 (iii) the supply, or likely supply, of goods or services to
8 persons or classes of persons by any or all of the parties
9 to the contract, arrangement or understanding; or
10 (b) allocating between any or all of the parties to the contract,
11 arrangement or understanding:
12 (i) the persons or classes of persons who have acquired, or
13 who are likely to acquire, goods or services from any or
14 all of the parties to the contract, arrangement or
15 understanding; or
16 (ii) the persons or classes of persons who have supplied, or
17 who are likely to supply, goods or services to any or all
18 of the parties to the contract, arrangement or
19 understanding; or
20 (iii) the geographical areas in which goods or services are
21 supplied, or likely to be supplied, by any or all of the
22 parties to the contract, arrangement or understanding; or
23 (iv) the geographical areas in which goods or services are
24 acquired, or likely to be acquired, by any or all of the
25 parties to the contract, arrangement or understanding; or
26 (c) ensuring that in the event of a request for bids in relation to
27 the supply or acquisition of goods or services:
28 (i) one or more parties to the contract, arrangement or
29 understanding bid, but one or more other parties do not;
30 or
31 (ii) 2 or more parties to the contract, arrangement or
32 understanding bid, but at least 2 of them do so on the
33 basis that one of those bids is more likely to be
34 successful than the others; or
35 (iii) 2 or more parties to the contract, arrangement or
36 understanding bid, but not all of those parties proceed
37 with their bids until the suspension or finalisation of the
38 request for bids process; or
39 (iv) 2 or more parties to the contract, arrangement or
40 understanding bid and proceed with their bids, but at
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- 1 least 2 of them proceed with their bids on the basis that
2 one of those bids is more likely to be successful than the
3 others; or
4 (v) 2 or more parties to the contract, arrangement or
5 understanding bid, but a material component of at least
6 one of those bids is worked out in accordance with the
7 contract, arrangement or understanding.

- 8 Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a
9 roster for the supply of after-hours medical services if the roster does
10 not prevent, restrict or limit the supply of services.
11 Note 2: The purpose condition can be satisfied when a provision is considered
12 with related provisions—see subsection (9).
13 Note 3: **Party** has an extended meaning—see section 44ZZRC.

14 *Competition condition*

- 15 (4) The competition condition is satisfied if at least 2 of the parties to
16 the contract, arrangement or understanding:
17 (a) are or are likely to be; or
18 (b) but for any contract, arrangement or understanding, would be
19 or would be likely to be;
20 in competition with each other in relation to:
21 (c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or
22 likely supply, of goods or services—the supply of those
23 goods or services; or
24 (d) if paragraph (2)(d) or (3)(b) applies in relation to an
25 acquisition, or likely acquisition, of goods or services—the
26 acquisition of those goods or services; or
27 (e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or
28 likely re-supply, of goods or services—the supply of those
29 goods or services to that re-supplier; or
30 (f) if subparagraph (3)(a)(i) applies in relation to preventing,
31 restricting or limiting the production, or likely production, of
32 goods—the production of those goods; or
33 (g) if subparagraph (3)(a)(ii) applies in relation to preventing,
34 restricting or limiting the capacity, or likely capacity, to
35 supply services—the supply of those services; or
36 (h) if subparagraph (3)(a)(iii) applies in relation to preventing,
37 restricting or limiting the supply, or likely supply, of goods
38 or services—the supply of those goods or services; or

- 1 (i) if paragraph (3)(c) applies in relation to a supply of goods or
2 services—the supply of those goods or services; or
3 (j) if paragraph (3)(c) applies in relation to an acquisition of
4 goods or services—the acquisition of those goods or services.

5 Note: *Party* has an extended meaning—see section 44ZZRC.

6 *Immaterial whether identities of persons can be ascertained*

- 7 (5) It is immaterial whether the identities of the persons referred to in
8 paragraph (2)(e) or (f) or subparagraph (3)(a)(iii), (b)(i) or (ii) can
9 be ascertained.

10 *Recommending prices etc.*

- 11 (6) For the purposes of this Division, a provision of a contract,
12 arrangement or understanding is not taken:
13 (a) to have the purpose mentioned in subsection (2); or
14 (b) to have, or be likely to have, the effect mentioned in
15 subsection (2);
16 by reason only that it recommends, or provides for the
17 recommending of, a price, discount, allowance, rebate or credit.

18 *Immaterial whether particular circumstances or particular*
19 *conditions*

- 20 (7) It is immaterial whether:
21 (a) for the purposes of subsection (2), subparagraph (3)(a)(iii)
22 and paragraphs (3)(b) and (c)—a supply or acquisition
23 happens, or a likely supply or likely acquisition is to happen,
24 in particular circumstances or on particular conditions; and
25 (b) for the purposes of subparagraph (3)(a)(i)—the production
26 happens, or the likely production is to happen, in particular
27 circumstances or on particular conditions; and
28 (c) for the purposes of subparagraph (3)(a)(ii)—the capacity
29 exists, or the likely capacity is to exist, in particular
30 circumstances or on particular conditions.

