

# Trade Practices Act 1974

Act No. 51 of 1974 as amended

## Part IV

This compilation was prepared by Julie Clarke on 22 July 2009 incorporating amendments up to and including Act No. 59 of 2009

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

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# An Act relating to certain Trade Practices

## Part IV—Restrictive trade practices

### Division 1—Cartel conduct

#### Subdivision A—Introduction

##### 44ZZRA Simplified outline

The following is a simplified outline of this Division:

- This Division sets out parallel offences and civil penalty provisions relating to cartel conduct.
- A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
- A cartel provision is a provision relating to:
  - (a) price-fixing; or
  - (b) restricting outputs in the production and supply chain; or
  - (c) allocating customers, suppliers or territories; 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.

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

***bid*** includes:

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

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

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

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

includes a possibility that is not remote.

***obtaining*** includes:

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

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

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

#### **44ZZRC Extended meaning of *party***

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

## 44ZZRD Cartel provisions

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

### *Purpose/effect condition*

- (2) The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:
  - (a) fixing, controlling or maintaining; or
  - (b) providing for the fixing, controlling or maintaining of;  
the price for, or a discount, allowance, rebate or credit in relation to:
    - (c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
    - (d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
    - (e) goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
    - (f) goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

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

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

### *Purpose condition*

- (3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
  - (a) preventing, restricting or limiting:
    - (i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
    - (ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or

- (iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or
- (b) allocating between any or all of the parties to the contract, arrangement or understanding:
  - (i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or
  - (ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or
  - (iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
  - (iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
- (c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:
  - (i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or
  - (ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or
  - (iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or
  - (iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or
  - (v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered with related provisions—see subsection (9).

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

*Competition condition*

- (4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:
- (a) are or are likely to be; or
  - (b) but for any contract, arrangement or understanding, would be or would be likely to be;
- in competition with each other in relation to:
- (c) if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services—the supply of those goods or services; or
  - (d) if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services; or
  - (e) if paragraph (2)(e) or (f) applies in relation to a re-supply, or likely re-supply, of goods or services—the supply of those goods or services to that re-supplier; or
  - (f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods; or
  - (g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services; or
  - (h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services; or
  - (i) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services; or
  - (j) if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services.

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

*Immaterial whether identities of persons can be ascertained*

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

*Recommending prices etc.*

- (6) For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:
- (a) to have the purpose mentioned in subsection (2); or
  - (b) to have, or be likely to have, the effect mentioned in subsection (2);

by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

*Immaterial whether particular circumstances or particular conditions*

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

*Considering related provisions—purpose/effect condition*

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

*Considering related provisions—purpose condition*

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



*Purpose/effect of a provision*

- (10) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:
- (a) the form of the provision; or
  - (b) the form of the contract, arrangement or understanding; or
  - (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

*Purpose of a provision*

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

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

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

**Subdivision B—Offences etc.**

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

*Offence*

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

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

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

*Penalty*

- (3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:
- (a) \$10,000,000;

- (b) if the court can determine the total value of the benefits that:
  - (i) have been obtained by one or more persons; and
  - (ii) are reasonably attributable to the commission of the offence;3 times that total value;
- (c) if the court cannot determine the total value of those benefits—10% of the corporation' s annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

#### *Indictable offence*

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

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

#### *Offence*

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

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

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

#### *Penalty*

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

#### *Pre-commencement contracts etc.*

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

### *Indictable offence*

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

## **44ZZRH Determining guilt**

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

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

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

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

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

- (a) grant an injunction under section 80 against the person in relation to:
  - (i) the conduct that constitutes, or is alleged to constitute, the offence; or
  - (ii) other conduct of that kind; or
- (b) make an order under section 86C, 86D, 86E or 87 in relation to the offence.

## **Subdivision C—Civil penalty provisions**

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

A corporation contravenes this section if:

- (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
- (b) the contract, arrangement or understanding contains a cartel provision.

Note: For enforcement, see Part VI.

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

- (1) A corporation contravenes this section if:
- (a) a contract, arrangement or understanding contains a cartel provision; and

- (b) the corporation gives effect to the cartel provision.

Note: For enforcement, see Part VI.

