



Western Australia

# **Competition Policy Reform (Western Australia) Act 1996**

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Western Australia

## Competition Policy Reform (Western Australia) Act 1996

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### CONTENTS

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#### **Part 1 — Preliminary**

|    |              |   |
|----|--------------|---|
| 1. | Short title  | 2 |
| 2. | Commencement | 2 |
| 3. | Definitions  | 2 |

#### **Part 2 — The Competition Code**

|    |   |   |
|----|---|---|
| 4. | The Competition Code text                     | 5 |
| 5. | Application of Competition Code               | 5 |
| 6. | Future modifications of Competition Code text | 5 |
| 7. | Interpretation of Competition Code            | 6 |
| 8. | Application of Competition Code               | 7 |
| 9. | Special provisions                            | 8 |

#### **Part 3 — Citing the Competition Codes**

|     |   |   |
|-----|---|---|
| 10. | Citation of Competition Code of this jurisdiction         | 9 |
| 11. | References to Competition Code                            | 9 |
| 12. | References to Competition Codes of other<br>jurisdictions | 9 |

**Part 4 — Application of Competition  
Codes to Crown**

|     |   |    |
|-----|---|----|
| 13. | Application law of this jurisdiction                    | 10 |
| 14. | Application law of other jurisdictions                  | 10 |
| 15. | Activities that are not business                        | 10 |
| 16. | Crown not liable to pecuniary penalty or<br>prosecution | 12 |
| 17. | This Part overrides the prerogative                     | 12 |

**Part 5 — National administration  
and enforcement of Competition  
Codes**

**Division 1 — Preliminary**

|     |        |    |
|-----|--------|----|
| 18. | Object | 13 |
|-----|--------|----|

**Division 2 — Conferral of functions**

|     |   |    |
|-----|---|----|
| 19. | Conferral of functions and powers on certain<br>bodies                              | 13 |
| 20. | Conferral of other functions and powers for<br>purposes of law in this jurisdiction | 13 |

**Division 4 — Offences**

|     |  |    |
|-----|--|----|
| 24. | Object   | 14 |
| 25. | Application of Commonwealth laws to offences<br>against Competition Code of this jurisdiction    | 15 |
| 26. | Application of Commonwealth laws to offences<br>against Competition Codes of other jurisdictions | 15 |
| 27. | Functions and powers conferred on<br>Commonwealth officers and authorities                       | 16 |
| 28. | Restriction of functions and powers of officers and<br>authorities of this jurisdiction          | 16 |

**Division 5 — Administrative law**

|     |  |    |
|-----|--|----|
| 29. | Definition   | 17 |
| 30. | Application of Commonwealth administrative laws<br>to Competition Code of this jurisdiction    | 17 |
| 31. | Application of Commonwealth administrative laws<br>to Competition Codes of other jurisdictions | 18 |
| 32. | Functions and powers conferred on<br>Commonwealth officers and authorities                     | 18 |

|   |  |    |
|---|--|----|
| 33.   | Restriction of functions and powers of authorities and officers of this jurisdiction | 19 |
| <b>Part 6 — Miscellaneous</b>   |  |    |
| 34.   | No doubling-up of liabilities  | 20 |
| 35.   | Things done for multiple purposes  | 20 |
| 36.   | Reference in Commonwealth law to a provision of another law                          | 20 |
| 37.   | Fees and other money   | 21 |
| 38.   | Regulations  | 21 |
| 39.   | Regulations for exceptions under section 51 of Trade Practices Act or Code           | 21 |
| <b>Part 7 — Transitional rules</b>  |  |    |
| 40.   | Definitions  | 22 |
| 41.   | Existing contracts   | 22 |
| 42.   | Section 51 exceptions  | 23 |
| 43.   | Temporary exemption from pecuniary penalties   | 23 |
| 44.   | Regulations relating to savings and transitional matters                             | 23 |
| <b>Part 8 — State administration of Competition Code</b>                              |  |    |
| <b>Division 1 — Preliminary</b>   |  |    |
| 45.   | Definitions  | 24 |
| 46.   | Arrangements   | 24 |
| 47.   | Minister may declare a matter to be a State matter                                   | 25 |
| <b>Division 2 — Application of provisions</b>   |  |    |
| 48.   | If State is not a fully-participating jurisdiction                                   | 25 |
| 49.   | If State is not a party to the Conduct Code Agreement                                | 26 |
| 50.   | If matter is a State matter  | 26 |
| <b>Division 3 — State authorities to perform functions under the Competition Code</b> |  |    |
| 51.   | Application of this Division   | 27 |
| 52.   | References in Competition Code taken to be references to State authorities           | 27 |
| 53.   | Conferral of functions and powers on State authorities                               | 27 |