31 *Considering related provisions—purpose/effect condition*

- 32 (8) For the purposes of this Division, a provision of a contract,
33 arrangement or understanding is taken to have the purpose, or to
34 have or be likely to have the effect, mentioned in subsection (2) if
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1 the provision, when considered together with any or all of the
2 following provisions:

3 (a) the other provisions of the contract, arrangement or
4 understanding;

5 (b) the provisions of another contract, arrangement or
6 understanding, if the parties to that other contract,
7 arrangement or understanding consist of or include at least
8 one of the parties to the first-mentioned contract,
9 arrangement or understanding;

10 has that purpose, or has or is likely to have that effect.

11 *Considering related provisions—purpose condition*

12 (9) For the purposes of this Division, a provision of a contract,
13 arrangement or understanding is taken to have the purpose
14 mentioned in a paragraph of subsection (3) if the provision, when
15 considered together with any or all of the following provisions:

16 (a) the other provisions of the contract, arrangement or
17 understanding;

18 (b) the provisions of another contract, arrangement or
19 understanding, if the parties to that other contract,
20 arrangement or understanding consist of or include at least
21 one of the parties to the first-mentioned contract,
22 arrangement or understanding;

23 has that purpose.

24 *Purpose/effect of a provision*

25 (10) For the purposes of this Division, a provision of a contract,
26 arrangement or understanding is not to be taken not to have the
27 purpose, or not to have or to be likely to have the effect, mentioned
28 in subsection (2) by reason only of:

29 (a) the form of the provision; or

30 (b) the form of the contract, arrangement or understanding; or

31 (c) any description given to the provision, or to the contract,
32 arrangement or understanding, by the parties.

33 *Purpose of a provision*

34 (11) For the purposes of this Division, a provision of a contract,
35 arrangement or understanding is not to be taken not to have the

- 1 purpose mentioned in a paragraph of subsection (3) by reason only
2 of:
3 (a) the form of the provision; or
4 (b) the form of the contract, arrangement or understanding; or
5 (c) any description given to the provision, or to the contract,
6 arrangement or understanding, by the parties.

7 **44ZZRE Meaning of expressions in other provisions of this Act**

8 In determining the meaning of an expression used in a provision of
9 this Act (other than this Division, subsection 6(2C), paragraph
10 76(1A)(aa) or subsection 93AB(1A)), this Division is to be
11 disregarded.

12 **Subdivision B—Offences etc.**

13 **44ZZRF Making a contract etc. containing a cartel provision**

14 *Offence*

- 15 (1) A person commits an offence if:
16 (a) the person makes a contract or arrangement, or arrives at an
17 understanding; and
18 (b) the contract, arrangement or understanding contains a cartel
19 provision.
20 (2) The fault element for paragraph (1)(b) is knowledge or belief.

21 *Penalty*

- 22 (3) An offence against subsection (1) committed by a body corporate
23 is punishable on conviction by a fine not exceeding the greater of
24 the following:
25 (a) \$10,000,000;
26 (b) if the court can determine the total value of the benefits that:
27 (i) have been obtained by one or more persons; and
28 (ii) are reasonably attributable to the commission of the
29 offence;
30 3 times that total value;
31 (c) if the court cannot determine the total value of those
32 benefits—10% of the body corporate's annual turnover
-

1 during the 12-month period ending at the end of the month in
2 which the body corporate committed, or began committing,
3 the offence.

4 (4) An offence against subsection (1) committed by a person other
5 than a body corporate is punishable on conviction by a term of
6 imprisonment not exceeding 10 years or a fine not exceeding 2,000
7 penalty units, or both.

8 *Indictable offence*

9 (5) An offence against subsection (1) is an indictable offence.

10 **44ZZRG Giving effect to a cartel provision**

11 *Offence*

- 12 (1) A person commits an offence if:
13 (a) a contract, arrangement or understanding contains a cartel
14 provision; and
15 (b) the person gives effect to the cartel provision.
16 (2) The fault element for paragraph (1)(a) is knowledge or belief.

17 *Penalty*

- 18 (3) An offence against subsection (1) committed by a body corporate
19 is punishable on conviction by a fine not exceeding the greater of
20 the following:
21 (a) \$10,000,000;
22 (b) if the court can determine the total value of the benefits that:
23 (i) have been obtained by one or more persons; and
24 (ii) are reasonably attributable to the commission of the
25 offence;
26 3 times that total value;
27 (c) if the court cannot determine the total value of those
28 benefits—10% of the body corporate's annual turnover
29 during the 12-month period ending at the end of the month in
30 which the body corporate committed, or began committing,
31 the offence.

- 1 (4) An offence against subsection (1) committed by a person other
2 than a body corporate is punishable on conviction by a term of
3 imprisonment not exceeding 10 years or a fine not exceeding 2,000
4 penalty units, or both.

5 *Pre-commencement contracts etc.*

- 6 (5) Paragraph (1)(a) applies to contracts or arrangements made, or
7 understandings arrived at, before, at or after the commencement of
8 this section.

9 *Indictable offence*

- 10 (6) An offence against subsection (1) is an indictable offence.

11 **44ZZRH Determining guilt**

- 12 (1) A person may be found guilty of an offence against
13 section 44ZZRF or 44ZZRG even if:
14 (a) each other party to the contract, arrangement or
15 understanding is a person who is not criminally responsible;
16 or
17 (b) subject to subsection (2), all other parties to the contract,
18 arrangement or understanding have been acquitted of the
19 offence.