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

## Subdivision D—Exceptions

### 44ZZRL Conduct notified

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply to a corporation in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
  - (a) the cartel provision:
    - (i) has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); or
    - (ii) has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); and
  - (b) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1A) setting out particulars of the contract, arrangement or understanding; and
  - (c) the notice is in force under section 93AD.
- (2) A person who wishes to rely on subsection (1) in relation to a contravention of section 44ZZRJ or 44ZZRK bears an evidential burden in relation to that matter.

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

### 44ZZRM Cartel provision subject to grant of authorisation

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

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

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

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

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

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

## **44ZZRO Joint ventures—prosecution**

- (1) Sections 44ZZRF and 44ZZRG do not apply in relation to a contract containing a cartel provision if:

- (a) the cartel provision is for the purposes of a joint venture; and
- (b) the joint venture is for the production and/or supply of goods or services; and
- (c) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the contract; and
- (d) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the contract for the purpose of enabling those parties to carry on the activity mentioned in paragraph (b) jointly by means of:
  - (i) their joint control; or
  - (ii) their ownership of shares in the capital; of that body corporate.

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

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

- (1A) Section 44ZZRF does not apply in relation to an arrangement or understanding containing a cartel provision 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) the cartel provision is for the purposes of a joint venture; and

- (d) the joint venture is for the production and/or supply of goods or services; and
- (e) 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
- (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 1: A defendant bears an evidential burden in relation to the matter in subsection (1A) (see subsection 13.3(3) of the *Criminal Code*).

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

(1B) Section 44ZZRG 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.

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

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

*Notice to prosecutor*

- (2) A person is not entitled to rely on subsection (1), (1A) or (1B) in a trial for an offence unless, within 28 days after the day on which the person is committed for trial, the person gives the prosecutor:
  - (a) a written notice setting out:
    - (i) the facts on which the person proposes to rely for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1), (1A) or (1B), as the case may be; and
    - (ii) the names and address of any witnesses whom the person proposes to call for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1), (1A) or (1B), as the case may be; and
  - (b) certified copies of any documents which the person proposes to adduce or point to for the purpose of discharging the evidential burden borne by the person in relation to the matter in subsection (1), (1A) or (1B), as the case may be.
- (3) If the trial of a person for an offence is being, or is to be, held in a court, the court may, by order:
  - (a) exempt the person from compliance with subsection (2); or
  - (b) extend the time within which the person is required to comply with subsection (2).
- (4) For the purposes of paragraph (2)(b), a ***certified copy*** of a document is a copy of the document certified to be a true copy by:
  - (a) a Justice of the Peace; or
  - (b) a commissioner for taking affidavits.

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

- (1) Sections 44ZZRJ and 44ZZRK do not apply in relation to a contract containing a cartel provision if:
  - (a) the cartel provision is for the purposes of a joint venture; and
  - (b) the joint venture is for the production and/or supply of goods or services; and

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

(1A) Section 44ZZRJ does not apply in relation to an arrangement or understanding containing a cartel provision 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) the cartel provision is for the purposes of a joint venture; and
- (d) the joint venture is for the production and/or supply of goods or services; and
- (e) 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
- (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 44ZZRK 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.

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

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

## **44ZZRQ Covenants affecting competition**

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

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

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

## **44ZZRR Resale price maintenance**

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision relates to:
  - (a) conduct that contravenes section 48; or
  - (b) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
  - (c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

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

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

## **44ZZRS Exclusive dealing**

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

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

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

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

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

#### **44ZZRT Dual listed company arrangement**

- (1) Sections 44ZZRF and 44ZZRJ do not apply in relation to the making of a contract, arrangement or understanding that contains a cartel provision, in so far as:
- (a) the contract, arrangement or understanding is a dual listed company arrangement; and
  - (b) the making of the contract, arrangement or understanding would, or would apart from subsection 88(8B), contravene section 49.

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

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

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

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

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

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

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

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

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

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

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

(b) either:

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

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

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

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

## **Division 2—Other provisions**

### **45 Contracts, arrangements or understandings that restrict dealings or affect competition**

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

(a) is an exclusionary provision; or

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

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

(2) A corporation shall not:

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

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

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

- (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
    - (i) is an exclusionary provision; or
    - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.
- (3) For the purposes of this section, ***competition***, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.
- (4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:
  - (a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and
  - (b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;together have or are likely to have that effect.
- (5) This section does not apply to or in relation to:
  - (a) a provision of a contract where the provision constitutes a covenant to which section 45B applies or, but for subsection 45B(9), would apply;
  - (b) a provision of a proposed contract where the provision would constitute a covenant to which section 45B would apply or, but for subsection 45B(9), would apply; or
  - (c) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding in so far as the provision relates to:
    - (i) conduct that contravenes section 48; or
    - (ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or

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

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

- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or
- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
  - (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
  - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
  - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.