|       |   |    |
|-------|---|----|
|       | <b>Division 4 — Jurisdiction of State courts</b>  |    |
| 54.   | Application of this Division  | 28 |
| 55.   | Jurisdiction of State courts  | 28 |
| 56.   | References in Competition Code taken to be references to State courts   | 28 |
| 57.   | Exercise of jurisdiction under cross-vesting provisions   | 29 |
|       | <b>Note — Schedule version of Part IV of the Trade Practices Act 1974 of the Commonwealth</b>                     |    |
| 45.   | Contracts, arrangements or understandings that restrict dealings or affect competition                            | 30 |
| 45A.  | Contracts, arrangements or understandings in relation to prices   | 33 |
| 45B.  | Covenants affecting competition   | 36 |
| 45C.  | Covenants in relation to prices   | 39 |
| 45D.  | Secondary boycotts for the purpose of causing substantial loss or damage  | 41 |
| 45DA. | Secondary boycotts for the purpose of causing substantial lessening of competition                                | 42 |
| 45DC. | Involvement and liability of employee organisations   | 43 |
| 45DD. | Situations in which boycotts permitted  | 45 |
| 45E.  | Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services | 47 |
| 45EA. | Provisions contravening section 45E not to be given effect  | 51 |
| 45EB. | Sections 45D to 45EA do not affect operation of other provisions of Part  | 51 |
| 46.   | Misuse of market power  | 51 |
| 47.   | Exclusive dealing   | 53 |
| 48.   | Resale price maintenance  | 59 |
| 50.   | Prohibition of acquisitions that would result in a substantial lessening of competition                           | 60 |
| 51.   | Exceptions  | 61 |

**Notes**

Compilation table

66

**Defined Terms**







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Western Australia

## **Competition Policy Reform (Western Australia) Act 1996**

**An Act to apply certain laws of the Commonwealth relating to competition policy as laws of Western Australia, and for other purposes.**

## **Part 1 — Preliminary**

### **1. Short title**

This Act may be cited as the *Competition Policy Reform (Western Australia) Act 1996*<sup>1</sup>.

### **2. Commencement**

This Act shall be deemed to have come into operation on 21 July 1996.

### **3. Definitions**

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

**“application law”** means —

- (a) a law of a participating jurisdiction that applies the Competition Code text, either with or without modifications, as a law of the participating jurisdiction; or
- (b) any regulations or other legislative instrument made under a law described in paragraph (a); or
- (c) the Competition Code text, applying as a law of the participating jurisdiction, either with or without modifications;

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

**“Competition Code”** means (according to the context) —

- (a) the Competition Code text; or
- (b) the Competition Code text, applying as a law of a participating jurisdiction, either with or without modifications;

**“Competition Code text”** means the text described in section 4;

**“Conduct Code Agreement”** means the Conduct Code Agreement made on 11 April 1995 between the Commonwealth, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia, as in force for the time being;

**“Council”** means the National Competition Council established by section 29A of the Trade Practices Act;

**“instrument”** means any document whatever, including —

- (a) an Act or an instrument made under an Act;
- (b) a law of this jurisdiction or an instrument made under such a law;
- (c) an award or other industrial determination or order, or an industrial agreement;
- (d) any other order (whether executive, judicial or of any other kind);
- (e) a notice, certificate or licence;
- (f) an agreement;
- (g) an application or declaration made, information or complaint laid, affidavit sworn, or warrant issued, for any purpose;
- (h) an indictment, prosecution notice, presentment, summons or writ; or
- (i) any other pleading in, or process issued in connection with, a legal or other proceeding;

**“jurisdiction”** means a State;

**“law”**, in relation to a Territory, means a law of, or in force in, that Territory;

s. 3

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“**modifications**” includes additions, omissions and substitutions;

“**month**” means a period commencing at the beginning of a day of one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month;

“**officer**”, in relation to the Commonwealth, has the meaning given in Part XIA of the Trade Practices Act;

“**participating jurisdiction**” means a jurisdiction that is a party to the Conduct Code Agreement and applies the Competition Code text as a law of the jurisdiction, either with or without modifications;

“**Schedule version of Part IV**” means the text that is set out in Part 1 of the Schedule to the Trade Practices Act;

“**State**” includes a Territory;

“**Territory**” means the Australian Capital Territory or the Northern Territory of Australia;

“**this jurisdiction**” means Western Australia;

“**Trade Practices Act**” means the *Trade Practices Act 1974* of the Commonwealth;

“**Tribunal**” means the Australian Competition Tribunal referred to in the Trade Practices Act, and includes a member of the Tribunal or a Division of the Tribunal performing functions of the Tribunal.

- (2) If this Act uses an expression that is given a meaning in the Trade Practices Act, the expression has the meaning so given unless the contrary intention appears in this Act.
- (3) The notes in and at the end of this Act do not form part of this Act.

[Section 3 amended by No. 51 of 1999 s. 37; No. 84 of 2004 s. 80.]