20 Note: *Party* has an extended meaning—see section 44ZZRC.

- 21 (2) A person cannot be found guilty of an offence against
22 section 44ZZRF or 44ZZRG if:
23 (a) all other parties to the contract, arrangement or understanding
24 have been acquitted of such an offence; and
25 (b) a finding of guilt would be inconsistent with their acquittal.

26 **44ZZRI Court may make related civil orders**

27 If a prosecution against a person for an offence against
28 section 44ZZRF or 44ZZRG is being, or has been, heard by a
29 court, the court may:

- 30 (a) grant an injunction under section 80 against the person in
31 relation to:
32 (i) the conduct that constitutes, or is alleged to constitute,
33 the offence; or
-

- 1 (ii) other conduct of that kind; or
2 (b) make an order under section 86C, 86D, 86E or 87 in relation
3 to the offence.

4 **Subdivision C—Civil penalty provisions**

5 **44ZZRJ Making a contract etc. containing a cartel provision**

- 6 A person contravenes this section if:
7 (a) the person makes a contract or arrangement, or arrives at an
8 understanding; and
9 (b) the contract, arrangement or understanding contains a cartel
10 provision.

11 Note: For enforcement, see Part VI.

12 **44ZZRK Giving effect to a cartel provision**

- 13 (1) A person contravenes this section if:
14 (a) a contract, arrangement or understanding contains a cartel
15 provision; and
16 (b) the person gives effect to the cartel provision.

17 Note: For enforcement, see Part VI.

- 18 (2) Paragraph (1)(a) applies to contracts or arrangements made, or
19 understandings arrived at, before, at or after the commencement of
20 this section.

21 **Subdivision D—Exceptions**

22 **44ZZRL Conduct notified**

- 23 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply to
24 a person in relation to a contract, arrangement or understanding
25 containing a cartel provision, in so far as:
26 (a) the cartel provision:
27 (i) has the purpose, or has or is likely to have the effect,
28 mentioned in subsection 44ZZRD(2); or
29 (ii) has the purpose mentioned in a paragraph of subsection
30 44ZZRD(3) other than paragraph (c); and

- 1 (b) the person has given the Commission a collective bargaining
2 notice under subsection 93AB(1A) setting out particulars of
3 the contract, arrangement or understanding; and
4 (c) the notice is in force under section 93AD.
- 5 (2) A person who wishes to rely on subsection (1) bears an evidential
6 burden in relation to that matter.

7 **44ZZRM Cartel provision subject to grant of authorisation**

- 8 (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the
9 making of a contract that contains a cartel provision if:
10 (a) the contract is subject to a condition that the provision will
11 not come into force unless and until the person is granted an
12 authorisation to give effect to the provision; and
13 (b) the person applies for the grant of such an authorisation
14 within 14 days after the contract is made.
- 15 (2) A person who wishes to rely on subsection (1) bears an evidential
16 burden in relation to that matter.

17 **44ZZRN Contracts, arrangements or understandings between**
18 **related bodies corporate**

- 19 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
20 relation to a contract, arrangement or understanding if the only
21 parties to the contract, arrangement or understanding are bodies
22 corporate that are related to each other.
- 23 (2) A person who wishes to rely on subsection (1) bears an evidential
24 burden in relation to that matter.

25 **44ZZRO Joint ventures—prosecution**

- 26 (1) Sections 44ZZRF and 44ZZRG do not apply in relation to a
27 contract containing a cartel provision if:
28 (a) the cartel provision is for the purposes of a joint venture; and
29 (b) the joint venture is for the production and/or supply of goods
30 or services; and
31 (c) in a case where subparagraph 4J(a)(i) applies to the joint
32 venture—the joint venture is carried on jointly by the parties
33 to the contract; and
-

- 1 (d) in a case where subparagraph 4J(a)(ii) applies to the joint
2 venture—the joint venture is carried on by a body corporate
3 formed by the parties to the contract for the purpose of
4 enabling those parties to carry on the activity mentioned in
5 paragraph (b) jointly by means of:
6 (i) their joint control; or
7 (ii) their ownership of shares in the capital;
8 of that body corporate.

9 Note: For example, if a joint venture formed for the purpose of research and
10 development provides the results of its research and development to
11 participants in the joint venture, it may be a joint venture for the
12 supply of services.

- 13 (1A) Section 44ZZRF does not apply in relation to an arrangement or
14 understanding containing a cartel provision if:
15 (a) the arrangement or understanding is not a contract; and
16 (b) when the arrangement was made, or the understanding was
17 arrived at, each party to the arrangement or understanding:
18 (i) intended the arrangement or understanding to be a
19 contract; and
20 (ii) reasonably believed that the arrangement or
21 understanding was a contract; and
22 (c) the cartel provision is for the purposes of a joint venture; and
23 (d) the joint venture is for the production and/or supply of goods
24 or services; and
25 (e) in a case where subparagraph 4J(a)(i) applies to the joint
26 venture—the joint venture is carried on jointly by the parties
27 to the arrangement or understanding; and
28 (f) in a case where subparagraph 4J(a)(ii) applies to the joint
29 venture—the joint venture is carried on by a body corporate
30 formed by the parties to the arrangement or understanding for
31 the purpose of enabling those parties to carry on the activity
32 mentioned in paragraph (d) jointly by means of:
33 (i) their joint control; or
34 (ii) their ownership of shares in the capital;
35 of that body corporate.