(6A) The following conduct:

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

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

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

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

- (8A) Subsection (2) does not apply to a corporation engaging in conduct described in that subsection if:
- (a) the corporation has given the Commission a collective bargaining notice under subsection 93AB(1) describing the conduct; and
  - (b) the notice is in force under section 93AD.
- (9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:
- (a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and
  - (b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;
- but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

#### **45B Covenants affecting competition**

- (1) A covenant, whether the covenant was given before or after the commencement of this section, is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation or on a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.
- (2) A corporation or a person associated with a corporation shall not:
- (a) require the giving of a covenant, or give a covenant, if the proposed covenant has the purpose, or would have or be likely to have the effect, of substantially lessening competition in any market in which:
    - (i) the corporation, or any person associated with the corporation by virtue of paragraph (7)(b), supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services; or
    - (ii) any person associated with the corporation by virtue of the operation of paragraph (7)(a) supplies or acquires, is likely to supply or acquire, or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services, being a supply or acquisition in relation to which that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the corporation;

- (b) threaten to engage in particular conduct if a person who, but for subsection (1), would be bound by a covenant does not comply with the terms of the covenant; or
- (c) engage in particular conduct by reason that a person who, but for subsection (1), would be bound by a covenant has failed to comply, or proposes or threatens to fail to comply, with the terms of the covenant.

(3) Where a person:

- (a) issues an invitation to another person to enter into a contract containing a covenant;
- (b) makes an offer to another person to enter into a contract containing a covenant; or
- (c) makes it known that the person will not enter into a contract of a particular kind unless the contract contains a covenant of a particular kind or in particular terms;

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

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

- (a) a corporation that, or person who, is or would be, or but for subsection (1) would be, entitled to the benefit of the first-mentioned covenant or proposed covenant; or
- (b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragraph;

is or would be, or but for subsection (1) would be, entitled.

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

- (a) conduct that contravenes, or would but for the operation of subsection 88(8) or section 93 contravene, section 47; or
- (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:



- (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
  - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
  - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.
- (7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:
  - (a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the corporation in relation to the covenant or proposed covenant; or
  - (b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A(1)(a)(ii).
- (8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:
  - (a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and
  - (b) the person applies for the grant of such an authorization within 14 days after the covenant is given;but nothing in this subsection affects the application of paragraph (2)(b) or (c) in relation to the covenant.
- (9) This section does not apply to or in relation to a covenant or proposed covenant if:
  - (a) the sole or principal purpose for which the covenant was or is required to be given was or is to prevent the relevant land from being used otherwise than for residential purposes;
  - (b) the person who required or requires the covenant to be given was or is a religious, charitable or public benevolent institution or a trustee for such an

institution and the covenant was or is required to be given for or in accordance with the purposes or objects of that institution; or

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

#### **45C Covenants in relation to prices**

- (1) In the application of subsection 45B(1) in relation to a covenant that has, or is likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who are, or but for that subsection would be, bound by or entitled to the benefit of the covenant, or by any of them, or by any persons associated with any of them, in competition with each other, that subsection has effect as if the words “if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the corporation or any person associated with the corporation supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services” were omitted.
- (2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words “require the giving of a covenant, or give a covenant” were omitted.
- (3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:
  - (a) the form of the covenant or proposed covenant; or
  - (b) any description given to the covenant by any of the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the

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

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

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

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

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

#### **45D Secondary boycotts for the purpose of causing substantial loss or damage**

(1) In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:

- (a) that hinders or prevents:
  - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
  - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
- (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
- (3) Subsection (1) applies if the fourth person is a corporation.
- (4) Subsection (1) also applies if:
  - (a) the third person is a corporation and the fourth person is not a corporation; and
  - (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

#### **45DA Secondary boycotts for the purpose of causing substantial lessening of competition**

- (1) In the circumstances specified in subsection (3), a person must not, in concert with a second person, engage in conduct:
  - (a) that hinders or prevents:
    - (i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person); or
    - (ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and
  - (b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.
- (3) Subsection (1) applies if:
  - (a) the third person or the fourth person is a corporation, or both of them are corporations; and
  - (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