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## Part 2 — The Competition Code

### 4. The Competition Code text

- (1) The Competition Code text consists of —
- (a) the Schedule version of Part IV;

NOTE: The Schedule version of Part IV (as at 1 June 2001) is set out in a note at the end of this Act.

- (b) the remaining provisions of the Trade Practices Act (except sections 2A, 5, 6 and 172), so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV of that Act; and
  - (c) the regulations under the Trade Practices Act, so far as they relate to any provisions covered by paragraph (a) or (b).
- (2) For the purpose of forming part of the Competition Code text, the provisions referred to in subsection (1)(b) and (c) are to be modified as necessary to fit in with the Schedule version of Part IV and, in particular, references in them to corporations are to include references to persons who are not corporations.

### 5. Application of Competition Code

- (1) The Competition Code text, as in force for the time being, applies as a law of Western Australia.
- (2) This section has effect subject to section 6.

### 6. Future modifications of Competition Code text

- (1) A modification made by a law of the Commonwealth to the Competition Code text after the commencement of this section —
- (a) does not apply under section 5 until at least the end of the period of 2 months after the date of the modification, unless a proclamation appoints an earlier day; and

**s. 7**

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- (b) does not apply under that section at all, if the modification is declared by a proclamation to be excluded from the operation of that section.
- (2) A proclamation under subsection (1)(b) has effect only if published before the end of 2 months after the date of the modification.
- (3) If, after a proclamation is made under subsection (1)(b), a further proclamation is made appointing a day on and from which the modification of the text is to apply under section 5, subsection (1)(b) ceases to apply to the modification immediately before that day.
- (4) A proclamation under subsection (1)(a) or (3) —
  - (a) cannot appoint any day that is earlier than the day of publication of the proclamation or that is earlier than the day on which the modification of the text takes effect; and
  - (b) is to be regarded in such a case as appointing the day of publication of the proclamation or the day on which the modification of the text takes effect, whichever is the later.
- (5) For the purposes of this section, the date of the modification is —
  - (a) the day on which the Commonwealth Act effecting the modification receives the Royal Assent or the regulation effecting the modification is notified in the Commonwealth of Australia *Gazette*; or
  - (b) the day on which this Act receives the Royal Assent,whichever is the later.

**7. Interpretation of Competition Code**

- (1) The *Acts Interpretation Act 1901* of the Commonwealth applies as a law of this jurisdiction to —

- (a) the Competition Code of this jurisdiction; and
  - (b) any instrument under that Code.
- (2) For the purposes of subsection (1), the Commonwealth Act mentioned in that subsection applies as if —
  - (a) the statutory provisions in the Competition Code of this jurisdiction were a Commonwealth Act; and
  - (b) the regulations in the Competition Code of this jurisdiction or instruments mentioned in that subsection were regulations or instruments under a Commonwealth Act.
- (3) The *Interpretation Act 1984* does not apply to —
  - (a) the Competition Code of this jurisdiction; or
  - (b) any instrument under that Code.

**8. Application of Competition Code**

- (1) The Competition Code of this jurisdiction applies to and in relation to —
  - (a) persons carrying on business within this jurisdiction;
  - (b) bodies corporate incorporated or registered under the law of this jurisdiction;
  - (c) persons ordinarily resident in this jurisdiction; and
  - (d) persons otherwise connected with this jurisdiction.
- (2) Subject to subsection (1), the Competition Code of this jurisdiction extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside this jurisdiction (whether within or outside Australia).
- (3) Where a claim under section 82 of the Competition Code of this jurisdiction is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of the Code extends occurring outside Australia except with the consent in writing of the Commonwealth Minister.

**s. 9**

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- (4) A person other than the Commonwealth Minister or the Commission is not entitled to make an application to the Court for an order under section 87(1) or (1A) of the Competition Code of this jurisdiction in a proceeding in respect of conduct to which a provision of the Code extends occurring outside Australia except with the consent in writing of the Commonwealth Minister.
- (5) The Commonwealth Minister is required to give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Commonwealth Minister —
  - (a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and
  - (b) it is not in the national interest that the consent be given.
- (6) In this section —

**“Commonwealth Minister”** means a Minister of State for the Commonwealth administering Part IV of the Trade Practices Act.

**9. Special provisions**

The references in sections 45 and 45B of the Competition Code of this or another participating jurisdiction to “the commencement of this section” are to be regarded as references to the commencement of the provision of the law of the jurisdiction that provides that the Competition Code text as in force for the time being applies as a law of the jurisdiction.



### **Part 3 — Citing the Competition Codes**

#### **10. Citation of Competition Code of this jurisdiction**

The Competition Code text applying as a law of this jurisdiction may be cited as the Competition Code of Western Australia.