36 Note: For example, if a joint venture formed for the purpose of research and
37 development provides the results of its research and development to
38 participants in the joint venture, it may be a joint venture for the
39 supply of services.

- 1 (1B) Section 44ZZRG does not apply in relation to giving effect to a
2 cartel provision contained in an arrangement or understanding if:
3 (a) the arrangement or understanding is not a contract; and
4 (b) when the arrangement was made, or the understanding was
5 arrived at, each party to the arrangement or understanding:
6 (i) intended the arrangement or understanding to be a
7 contract; and
8 (ii) reasonably believed that the arrangement or
9 understanding was a contract; and
10 (c) when the cartel provision was given effect to, each party to
11 the arrangement or understanding reasonably believed that
12 the arrangement or understanding was a contract; and
13 (d) the cartel provision is for the purposes of a joint venture; and
14 (e) the joint venture is for the production and/or supply of goods
15 or services; and
16 (f) in a case where subparagraph 4J(a)(i) applies to the joint
17 venture—the joint venture is carried on jointly by the parties
18 to the arrangement or understanding; and
19 (g) in a case where subparagraph 4J(a)(ii) applies to the joint
20 venture—the joint venture is carried on by a body corporate
21 formed by the parties to the arrangement or understanding for
22 the purpose of enabling those parties to carry on the activity
23 mentioned in paragraph (e) jointly by means of:
24 (i) their joint control; or
25 (ii) their ownership of shares in the capital;
26 of that body corporate.

27 Note: For example, if a joint venture formed for the purpose of research and
28 development provides the results of its research and development to
29 participants in the joint venture, it may be a joint venture for the
30 supply of services.

- 31 (2) A person who wishes to rely on subsection (1), (1A) or (1B) bears
32 an evidential burden in relation to that matter.

33 *Notice to prosecutor*

- 34 (3) A person is not entitled to rely on subsection (1), (1A) or (1B) in a
35 trial for an offence unless, within 28 days after the day on which
36 the person is committed for trial, the person gives the prosecutor:
37 (a) a written notice setting out:

- 1 (i) the facts on which the person proposes to rely for the
2 purpose of discharging the evidential burden borne by
3 the person in relation to the matter in subsection (1),
4 (1A) or (1B), as the case may be; and
- 5 (ii) the names and address of any witnesses whom the
6 person proposes to call for the purpose of discharging
7 the evidential burden borne by the person in relation to
8 the matter in subsection (1), (1A) or (1B), as the case
9 may be; and
- 10 (b) certified copies of any documents which the person proposes
11 to adduce or point to for the purpose of discharging the
12 evidential burden borne by the person in relation to the
13 matter in subsection (1), (1A) or (1B), as the case may be.
- 14 (4) If the trial of a person for an offence is being, or is to be, held in a
15 court, the court may, by order:
- 16 (a) exempt the person from compliance with subsection (3); or
17 (b) extend the time within which the person is required to
18 comply with subsection (3).
- 19 (5) For the purposes of paragraph (3)(b), a *certified copy* of a
20 document is a copy of the document certified to be a true copy by:
- 21 (a) a Justice of the Peace; or
22 (b) a commissioner for taking affidavits.

23 **44ZZRP Joint ventures—civil penalty proceedings**

- 24 (1) Sections 44ZZRJ and 44ZZRK do not apply in relation to a
25 contract containing a cartel provision if:
- 26 (a) the cartel provision is for the purposes of a joint venture; and
27 (b) the joint venture is for the production and/or supply of goods
28 or services; and
- 29 (c) in a case where subparagraph 4J(a)(i) applies to the joint
30 venture—the joint venture is carried on jointly by the parties
31 to the contract; and
- 32 (d) in a case where subparagraph 4J(a)(ii) applies to the joint
33 venture—the joint venture is carried on by a body corporate
34 formed by the parties to the contract for the purpose of
35 enabling those parties to carry on the activity mentioned in
36 paragraph (b) jointly by means of:
- 37 (i) their joint control; or
-

- 1 (ii) their ownership of shares in the capital;
2 of that body corporate.

3 Note: For example, if a joint venture formed for the purpose of research and
4 development provides the results of its research and development to
5 participants in the joint venture, it may be a joint venture for the
6 supply of services.

7 (1A) Section 44ZZRJ does not apply in relation to an arrangement or
8 understanding containing a cartel provision if:

- 9 (a) the arrangement or understanding is not a contract; and
10 (b) when the arrangement was made, or the understanding was
11 arrived at, each party to the arrangement or understanding:
12 (i) intended the arrangement or understanding to be a
13 contract; and
14 (ii) reasonably believed that the arrangement or
15 understanding was a contract; and
16 (c) the cartel provision is for the purposes of a joint venture; and
17 (d) the joint venture is for the production and/or supply of goods
18 or services; and
19 (e) in a case where subparagraph 4J(a)(i) applies to the joint
20 venture—the joint venture is carried on jointly by the parties
21 to the arrangement or understanding; and
22 (f) in a case where subparagraph 4J(a)(ii) applies to the joint
23 venture—the joint venture is carried on by a body corporate
24 formed by the parties to the arrangement or understanding for
25 the purpose of enabling those parties to carry on the activity
26 mentioned in paragraph (d) jointly by means of:
27 (i) their joint control; or
28 (ii) their ownership of shares in the capital;
29 of that body corporate.