#### **45DB Boycotts affecting trade or commerce**

- (1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

#### **45DC Involvement and liability of employee organisations**

##### *Certain organisations taken to be acting in concert*

- (1) If 2 or more persons (the **participants**), each of whom is a member or officer of the same organisation of employees, engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with another person, then, unless the organisation proves otherwise, the organisation is taken for the purposes of sections 45D, 45DA and 45DB:
  - (a) to engage in that conduct in concert with the participants; and
  - (b) to have engaged in that conduct for the purposes for which the participants engaged in it.

##### *Consequences of organisation contravening subsection 45D(1), 45DA(1) or 45DB(1)*

- (2) The consequences of an organisation of employees engaging, or being taken by subsection (1) to engage, in conduct in concert with any of its members or

officers in contravention of subsection 45D(1), 45DA(1) or 45DB(1) are as set out in subsections (3), (4) and (5).

*Loss or damage taken to have been caused by organisation' s conduct*

- (3) Any loss or damage suffered by a person as a result of the conduct is taken, for the purposes of this Act, to have been caused by the conduct of the organisation.

*Taking proceedings if organisation is a body corporate*

- (4) If the organisation is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organisation in respect of the conduct.

*Taking proceedings if organisation is not a body corporate*

- (5) If the organisation is not a body corporate:
- (a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation' s members and the proceeding is taken to be a proceeding against all the persons who were members of the organisation at the time when the conduct was engaged in; and
  - (b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and
  - (c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and
  - (d) except as provided by paragraph (a), a proceeding in respect of the conduct must not be brought under section 77 or 82 against any of the members or officers of the organisation; and
  - (e) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in paragraph (a) that was brought under section 77 or 82, process may be issued and executed against the following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:
    - (i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or however otherwise held;
    - (ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or however otherwise held;
    - (iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity

as members, whether vested in trustees or however otherwise held;  
and

- (f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

#### **45DD Situations in which boycotts permitted**

*Dominant purpose of conduct relates to employment matters—conduct by a person*

- (1) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person.

*Dominant purpose of conduct relates to employment matters—conduct by employee organisation and employees*

- (2) If:
- (a) an employee, or 2 or more employees who are employed by the same employer, engage in conduct in concert with another person who is, or with other persons each of whom is:
    - (i) an organisation of employees; or
    - (ii) an officer of an organisation of employees; and
  - (b) the conduct is only engaged in by the persons covered by paragraph (a); and
  - (c) the dominant purpose for which the conduct is engaged in is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the employee, or any of the employees, covered by paragraph (a);

the persons covered by paragraph (a) do not contravene, and are not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in the conduct.

*Dominant purpose of conduct relates to environmental protection or consumer protection*

- (3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:
- (a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and

- (b) engaging in the conduct is not industrial action.

Note 1: If an environmental organisation or a consumer organisation is a body corporate:

- (a) it is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption; and
- (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

Note 2: If an environmental organisation or a consumer organisation is not a body corporate:

- (a) it is not a “person” and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but
- (b) each of its members is a “person” who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

#### *Meaning of **industrial action**—basic definition*

(4) In subsection (3), **industrial action** means:

- (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
  - (i) the terms and conditions of the work are prescribed, wholly or partly, by a workplace instrument or an order of an industrial body; or
  - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute; or
- (b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by a workplace instrument or by an order of an industrial body; or
- (c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or
- (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work.

For this purpose, **industrial body** and **workplace instrument** have the same meanings as in the *Fair Work Act 2009*.

#### *Meaning of **industrial action**—further clarification*

(5) For the purposes of subsection (3):

- (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that persons are required to perform in the course of their employment; and
- (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.



*Subsections (1), (2) and (3) do not protect people not covered by them*

- (6) In applying subsection 45D(1), 45DA(1) or 45DB(1) to a person who is not covered by subsection (1), (2) or (3) in respect of certain conduct, disregard the fact that other persons may be covered by one of those subsections in respect of the same conduct.

*Defences to contravention of subsection 45DB(1)*

- (7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:
- (a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or
  - (b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

*Each person to prove defence*

- (8) If:
- (a) a person engages in conduct in concert with another person; and
  - (b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct;
- in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

Note: Section 415 of the *Fair Work Act 2009* limits the right to bring actions under this Act in respect of industrial action that is protected action for the purposes of that section.