#### **11. References to Competition Code**

- (1) The object of this section is to help ensure that the Competition Code of this jurisdiction can operate, in appropriate circumstances, as if that Code, together with the Competition Code of each other participating jurisdiction, constituted a single national Competition Code applying throughout the participating jurisdictions.
- (2) A reference in any instrument to the Competition Code is a reference to the Competition Codes of any or all of the participating jurisdictions.
- (3) Subsection (2) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

#### **12. References to Competition Codes of other jurisdictions**

- (1) This section has effect for the purposes of an Act, a law of this jurisdiction or an instrument under an Act or such a law.
- (2) If a law of a participating jurisdiction other than this jurisdiction provides that the Competition Code text as in force for the time being applies as a law of that jurisdiction, the Competition Code of that jurisdiction is the Competition Code text, applying as a law of that jurisdiction.

## **Part 4 — Application of Competition Codes to Crown**

### **13. Application law of this jurisdiction**

The application law of this jurisdiction binds (so far as the legislative power of Parliament permits) the Crown in right of this jurisdiction and of each other jurisdiction, so far as the Crown carries on a business, either directly or by an authority of the jurisdiction concerned.

### **14. Application law of other jurisdictions**

The application law of each participating jurisdiction other than this jurisdiction binds the Crown in right of this jurisdiction, so far as the Crown carries on a business, either directly or by an authority of this jurisdiction.

### **15. Activities that are not business**

- (1) For the purposes of sections 13 and 14, the following do not amount to carrying on a business —
  - (a) imposing or collecting —
    - (i) taxes;
    - (ii) levies; or
    - (iii) fees for licences;
  - (b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions);
  - (c) a transaction involving —
    - (i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of a State);
    - (ii) only persons who are all acting for the same authority of a State;
    - (iii) only the Crown in right of a State and one or more non-commercial authorities of that State; or

- (iv) only non-commercial authorities of the same State;
- (d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because —
  - (i) the body chooses to acquire the products; or
  - (ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.
- (2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of sections 13 and 14.
- (3) In this section —
  - “acquisition of primary products by a government body under legislation”** includes vesting of ownership of primary products in a government body by legislation;
  - “government body”** means a State or an authority of a State;
  - “licence”** means a licence that allows the licensee to supply goods or services;
  - “primary products”** means —
    - (a) agricultural or horticultural produce;
    - (b) crops, whether on or attached to the land or not;
    - (c) animals (whether dead or alive); or
    - (d) the bodily produce (including natural increase) of animals.
- (4) For the purposes of this section, an authority of a State is “non-commercial” if —
  - (a) it is constituted by only one person; and
  - (b) it is neither a trading corporation nor a financial corporation.

**s. 16**

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**16. Crown not liable to pecuniary penalty or prosecution**

- (1) Nothing in the application law of this jurisdiction makes the Crown in any capacity liable to a pecuniary penalty or to be prosecuted for an offence.
- (2) Without limiting subsection (1), nothing in the application law of a participating jurisdiction makes the Crown in right of this jurisdiction liable to a pecuniary penalty or to be prosecuted for an offence.
- (3) The protection in subsection (1) or (2) does not apply to an authority of any jurisdiction.

**17. This Part overrides the prerogative**

If, because of this Part, a provision of the law of another participating jurisdiction binds the Crown in right of this jurisdiction, the Crown in that right is subject to that provision despite any prerogative right or privilege.

## **Part 5 — National administration and enforcement of Competition Codes**

### **Division 1 — Preliminary**

#### **18. Object**

The object of this Part is to help ensure that the Competition Codes of the participating jurisdictions are administered on a uniform basis, in the same way as if those Codes constituted a single law of the Commonwealth.

### **Division 2 — Conferral of functions**

#### **19. Conferral of functions and powers on certain bodies**

- (1) The authorities and officers of the Commonwealth referred to in the Competition Code of this jurisdiction, including (but not limited to) the Commission, the Tribunal and the Council, have the functions and powers conferred or expressed to be conferred on them respectively under the Competition Code of this jurisdiction.
- (2) In addition to the powers mentioned in subsection (1), the authorities and officers referred to in that subsection have power to do all things necessary or convenient to be done in connection with the performance of the functions and exercise of the powers referred to in that subsection.

#### **20. Conferral of other functions and powers for purposes of law in this jurisdiction**

The Commission and the Tribunal have power to do acts in this jurisdiction in the performance or exercise of any function or power expressed to be conferred on them respectively by the Competition Code of another participating jurisdiction.