30 Note: For example, if a joint venture formed for the purpose of research and
31 development provides the results of its research and development to
32 participants in the joint venture, it may be a joint venture for the
33 supply of services.

34 (1B) Section 44ZZRK does not apply in relation to giving effect to a
35 cartel provision contained in an arrangement or understanding if:

- 36 (a) the arrangement or understanding is not a contract; and
37 (b) when the arrangement was made, or the understanding was
38 arrived at, each party to the arrangement or understanding:
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- 1 (i) intended the arrangement or understanding to be a
2 contract; and
3 (ii) reasonably believed that the arrangement or
4 understanding was a contract; and
5 (c) when the cartel provision was given effect to, each party to
6 the arrangement or understanding reasonably believed that
7 the arrangement or understanding was a contract; and
8 (d) the cartel provision is for the purposes of a joint venture; and
9 (e) the joint venture is for the production and/or supply of goods
10 or services; and
11 (f) in a case where subparagraph 4J(a)(i) applies to the joint
12 venture—the joint venture is carried on jointly by the parties
13 to the arrangement or understanding; and
14 (g) in a case where subparagraph 4J(a)(ii) applies to the joint
15 venture—the joint venture is carried on by a body corporate
16 formed by the parties to the arrangement or understanding for
17 the purpose of enabling those parties to carry on the activity
18 mentioned in paragraph (e) jointly by means of:
19 (i) their joint control; or
20 (ii) their ownership of shares in the capital;
21 of that body corporate.

22 Note: For example, if a joint venture formed for the purpose of research and
23 development provides the results of its research and development to
24 participants in the joint venture, it may be a joint venture for the
25 supply of services.

- 26 (2) A person who wishes to rely on subsection (1), (1A) or (1B) bears
27 an evidential burden in relation to that matter.

28 **44ZZRQ Covenants affecting competition**

- 29 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
30 relation to a contract containing a cartel provision, in so far as the
31 cartel provision constitutes a covenant to which section 45B
32 applies or, but for subsection 45B(9), would apply.
33 (2) A person who wishes to rely on subsection (1) bears an evidential
34 burden in relation to that matter.

1 **44ZZRR Resale price maintenance**

- 2 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
3 relation to a contract, arrangement or understanding containing a
4 cartel provision, in so far as the cartel provision relates to:
5 (a) conduct that contravenes section 48; or
6 (b) conduct that would contravene section 48 but for the
7 operation of subsection 88(8A); or
8 (c) conduct that would contravene section 48 if this Act defined
9 the acts constituting the practice of resale price maintenance
10 by reference to the maximum price at which goods or
11 services are to be sold or supplied or are to be advertised,
12 displayed or offered for sale or supply.
- 13 (2) A person who wishes to rely on subsection (1) bears an evidential
14 burden in relation to that matter.

15 **44ZZRS Exclusive dealing**

- 16 (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the
17 making of a contract, arrangement or understanding that contains a
18 cartel provision, in so far as giving effect to the cartel provision
19 would, or would but for the operation of subsection 47(10) or 88(8)
20 or section 93, constitute a contravention of section 47.
- 21 (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the
22 giving effect to a cartel provision by way of:
23 (a) engaging in conduct that contravenes, or would but for the
24 operation of subsection 47(10) or 88(8) or section 93
25 contravene, section 47; or
26 (b) doing an act by reason of a breach or threatened breach of a
27 condition referred to in subsection 47(2), (4), (6) or (8), being
28 an act done by a person at a time when:
29 (i) an authorisation under subsection 88(8) is in force in
30 relation to conduct engaged in by that person on that
31 condition; or
32 (ii) by reason of subsection 93(7), conduct engaged in by
33 that person on that condition is not to be taken to have
34 the effect of substantially lessening competition within
35 the meaning of section 47; or

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

3 (3) A person who wishes to rely on subsection (1) or (2) bears an
4 evidential burden in relation to that matter.

5 **44ZZRT Dual listed company arrangement**

6 (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the
7 making of a contract, arrangement or understanding that contains a
8 cartel provision, in so far as:

9 (a) the contract, arrangement or understanding is a dual listed
10 company arrangement; and

11 (b) the making of the contract, arrangement or understanding
12 would, or would apart from subsection 88(8B), contravene
13 section 49.

14 (2) Sections 44ZZRG and 44ZZRK do not apply in relation to the
15 giving effect to a cartel provision, in so far as:

16 (a) the cartel provision is a provision of a dual listed company
17 arrangement; and

18 (b) the giving effect to the cartel provision would, or would apart
19 from subsection 88(8B), contravene section 49.

20 (3) A person who wishes to rely on subsection (1) or (2) bears an
21 evidential burden in relation to that matter.

22 **44ZZRU Acquisition of shares or assets**

23 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
24 relation to a contract, arrangement or understanding containing a
25 cartel provision, in so far as the cartel provision provides directly
26 or indirectly for the acquisition of:

27 (a) any shares in the capital of a body corporate; or

28 (b) any assets of a person.