## **45E Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services**

*Situations to which section applies*

- (1) This section applies in the following situations:
- (a) a ***supply situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to supply goods or services to another person (the ***second person***); or
  - (b) an ***acquisition situation***—in this situation, a person (the ***first person***) has been accustomed, or is under an obligation, to acquire goods or services from another person (the ***second person***).

Despite paragraphs (a) and (b), this section does not apply unless the first or second person is a corporation or both of them are corporations.

Note: For the meanings of ***accustomed to supply*** and ***accustomed to acquire***, see subsections (5) and (7).

### *Prohibition in a supply situation*

- (2) In a supply situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:
- (a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or
  - (b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:
    - (i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and
    - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

### *Prohibition in an acquisition situation*

- (3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:
- (a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or
  - (b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:
    - (i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and
    - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

*No contravention if second person gives written consent to written contract etc.*

- (4) Subsections (2) and (3) do not apply to a contract, arrangement or understanding if it is in writing and was made or arrived at with the written consent of the second person.

*Meaning of **accustomed to supply***

- (5) In this section, a reference to a person who has been **accustomed to supply** goods or services to a second person includes (subject to subsection (6)):
- (a) a regular supplier of such goods or services to the second person; or
  - (b) the latest supplier of such goods or services to the second person; or
  - (c) a person who, at any time during the immediately preceding 3 months, supplied such goods or services to the second person.

*Exception to subsection (5)*

- (6) If:
- (a) goods or services have been supplied by a person to a second person under a contract between them that required the first person to supply such goods or services over a period; and
  - (b) the period has ended; and
  - (c) after the end of the period, the second person has been supplied with such goods or services by another person and has not also been supplied with such goods or services by the first person;

then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to supply such goods or services to the second person.

*Meaning of **accustomed to acquire***

- (7) In this section, a reference to a person who has been **accustomed to acquire** goods or services from a second person includes (subject to subsection (8)):
- (a) a regular acquirer of such goods or services from the second person; or
  - (b) a person who, when last acquiring such goods or services, acquired them from the second person; or
  - (c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

*Exception to subsection (7)*

- (8) If:

- (a) goods or services have been acquired by a person from a second person under a contract between them that required the first person to acquire such goods or services over a period; and
- (b) the period has ended; and
- (c) after the end of the period, the second person has refused to supply such goods or services to the first person;

then, for the purposes of the application of this section in relation to anything done after the second person has refused to supply goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to acquire such goods or services from the second person.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

#### **45EA Provisions contravening section 45E not to be given effect**

A person must not give effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person:

- (a) contravened subsection 45E(2) or (3); or
- (b) would have contravened subsection 45E(2) or (3) if:
  - (i) section 45E had been in force when the contract or arrangement was made, or the understanding was arrived at; and
  - (ii) the words “is in writing and” and “written” were not included in subsection 45E(4).

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

#### **45EB Sections 45D to 45EA do not affect operation of other provisions of Part**

Nothing in section 45D, 45DA, 45DB, 45DC, 45DD, 45E or 45EA affects the operation of any other provision of this Part.

### **46 Misuse of market power**

- (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
  - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
  - (b) preventing the entry of a person into that or any other market; or
  - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

- (1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.
- (1AA) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of:
- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
  - (b) preventing the entry of a person into that or any other market; or
  - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
- (1AB) For the purposes of subsection (1AA), without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has a substantial share of a market, the Court may have regard to the number and size of the competitors of the corporation in the market.
- (1A) For the purposes of subsections (1) and (1AA):
- (a) the reference in paragraphs (1)(a) and (1AA)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
  - (b) the reference in paragraphs (1)(b) and (c) and (1AA)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.
- (2) If:
- (a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or
  - (b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;
- the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.
- (3) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court shall have

regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

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

(3A) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate or bodies corporate has or have in that market that results from:

- (a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties; and
- (b) any covenants, or proposed covenants, that the body corporate or bodies corporate is or are, or would be, bound by or entitled to the benefit of.