*[Division 3: s. 21, 23 repealed by No. 32 of 2001 s. 4;  
s. 22 repealed by No. 32 of 1999 s. 16.]*

### **Division 4 — Offences**

#### **24. Object**

- (1) The object of this Division is to further the object of this Part by providing —
  - (a) for an offence against the Competition Code of this jurisdiction to be treated as if it were an offence against a law of the Commonwealth; and
  - (b) for an offence against the Competition Code of another participating jurisdiction to be treated in this jurisdiction as if it were an offence against a law of the Commonwealth.
- (2) The purposes for which an offence is to be treated as mentioned in subsection (1) include, for example (but without limitation) —
  - (a) the investigation and prosecution of offences;
  - (b) the arrest, custody, bail, trial and conviction of offenders or persons charged with offences;
  - (c) proceedings relating to a matter referred to in paragraph (a) or (b);
  - (d) appeals and review relating to criminal proceedings and to proceedings of the kind referred to in paragraph (c);
  - (e) the sentencing, punishment and release of persons convicted of offences;
  - (f) fines, penalties and forfeitures;
  - (g) liability to make reparation in connection with offences;
  - (h) proceeds of crime; and
  - (i) spent convictions.

**25. Application of Commonwealth laws to offences against Competition Code of this jurisdiction**

- (1) The laws of the Commonwealth apply as laws of this jurisdiction in relation to an offence against the Competition Code of this jurisdiction as if that Code were a law of the Commonwealth and not a law of this jurisdiction.
- (2) For the purposes of a law of this jurisdiction, an offence against the Competition Code of this jurisdiction —
  - (a) is to be regarded as an offence against the laws of the Commonwealth, in the same way as if that Code were a law of the Commonwealth; and
  - (b) is not to be regarded as an offence against the laws of this jurisdiction.
- (3) Subsection (2) has effect for the purposes of a law of this jurisdiction except as prescribed by regulations under this Act.

**26. Application of Commonwealth laws to offences against Competition Codes of other jurisdictions**

- (1) The laws of the Commonwealth apply as laws of this jurisdiction in relation to an offence against the Competition Code of another participating jurisdiction as if that Code were a law of the Commonwealth and not a law of that other jurisdiction.
- (2) For the purposes of a law of this jurisdiction, an offence against the Competition Code of another participating jurisdiction —
  - (a) is to be regarded as an offence against the laws of the Commonwealth, in the same way as if that Code were a law of the Commonwealth; and
  - (b) is not to be regarded as an offence against the laws of that jurisdiction.
- (3) Subsection (2) has effect for the purposes of a law of this jurisdiction except as prescribed by regulations under this Act.

- (4) This section does not require, prohibit, empower, authorise or otherwise provide for, the doing of an act outside this jurisdiction.

**27. Functions and powers conferred on Commonwealth officers and authorities**

- (1) A law of the Commonwealth applying because of section 25 that confers on a Commonwealth officer or authority a function or power in relation to an offence against the Trade Practices Act also confers on the officer or authority the same function or power in relation to an offence against the corresponding provision of the Competition Code of this jurisdiction.
- (2) A law of the Commonwealth applying because of section 26 that confers on a Commonwealth officer or authority a function or power in relation to an offence against the Trade Practices Act also confers on the officer or authority the same function or power in relation to an offence against the corresponding provision of the Competition Code of another participating jurisdiction.
- (3) The function or power referred to in subsection (2) can only be performed or exercised in this jurisdiction.
- (4) In performing a function or exercising a power conferred by subsection (1) or (2), the Commonwealth officer or authority must act as nearly as practicable as the officer or authority would act in performing or exercising the same function or power in relation to an offence against the corresponding provision of the Trade Practices Act.

**28. Restriction of functions and powers of officers and authorities of this jurisdiction**

Where, by reason of this Division, a function or power is conferred on a Commonwealth officer or authority, that function or power cannot be performed or exercised by an officer or authority of this jurisdiction.



### **Division 5 — Administrative law**

#### **29. Definition**

In this Division —

**“Commonwealth administrative laws”** means —

- (a) the following Acts —
  - (i) the *Administrative Appeals Tribunal Act 1975* of the Commonwealth;
  - [(ii) deleted]*
  - (iii) the *Freedom of Information Act 1982* of the Commonwealth;
  - (iv) the *Ombudsman Act 1976* of the Commonwealth;
  - (v) the *Privacy Act 1988* of the Commonwealth;
- and
- (b) the regulations in force under those Acts.

*[Section 29 amended by No. 32 of 2001 s. 5.]*

#### **30. Application of Commonwealth administrative laws to Competition Code of this jurisdiction**

- (1) The Commonwealth administrative laws apply as laws of this jurisdiction to any matter arising in relation to the Competition Code of this jurisdiction as if that Code were a law of the Commonwealth and not a law of this jurisdiction.
- (2) For the purposes of a law of this jurisdiction, a matter arising in relation to the Competition Code of this jurisdiction —
  - (a) is to be regarded as a matter arising in relation to laws of the Commonwealth in the same way as if that Code were a law of the Commonwealth; and
  - (b) is not to be regarded as a matter arising in relation to laws of this jurisdiction.

- (3) Subsection (2) has effect for the purposes of a law of this jurisdiction except as prescribed by regulations under this Act.