29 (2) A person who wishes to rely on subsection (1) bears an evidential
30 burden in relation to that matter.

1 **44ZZRV Collective acquisition of goods or services by the parties to**
2 **a contract, arrangement or understanding**

3 (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in
4 relation to a contract, arrangement or understanding containing a
5 cartel provision, in so far as:

6 (a) the cartel provision has the purpose, or has or is likely to
7 have the effect, mentioned in subsection 44ZZRD(2); and

8 (b) either:

9 (i) the cartel provision relates to the price for goods or
10 services to be collectively acquired, whether directly or
11 indirectly, by the parties to the contract, arrangement or
12 understanding; or

13 (ii) the cartel provision is for the joint advertising of the
14 price for the re-supply of goods or services so acquired.

15 (2) A person who wishes to rely on subsection (1) bears an evidential
16 burden in relation to that matter.

17 **Division 2—Other provisions**

18 **127 Subsection 45(3) of the Schedule**

19 Omit “and section 45A”.

20 **128 Section 45A of the Schedule**

21 Repeal the section.
22

1 **Schedule 2—Other amendments**

2 **Part 1—Amendments**

3 ***Trade Practices Act 1974***

4 **1 Subsection 79A(5)**

5 Omit “section 18A of the *Crimes Act 1914*”, substitute “section 15A of
6 the *Crimes Act 1914* (including an order described in subsection
7 15A(1AA) of that Act)”.

8 **2 Subsection 79A(10)**

9 Repeal the subsection.

10 **3 Section 83**

11 Omit “or 86D”, substitute “, 86D or 86E”.

12 **4 Before subsection 86E(4)**

13 Insert:

14 (3B) For the purposes of this Act (other than this section or
15 section 86F), an order under this section is not a penalty.

16 **5 After section 86E**

17 Insert:

18 **86F Privilege against exposure to penalty—disqualification from**
19 **managing corporations**

20 *Court proceeding*

21 (1) In a civil or criminal proceeding under, or arising out of, this Act, a
22 person is not entitled to refuse or fail to comply with a
23 requirement:

- 24 (a) to answer a question or give information; or
25 (b) to produce a document or any other thing; or
26 (c) to do any other act;

27 on the ground that the answer or information, production of the
28 document or other thing, or doing that other act, as the case may

1 be, might tend to expose the person to a penalty by way of an order
2 under section 86E.

3 (2) Subsection (1) applies whether or not the person is a defendant in
4 the proceeding or in any other proceeding.

5 *Statutory requirement*

6 (3) A person is not entitled to refuse or fail to comply with a
7 requirement under this Act:

8 (a) to answer a question or give information; or

9 (b) to produce a document or any other thing; or

10 (c) to do any other act;

11 on the ground that the answer or information, production of the
12 document or other thing, or doing that other act, as the case may
13 be, might tend to expose the person to a penalty by way of an order
14 under section 86E.

15 *Definition*

16 (4) In this section:

17 *penalty* includes forfeiture.

18 **6 Subsection 87(1)**

19 Omit “or 86D”, substitute “, 86D or 86E”.

20 **7 Section 154A**

21 Insert:

22 *contravention*, in relation to a law, includes an offence against
23 section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an
24 offence against that law.

25 **8 Section 154A**

26 Insert:

27 *data* includes:

28 (a) information in any form; or

29 (b) any program (or part of a program).

30 **9 Section 154A**

1 Insert:

2 ***data held in a computer*** includes:

- 3 (a) data held in any removable data storage device for the time
4 being held in a computer; or
5 (b) data held in a data storage device on a computer network of
6 which the computer forms a part.

7 **10 Section 154A**

8 Insert:

9 ***data storage device*** means a thing containing, or designed to
10 contain, data for use by a computer.

11 **11 Section 154A (definition of *evidential material*)**

12 Repeal the definition, substitute:

13 ***evidential material*** means a document or other thing that may
14 afford evidence relating to:

- 15 (a) a contravention of this Act; or
16 (b) a contravention of Part 20 of the *Telecommunications Act*
17 1997; or
18 (c) a contravention of Part 9 of the *Telecommunications*
19 (*Consumer Protection and Service Standards*) *Act 1999*; or
20 (d) a contravention of section 137.1, 137.2 or 149.1 of the
21 *Criminal Code* that relates to this Part.

22 **12 Section 154A (definition of *executing officer*)**

23 Repeal the definition, substitute:

24 ***executing officer***, for a search warrant, means:

- 25 (a) the inspector named in the warrant as being responsible for
26 executing the warrant; or
27 (b) if that inspector does not intend to be present at the execution
28 of the warrant—another inspector whose name has been
29 written in the warrant by the inspector so named; or
30 (c) another inspector whose name has been written in the warrant
31 by the inspector last named in the warrant.

32 **13 Subsection 154F(1)**

1 Repeal the subsection, substitute:

2 (1) If:

- 3 (a) an inspector or an assistant enters premises under this
4 Division; and
5 (b) he or she believes on reasonable grounds that any data
6 accessed by operating electronic equipment at the premises
7 (including data not held at the premises) might constitute
8 evidential material;
9 he or she may do only 1 of 2 things.