(3B) Subsections (3) and (3A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(3C) For the purposes of this section, without limiting the matters to which the court may have regard for the purpose of determining whether a body corporate has a substantial degree of power in a market, a body corporate may have a substantial degree of power in a market even though:

- (a) the body corporate does not substantially control the market; or
- (b) the body corporate does not have absolute freedom from constraint by the conduct of:
  - (i) competitors, or potential competitors, of the body corporate in that market; or
  - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(3D) To avoid doubt, for the purposes of this section, more than 1 corporation may have a substantial degree of power in a market.

(4) In this section:

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

- (c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.
- (4A) Without limiting the matters to which the court may have regard for the purpose of determining whether a corporation has contravened subsection (1), the court may have regard to:
- (a) any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services; and
  - (b) the reasons for that conduct.
- (5) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that it acquires plant or equipment.
- (6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 49 and 50, by reason that an authorization or clearance is in force or by reason of the operation of subsection 45(8A) or section 93.
- (6A) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:
- (a) whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;
  - (b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
  - (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;
  - (d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

This subsection does not limit the matters to which the court may have regard.

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

#### 46A Misuse of market power—corporation with substantial degree of power in trans-Tasman market

(1) In this section:

*conduct*, in relation to a market, means conduct in the market either as a supplier or acquirer of goods or services in the market.

*impact market* means a market in Australia that is not a market exclusively for services.

*market power*, in relation to a market, means market power in the market either as a supplier or acquirer of goods or services in the market.

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

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

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

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

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

(3) If:

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

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

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



corporate or of any of those bodies corporate, in the trans-Tasman market is constrained by the conduct of:

- (a) competitors, or potential competitors, of the body corporate, or of any of those bodies corporate, in the trans-Tasman market; or
  - (b) persons to whom or from whom the body corporate, or any of those bodies corporate, supplies or acquires goods or services in the trans-Tasman market.
- (5) Without extending by implication the meaning of subsection (2), a corporation is not taken to contravene that subsection merely because it acquires plant or equipment.
- (6) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47, 49 and 50, because an authorisation or clearance is in force or because of the operation of subsection 45(8A) or section 93.
- (7) Without limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its market power for a purpose referred to in subsection (2) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.
- (8) It is the intention of the Parliament that this section, and the provisions of Parts VI and XII so far as they relate to a contravention of this section, should apply to New Zealand and New Zealand Crown corporations to the same extent, and in the same way, as they respectively apply under section 2A to the Commonwealth and authorities of the Commonwealth.
- (9) Subsection (8) has effect despite section 9 of the *Foreign States Immunities Act 1985*.

#### **46B No immunity from jurisdiction in relation to certain New Zealand laws**

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

## 47 Exclusive dealing

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

(2) A corporation engages in the practice of exclusive dealing if the corporation:

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

on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services or, if that person is a body corporate, a body corporate related to that body corporate:

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

(3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

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

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

- (d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a

competitor of the corporation or from a competitor of a body corporate related to the corporation;

(e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or

(f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:

(i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(ii) in particular places or classes of places or in places other than particular places or classes of places.

(4) A corporation also engages in the practice of exclusive dealing if the corporation:

(a) acquires, or offers to acquire, goods or services; or

(b) acquires, or offers to acquire, goods or services at a particular price;

on the condition that the person from whom the corporation acquires or offers to acquire the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(5) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

(a) to acquire goods or services from a person; or

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

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

(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or

(d) in particular places or classes of places or in places other than particular places or classes of places.

(6) A corporation also engages in the practice of exclusive dealing if the corporation:

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

on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(7) A corporation also engages in the practice of exclusive dealing if the corporation refuses:

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

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

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

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

- (b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
    - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
    - (ii) in particular places or classes of places or in places other than particular places or classes of places; or
  - (c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.
- (9) A corporation also engages in the practice of exclusive dealing if the corporation refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:
  - (a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
  - (b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
  - (c) has supplied goods or services, or goods or services of a particular kind or description:
    - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
    - (ii) in particular places or classes of places or in places other than particular places or classes of places; or
  - (d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.
- (10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a corporation engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:
  - (a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