**31. Application of Commonwealth administrative laws to Competition Codes of other jurisdictions**

- (1) The Commonwealth administrative laws apply as laws of this jurisdiction to any matter arising in relation to the Competition Code of another participating jurisdiction as if that Code were a law of the Commonwealth and not a law of that jurisdiction.
- (2) For the purposes of a law of this jurisdiction, a matter arising in relation to the Competition Code of another participating jurisdiction —
- (a) is to be regarded as a matter arising in relation to laws of the Commonwealth in the same way as if that Code were a law of the Commonwealth; and
  - (b) is not to be regarded as a matter arising in relation to laws of that jurisdiction.
- (3) Subsection (2) has effect for the purposes of a law of this jurisdiction except as prescribed by regulations under this Act.
- (4) This section does not require, prohibit, empower, authorise or otherwise provide for, the doing of an act outside this jurisdiction.

**32. Functions and powers conferred on Commonwealth officers and authorities**

- (1) A Commonwealth administrative law applying because of section 30 that confers on a Commonwealth officer or authority a function or power also confers on the officer or authority the same function or power in relation to a matter arising in relation to the Competition Code of this jurisdiction.
- (2) A Commonwealth administrative law applying because of section 31 that confers on a Commonwealth officer or authority a function or power also confers on the officer or authority the

same function or power in relation to a matter arising in relation to the Competition Code of another participating jurisdiction.

- (3) The function or power referred to in subsection (2) can only be performed or exercised in this jurisdiction.
- (4) In performing a function or exercising a power conferred by subsection (1) or (2), the Commonwealth officer or authority must act as nearly as practicable as the officer or authority would act in performing or exercising the same function or power under the Commonwealth administrative law.

**33. Restriction of functions and powers of authorities and officers of this jurisdiction**

Where, by reason of this Division, a function or power is conferred on a Commonwealth officer or authority, that function or power cannot be performed or exercised by an officer or authority of this jurisdiction.

## **Part 6 — Miscellaneous**

### **34. No doubling-up of liabilities**

- (1) If —
- (a) an act or omission is an offence against the Competition Code of this jurisdiction and is also an offence against the Trade Practices Act or an application law of another participating jurisdiction; and
  - (b) the offender has been punished for the offence under the Trade Practices Act or the application law of the other jurisdiction,

the offender is not liable to be punished for the offence against the Competition Code of this jurisdiction.

- (2) If a person has been ordered to pay a pecuniary penalty under the Trade Practices Act or the application law of another participating jurisdiction, the person is not liable to a pecuniary penalty under the Competition Code of this jurisdiction in respect of the same conduct.

### **35. Things done for multiple purposes**

The validity of an authorisation, notification or any other thing given or done for the purposes of the Competition Code of this jurisdiction is not affected only because it was given or done also for the purposes of the Trade Practices Act or the Competition Code of one or more other jurisdictions.

### **36. Reference in Commonwealth law to a provision of another law**

For the purposes of section 25, 26, 30 or 31, a reference in a law of the Commonwealth to a provision of that or another law of the Commonwealth is to be regarded as a reference to that provision as applying because of that section.

**37. Fees and other money**

- (1) All fees, taxes, penalties (including pecuniary penalties referred to in section 76 of the Competition Code), fines and other money that, under the application law of this jurisdiction or the *Competition Policy Reform (Taxing) Act 1996*, are authorised or directed to be payable by or imposed on any person must be paid to the Commonwealth.
- (2) Subsection (1) does not apply to amounts recovered for loss or damage as referred to in section 82 or 87 of the Competition Code and other amounts prescribed by the regulations under this Act.
- (3) This subsection imposes the fees that the regulations in the Competition Code of this jurisdiction prescribe, except to the extent that they are taxes.

**38. Regulations**

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

**39. Regulations for exceptions under section 51 of Trade Practices Act or Code**

Without limiting any other power to make regulations under any other Act, regulations may be made under this Act specifically authorising a specified thing to be done in this jurisdiction and referring expressly to the Trade Practices Act or the Competition Code.

## **Part 7 — Transitional rules**

### **40. Definitions**

In this Part —

“**Code**” means the Competition Code of this jurisdiction;

“**cut-off date**” means 19 August 1994;

“**existing contract**” means a contract that was made before the operative date;

“**operative date**” means 21 July 1996.

### **41. Existing contracts**

- (1) For the purpose of deciding whether a person has contravened Part IV of the Code at any time after the operative date —
  - (a) existing contracts made before the cut-off date, and things done to give effect to those contracts, are to be disregarded;
  - (b) if an existing contract made before the cut-off date is varied on or after the cut-off date, things done to give effect to the varied contract are not to be disregarded under paragraph (a) unless they would have been disregarded under the contract as in force immediately before the cut-off date; and
  - (c) regard can be had to existing contracts made on or after the cut-off date and to things done to give effect to those contracts.
- (2) Part IV of the Code does not make unenforceable a provision of an existing contract made before the cut-off date, unless it was unenforceable immediately before the operative date.
- (3) Part IV of the Code can make unenforceable a provision of an existing contract made on or after the cut-off date.