10 **14 Subsection 154F(2)**

11 Omit “evidential material”, substitute “data”.

12 **15 At the end of subsection 154F(2)**

13 Add “from the premises”.

14 **16 Subsection 154F(3)**

15 Omit “evidential material”, substitute “data”.

16 **17 After subsection 154G(1)**

17 Insert:

18 (1A) In executing a search warrant that is in force in relation to
19 premises, the executing officer or an officer assisting may:

- 20 (a) for a purpose incidental to the execution of the warrant; or
21 (b) with the written consent of the occupier of the premises;
22 take photographs, or make video recordings, of the premises or of
23 anything at the premises.

24 (1B) If a search warrant in relation to premises is being executed, the
25 executing officer and the officers assisting may, if the warrant is
26 still in force, complete the execution of the warrant after all of
27 them temporarily cease its execution and leave the premises:

- 28 (a) for not more than one hour; or
29 (b) for a longer period if the occupier of the premises consents in
30 writing.

31 **18 Paragraph 154G(2)(a)**

32 Repeal the paragraph, substitute:

- 1 (a) the executing officer or an officer assisting, in the course of
2 searching for the kind of evidential material specified in the
3 warrant, finds another thing that he or she believes on
4 reasonable grounds to be evidence of:
- 5 (i) an indictable offence against this Act; or
 - 6 (ii) an indictable offence against Part 20 of the
7 *Telecommunications Act 1997*; or
 - 8 (iii) an indictable offence against Part 9 of the
9 *Telecommunications (Consumer Protection and Service*
10 *Standards) Act 1999*; or
 - 11 (iv) an offence against section 137.1, 137.2 or 149.1 of the
12 *Criminal Code* that relates to this Part; and

13 **19 After section 154G**

14 Insert:

15 **154GA Removing things for examination or processing**

- 16 (1) A thing found at the premises may be moved to another place for
17 examination or processing in order to determine whether it may be
18 seized under a search warrant if:
- 19 (a) both of the following subparagraphs apply:
 - 20 (i) it is significantly more practicable to do so having
21 regard to the timeliness and cost of examining or
22 processing the thing at another place and the availability
23 of expert assistance;
 - 24 (ii) there are reasonable grounds to believe that the thing
25 contains or constitutes evidential material; or
 - 26 (b) the occupier of the premises consents in writing.

27 *Notice to occupier*

- 28 (2) If a thing is moved to another place for the purpose of examination
29 or processing under subsection (1), the executing officer must, if it
30 is practicable to do so:
- 31 (a) inform the occupier of the address of the place and the time
32 at which the examination or processing will be carried out;
33 and
 - 34 (b) allow the occupier or his or her representative to be present
35 during the examination or processing.

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Period of removal

- (3) The thing may be moved to another place for examination or processing for no longer than 72 hours.

Extensions

- (4) An executing officer may apply to a magistrate for one or more extensions of that time if the executing officer believes on reasonable grounds that the thing cannot be examined or processed within 72 hours or that time as previously extended.
- (5) The executing officer must give notice of the application to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.
- (6) The magistrate may order an extension for a period specified in the order if the magistrate is satisfied that the extension is necessary.

20 Subsection 154H(1)

Repeal the subsection, substitute:

- (1) If:
 - (a) a search warrant is in force in relation to premises; and
 - (b) the executing officer or an officer assisting believes on reasonable grounds that any data accessed by operating electronic equipment at the premises (including data not held at the premises) might constitute evidential material of the kind specified in the warrant;he or she may do only 1 of 3 things.

21 Subsection 154H(3)

Omit “evidential material”, substitute “data”.

22 At the end of subsection 154H(3)

Add “from the premises”.

23 At the end of subsection 154H(3)

Add:

1 Note: An executing officer can obtain an order requiring a person with
2 knowledge of a computer or computer system to provide assistance—
3 see section 154RA.

4 **24 Subsection 154H(4)**

5 Omit “evidential materia^l”, substitute “data”.

6 **25 At the end of subsection 154H(4)**

7 Add:

8 Note: An executing officer can obtain an order requiring a person with
9 knowledge of a computer or computer system to provide assistance—
10 see section 154RA.

11 **26 Paragraph 154H(5)(a)**

12 Omit “evidential materia^l” (wherever occurring), substitute “data”.

13 **27 Section 154K**

14 After “authorise”, insert “a member of the Australian Federal Police”.

15 **28 After paragraph 154L(b)**

16 Insert:

17 (ba) a member of the Australian Federal Police who is an officer
18 assisting may use such force against persons and things as is
19 necessary and reasonable in the circumstances; and