- (b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.
- (10A) Subsection (1) does not apply to a corporation engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:
- (a) the corporation has given the Commission a notice under subsection 93(1) describing the conduct; and
  - (b) the notice is in force under section 93.
- (11) Subsections (8) and (9) do not apply with respect to:
- (a) conduct engaged in by, or by a trustee for, a religious, charitable or public benevolent institution, being conduct engaged in for or in accordance with the purposes or objects of that institution; or
  - (b) conduct engaged in in pursuance of a legally enforceable requirement made by, or by a trustee for, a religious, charitable or public benevolent institution, being a requirement made for or in accordance with the purposes or objects of that institution.
- (12) Subsection (1) does not apply with respect to any conduct engaged in by a body corporate by way of restricting dealings by another body corporate if those bodies corporate are related to each other.
- (13) In this section:
- (a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;
  - (b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:
    - (i) the corporation engaging in the conduct or any body corporate related to that corporation; or
    - (ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;
 supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services; and

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

## 48 Resale price maintenance

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

## 49 Dual listed company arrangements that affect competition

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

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

### *Exception*

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

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

### *Meaning of **competition***

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

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

## **50 Prohibition of acquisitions that would result in a substantial lessening of competition**

- (1) A corporation must not directly or indirectly:
- (a) acquire shares in the capital of a body corporate; or
  - (b) acquire any assets of a person;
- if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.
- Note: The corporation will not be prevented from making the acquisition if the corporation is granted a clearance or an authorisation for the acquisition under Division 3 of Part VII: see subsections 95AC(2) and 95AT(2).
- (2) A person must not directly or indirectly:
- (a) acquire shares in the capital of a corporation; or
  - (b) acquire any assets of a corporation;
- if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.
- Note: The person will not be prevented from making the acquisition if the person is granted a clearance or an authorisation for the acquisition under Division 3 of Part VII: see subsections 95AC(2) and 95AT(2).
- (3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:
- (a) the actual and potential level of import competition in the market;



- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.

(4) Where:

- (a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;
- (b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted a clearance or an authorization to acquire the shares or assets; and
- (c) the person applied for the grant of such a clearance or an authorization before the expiration of 14 days after the contract was entered into;

the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:

- (d) the application for the clearance or authorization is disposed of; or
- (e) the contract ceases to be subject to the condition;

whichever first happens.

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

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

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

(6) In this section:

**market** means a substantial market for goods or services in:

- (a) Australia; or
- (b) a State; or
- (c) a Territory; or
- (d) a region of Australia.

## 50A Acquisitions that occur outside Australia

(1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the ***first controlling interest***) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest (the ***second controlling interest***) in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:

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

(1A) Without limiting the matters that may be taken into account in determining whether the obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the matters mentioned in subsection 50(3) must be taken into account for that purpose.

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

- (a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
  - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
  - (b) without limiting the matters that may be taken into account, the Tribunal must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.
- (2) Where an application under subsection (1) is made:
- (a) the Tribunal shall give to:
    - (i) each corporation in relation to which the application relates; and
    - (ii) the Minister and the Commission;a notice in writing stating that the application has been made; and
  - (b) the persons referred to in paragraph (a) and, if the application was made by another person, that other person are entitled to appear, or be represented, at the proceedings following the application.
- (3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.
- (4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under subsection (1).
- (5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).
- (6) After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market to which the declaration relates.
- (7) Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.
- (8) For the purposes of this section:
- (a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and

- (b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate:
  - (i) controls the composition of the board of directors of another body corporate;
  - (ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or
  - (iii) holds shares in the capital of another body corporate;the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.

- (9) In this section:

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

## 51 Exceptions

- (1) In deciding whether a person has contravened this Part, the following must be disregarded:
  - (a) anything specified in, and specifically authorised by:
    - (i) an Act (not including an Act relating to patents, trade marks, designs or copyrights); or
    - (ii) regulations made under such an Act;
  - (b) anything done in a State, if the thing is specified in, and specifically authorised by:
    - (i) an Act passed by the Parliament of that State; or
    - (ii) regulations made under such an Act;
  - (c) anything done in the Australian Capital Territory, if the thing is specified in, and specifically authorised by:
    - (i) an enactment as defined in section 3 of the *Australian Capital Territory (Self-Government) Act 1988*; or
    - (ii) regulations made under such an enactment;
  - (d) anything done in the Northern Territory, if the thing is specified in, and specifically authorised by:
    - (i) an enactment as defined in section 4 of the *Northern Territory (Self-Government) Act 1978*; or
    - (ii) regulations made under such an enactment;

- (e) anything done in another Territory, if the thing is specified in, and specifically authorised by:
  - (i) an Ordinance of that Territory; or
  - (ii) regulations made under such an Ordinance.