**42. Section 51 exceptions**

- (1) This section applies (in addition to section 51(1) of the Code) to conduct taking place before 21 July 1998.
- (2) In deciding whether a person has contravened Part IV of the Code, a particular thing is to be disregarded if (and to the same extent as) it is to be disregarded for the purposes of the Trade Practices Act because of section 33 of the *Competition Policy Reform Act 1995* of the Commonwealth.

**43. Temporary exemption from pecuniary penalties**

A person is not liable to a pecuniary penalty under the Code for conduct taking place within 2 years after 20 July 1995.

**44. Regulations relating to savings and transitional matters**

- (1) The regulations under this Act may contain provisions of a savings or transitional nature consequent on the enactment of this Act.
- (2) Any such savings or transitional provision may, if the regulations so provide, take effect retrospectively.
- (3) To the extent to which any such savings or transitional provision takes effect from a day that is earlier than the day of its publication in the *Gazette*, the provision does not operate so as —
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the day of its publication; or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the day of its publication.

## **Part 8 — State administration of Competition Code**

### **Division 1 — Preliminary**

#### **45. Definitions**

In this Part —

“**Commissioner**” means the person holding or acting in the office of Commissioner for Consumer Affairs under section 15 of the *Consumer Affairs Act 1971*;

“**Department**” means the Department of the Public Service of the State principally assisting the Minister in the administration of this Act;

“**executive officer of the State Administrative Tribunal**” has the meaning given to the term “executive officer” in section 3(1) of the *State Administrative Tribunal Act 2004*;

“**matter**” means a matter to which the Competition Code text relates;

“**State matter**” means a matter declared under section 47 to be a State matter.

*[Section 45 amended by No. 74 of 2003 s. 38; No. 55 of 2004 s. 135.]*

#### **46. Arrangements**

The Commissioner may, with the approval of the Minister, enter into an agreement or arrangement with the Commission as to —

- (a) the matters that may be declared to be State matters under section 47; and
- (b) the procedures to be followed before making such a declaration.



**47. Minister may declare a matter to be a State matter**

- (1) The Minister may, by order published in the *Gazette*, declare a specified matter or a matter of a specified class to be a State matter for the purposes of this Act.
- (2) If an agreement or arrangement is in force under section 46, the Minister must not declare a matter to be a State matter except in accordance with that agreement or arrangement.
- (3) An order under subsection (1) is “subsidiary legislation” for the purposes of the *Interpretation Act 1984* and section 42 of that Act applies to and in relation to an order as if the order were a regulation.

**Division 2 — Application of provisions**

**48. If State is not a fully-participating jurisdiction**

- (1) If, at any time, the State is a participating jurisdiction but is named in a notice in operation under section 150K of the Trade Practices Act, the Minister may, by order published in the *Gazette*, declare that this section has effect.
- (2) If an order is in force under subsection (1) —
  - (a) Part 5 and sections 36 and 37(1) and (2) of this Act do not apply to any matter;
  - (b) sections 46 and 47 do not apply to any matter and any agreement or arrangement under section 46 or order under section 47 does not have any force; and
  - (c) Divisions 3 and 4 of this Part apply to any matter.
- (3) An order under subsection (1) is “subsidiary legislation” for the purposes of the *Interpretation Act 1984* and section 42 of that Act applies to and in relation to an order as if the order were a regulation.

**49. If State is not a party to the Conduct Code Agreement**

If, at any time, the State is not a party to the Conduct Code Agreement —

- (a) Part 5 and sections 36 and 37(1) and (2) of this Act do not apply to any matter;
- (b) sections 46 and 47 do not apply to any matter and any agreement or arrangement under section 46 or order under section 47 does not have any force;
- (c) the provisions of this Act, other than Part 5 and sections 36, 37(1) and (2), 46 and 47, apply to any matter as if the definition of “participating jurisdiction” in section 3(1) were deleted and the following definition were substituted —

“

**“participating jurisdiction”** means —

- (a) this jurisdiction; or
- (b) a jurisdiction that is a party to the Conduct Code Agreement and applies the Competition Code text as a law of that jurisdiction, either with or without modifications;

”;

and

- (d) Divisions 3 and 4 of this Part apply to any matter.

**50. If matter is a State matter**

If a matter is a State matter —

- (a) Part 5 and sections 36 and 37(1) and (2) of this Act do not apply to the matter; and
- (b) Divisions 3 and 4 of this Part apply to the matter.

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**Division 3 — State authorities to perform functions under the  
Competition Code**

**51. Application of this Division**

This Division applies only by operation of section 48(2)(c), 49(d) or 50(b).