20 **29 Subsection 154R(2) (penalty)**

21 Repeal the penalty, substitute:

22 Penalty: 30 penalty units or imprisonment for 12 months, or both.

23 **30 Subsection 154R(4)**

24 Omit “or in any proceedings that would expose the person to a
25 penalty”.

26 **31 Paragraph 154R(4)(b)**

27 Omit “or 137.2”, substitute “, 137.2 or 149.1”.

28 **32 At the end of Subdivision D of Division 4 of Part XIX**

29 Add:

1 **154RA Person with computer knowledge to assist access etc.**

- 2 (1) The executing officer for a search warrant may apply to a
3 magistrate for an order requiring a specified person to provide any
4 information or assistance that is reasonable and necessary to allow
5 the officer to do one or more of the following:
6 (a) access data held in, or accessible from, a computer that is on
7 premises to which the warrant relates;
8 (b) transfer the data to a disk, tape or other storage device;
9 (c) convert the data into documentary form.
- 10 (2) The magistrate may grant the order if the magistrate is satisfied
11 that:
12 (a) there are reasonable grounds for suspecting that evidential
13 material is held in, or is accessible from, the computer; and
14 (b) the specified person is:
15 (i) reasonably suspected of having committed the
16 contravention, or one or more of the contraventions,
17 stated in the search warrant; or
18 (ii) the owner or lessee of the computer; or
19 (iii) an employee of the owner or lessee of the computer; and
20 (c) the specified person has relevant knowledge of:
21 (i) the computer or a computer network of which the
22 computer forms a part; or
23 (ii) measures applied to protect data held in, or accessible
24 from, the computer.
- 25 (3) A person commits an offence if:
26 (a) the person is subject to an order under this section; and
27 (b) the person engages in conduct; and
28 (c) the person's conduct breaches the order.

29 Penalty for a contravention of this subsection: Imprisonment for 6
30 months.

31 **33 Subsection 154T(1)**

32 After "warrant", insert "or moved under subsection 154GA(1)".

33 Note: The heading to section 154T is altered by inserting "**or moved**" after "**seized**".

34 **34 Subsection 154T(2)**

1 After “seized”, insert “or moved”.

2 **35 Subsections 154U(1) and (2)**

3 Omit “60 days” (wherever occurring), substitute “120 days”.

4 **36 Paragraph 154V(1)(a)**

5 Omit “60 days”, substitute “120 days”.

6 **37 Subsection 154V(2)**

7 Omit “a contravention of”.

8 **38 Paragraph 154V(2)(a)**

9 Before “this”, insert “a contravention of”.

10 **39 Paragraphs 154V(2)(b) and (c)**

11 Before “Part”, insert “a contravention of”.

12 **40 At the end of paragraph 154V(2)(c)**

13 Add “or”.

14 **41 After paragraph 154V(2)(c)**

15 Insert:

16 (d) a contravention of section 137.1, 137.2 or 149.1 of the
17 *Criminal Code* that relates to this Part;

18 **42 At the end of subsection 154X(2)**

19 Add:

20 Note: A magistrate who holds office under a law of a State or Territory may
21 issue a warrant in relation to premises even if those premises are not in
22 that State or Territory.

23 **43 Subsection 155(7)**

24 After “incriminate the person”, insert “or expose the person to a
25 penalty”.

26 **44 Subsection 155(7)**

27 Omit “by a person” (wherever occurring), substitute “by an individual”.

28 **45 Subsection 155(7)**

1 Omit “, or any document produced in pursuance of such a notice,”.

2 **46 Subsection 155(7)**

3 Omit “against the person”, substitute “against the individual in any
4 criminal proceedings, other than”.

5 **47 Paragraphs 155(7)(a) and (b)**

6 Repeal the paragraphs, substitute:

- 7 (a) proceedings for an offence against this section; or
8 (b) proceedings for an offence against section 137.1, 137.2 or
9 149.1 of the *Criminal Code* that relates to this section.

10 **48 Subsection 159(1)**

11 Omit “him or her”, substitute “the person or expose the person to a
12 penalty”.

13 **49 Subsection 159(2)**

14 Repeal the subsection, substitute:

- 15 (2) Evidence given by an individual before the Commission is not
16 admissible against the individual in any criminal proceedings,
17 other than:
18 (a) proceedings for an offence against this Part; or
19 (b) proceedings for an offence against section 137.1, 137.2 or
20 149.1 of the *Criminal Code* that relates to this Part.

21 **50 Paragraph 165(1)(a)**

22 After “95(1)”, insert “or section 95AH”.

23 **51 After subsection 165(3)**

24 Insert:

- 25 (3A) Subject to any direction under subsection 106(2), a person may, on
26 application in accordance with the regulations and on payment of
27 the prescribed fee (if any):
28 (a) inspect any document contained in the register kept under
29 section 95AZ; and
30 (b) obtain a copy of such a document (including, where the
31 person so requests, a copy certified to be a true copy by the
32 Registrar or a Deputy Registrar).
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1 **Part 2—Application**

2 **52 Application—search warrants**

3 The amendments of the following provisions made by this Schedule:

4 (a) section 154A of the *Trade Practices Act 1974* (to the extent
5 to which that section relates to Division 4 of Part XIX of that
6 Act);

7 (b) Division 4 of Part XIX of the *Trade Practices Act 1974*;

8 apply in relation to search warrants issued after the commencement of
9 this item.

10 **53 Application—giving answers and producing documents**
11 **etc.**

12 (1) The amendments of subsection 155(7) of the *Trade Practices Act 1974*
13 made by this Schedule apply in relation to notices under section 155 of
14 that Act served after the commencement of this item.

15 (2) The amendments of section 159 of the *Trade Practices Act 1974* made
16 by this Schedule apply in relation to:

17 (a) requirements to give evidence; and

18 (b) requirements to produce documents;

19 imposed after the commencement of this item.
20

(228/08)