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

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

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

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

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

- (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to this Act;
- (b) subparagraph (1)(a)(ii) and paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50 or 50A;
- (c) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded if the thing happens more than 2 years after those regulations came into operation;
- (d) regulations referred to in subparagraph (1)(a)(ii), (b)(ii), (c)(ii), (d)(ii) or (e)(ii) do not have the effect of requiring a particular thing to be disregarded to the extent that the regulations are the same in substance as other regulations:
  - (i) referred to in the subparagraph concerned; and
  - (ii) that came into operation more than 2 years before the particular thing happened;
- (e) paragraphs (1)(b) to (d) have no effect in relation to things authorised by a law of a State or Territory unless:
  - (i) at the time of the alleged contravention referred to in subsection (1) the State or Territory was a fully-participating jurisdiction and a party to the Competition Principles Agreement; or

- (ii) all of the following conditions are met:
  - (A) the Minister published a notice in the *Gazette* under subsection 150K(1) in relation to the State or Territory, or the State or Territory ceased to be a party to the Competition Principles Agreement, within 12 months before the alleged contravention referred to in subsection (1);
  - (B) the thing authorised was the making of a contract, or an action under a contract, that existed immediately before the Minister published the notice or the State or Territory ceased to be a party;
  - (C) the law authorising the thing was in force immediately before the Minister published the notice or the State or Territory ceased to be a party;
- (f) subsection (1) does not apply to things that are covered by paragraph (1)(b), (c), (d) or (e) to the extent that those things are prescribed by regulations made under this Act for the purposes of this paragraph.
- (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:
  - (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;
  - (b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract;
  - (c) to any provision of a contract, arrangement or understanding, being a provision obliging a person to comply with or apply standards of dimension, design, quality or performance prepared or approved by Standards Australia International Limited or by a prescribed association or body;
  - (d) to any provision of a contract, arrangement or understanding between partners none of whom is a body corporate, being a provision in relation to the terms of the partnership or the conduct of the partnership business or in relation to competition between the partnership and a party to the

contract, arrangement or understanding while he or she is, or after he or she ceases to be, a partner;

(e) in the case of a contract for the sale of a business or of shares in the capital of a body corporate carrying on a business—to any provision of the contract that is solely for the protection of the purchaser in respect of the goodwill of the business; or

(g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or to the supply of services outside Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made or the understanding was arrived at, or before 8 September 1976, whichever was the later.

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

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

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

(i) a licence granted by the proprietor, licensee or owner of a patent, of a registered design, of a copyright or of EL rights within the meaning of the *Circuit Layouts Act 1989*, or by a person who has applied for a patent or for the registration of a design; or

(ii) an assignment of a patent, of a registered design, of a copyright or of such EL rights, or of the right to apply for a patent or for the registration of a design;

to the extent that the condition relates to:

(iii) the invention to which the patent or application for a patent relates or articles made by the use of that invention;

(iv) goods in respect of which the design is, or is proposed to be, registered and to which it is applied;

(v) the work or other subject matter in which the copyright subsists; or

(vi) the eligible layout in which the EL rights subsist;

(b) the inclusion in a contract, arrangement or understanding authorizing the use of a certification trade mark of a provision in accordance with rules

applicable under Part XI of the *Trade Marks Act 1955*, or the giving effect to such a provision; or

- (c) the inclusion in a contract, arrangement or understanding between:
  - (i) the registered proprietor of a trade mark other than a certification trade mark; and
  - (ii) a person registered as a registered user of that trade mark under Part IX of the *Trade Marks Act 1955* or a person authorized by the contract to use the trade mark subject to his or her becoming registered as such a registered user;

of a provision to the extent that it relates to the kinds, qualities or standards of goods bearing the mark that may be produced or supplied, or the giving effect to the provision to that extent.

- (4) This section applies in determining whether a provision of a contract is unenforceable by reason of subsection 45(1), or whether a covenant is unenforceable by reason of subsection 45B(1), in like manner as it applies in determining whether a contravention of a provision of this Part has been committed.
- (5) In the application of subsection (2A) to section 46A, the reference in that subsection to trade or commerce includes trade or commerce within New Zealand.

### **51AAA Concurrent operation of State and Territory laws**

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.