**52. References in Competition Code taken to be references to State authorities**

A reference in the Competition Code of Western Australia —

- (a) to the Commission is taken to be a reference to the Commissioner;
- (b) to the Tribunal is taken to be a reference to the State Administrative Tribunal;
- (c) to the Chairperson is taken to be a reference to the Commissioner;
- (d) to the Deputy Chairperson is taken to be a reference to the Commissioner;
- (e) to the Registrar is taken to be a reference to the executive officer of the State Administrative Tribunal;
- (f) to the Secretary to the Department is taken to be a reference to the chief executive officer of the Department;
- (g) to the Commonwealth Minister is taken to be a reference to the Minister;
- (h) to the Parliament is taken to be a reference to the Parliament of this State.

*[Section 52 amended by No. 55 of 2004 s. 136.]*

**53. Conferral of functions and powers on State authorities**

- (1) The authorities and officers of the State taken to be referred to in the Competition Code of Western Australia (by the operation

of section 52) have the functions or powers expressed to be conferred on them by that Code.

- (2) In addition to the powers mentioned in subsection (1), the authorities and officers referred to in that subsection have power to do all things necessary or convenient to be done in connection with the performance of the functions and exercise of the powers referred to in that subsection.

#### **Division 4 — Jurisdiction of State courts**

##### **54. Application of this Division**

This Division applies only by operation of section 48(2)(c), 49(d) or 50(b).

##### **55. Jurisdiction of State courts**

- (1) Proceedings for an offence against the Competition Code of Western Australia are to be dealt with by a court of summary jurisdiction.
- (2) Jurisdiction is conferred on the Supreme Court with respect to any other proceedings arising under the Competition Code of Western Australia.

*[Section 55 amended by No. 59 of 2004 s. 141.]*

##### **56. References in Competition Code taken to be references to State courts**

A reference in the Competition Code of Western Australia to the Court is taken to be —

- (a) in relation to proceedings for an offence against that Code, a reference to a court of summary jurisdiction; and
- (b) in any other case, a reference to the Supreme Court.

*[Section 56 amended by No. 59 of 2004 s. 141.]*

**57. Exercise of jurisdiction under cross-vesting provisions**

This Division does not affect the operation of a provision of a law of this State relating to cross-vesting of jurisdiction.

**Note**

**Schedule version of Part IV of the *Trade Practices Act 1974* of the Commonwealth**

*[This note contains the text as at 2 December 2005. For the current text of Part I of the Schedule to the Trade Practices Act 1974 of the Commonwealth reference should be made to that Act.]*

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

(1) If a provision of a contract made before the commencement of this section:

- (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 person.

(2) A person 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.

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- (3) For the purposes of this section and section 45A, competition, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a person who 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 person, 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 person, 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 person or a body corporate related to the person 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.
- (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.



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- (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.
- (9) The making by a person 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 person is granted an authorization to give effect to the provision; and
  - (b) the person 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 person to such a provision from constituting a contravention of subsection (2).

**45A. Contracts, arrangements or understandings in relation to prices**

- (1) Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.
- (2) Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:
- (a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in

- proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;
- (b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or
  - (c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):
    - (i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or
    - (ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:
      - (A) a person who is the owner of shares in the capital of the body corporate; or
      - (B) a body corporate that is related to such a person.
- (4) Subsection (1) does not apply to a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, being a provision:
- (a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or
  - (b) for the joint advertising of the price for the re-supply of goods or services so acquired.
- (5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of,

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the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

- (a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or
  - (b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.
- (6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.
- (7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.
- (8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a

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

**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 first person or on a person associated with a first person if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the first person or any person associated with the first person 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 first person or a person associated with a first person 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 first person, or any person associated with the first person 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 first person 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 first person;
  - (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 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 person referred to in paragraph (a);

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), the first person and another person (the second person) shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:
- (a) the first person is a body corporate and the second 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 first person in relation to the covenant or proposed covenant; or
  - (b) the second person is a body corporate in relation to which the first person 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 first person or any person associated with the first person 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



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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) 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.

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

- (1) 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.

Note: This version of Part IV does not contain an equivalent of section 45DB of the *Trade Practices Act 1974*.

**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 and 45DA:
- (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) or 45DA(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) or 45DA(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) or 45DA(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) or 45DA(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) or 45DA(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) and 45DA(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) and 45DA(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) and 45DA(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) and 45DA(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 an industrial 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 an industrial 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, industrial dispute and industrial instrument have the meanings given by subsection 298B(1) of the *Workplace Relations Act 1996*.

*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) or 45DA(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.

Note: Section 170MT of the *Workplace Relations Act 1996* limits the right to bring actions under the Competition Code 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).

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



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- (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, 45DC, 45DD, 45E or 45EA affects the operation of any other provision of this Part.

**46. Misuse of market power**

- (1) A person (the first person) who has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
  - (a) eliminating or substantially damaging a competitor of the first person or of a body corporate that is related to the first person in that or any other market;
  - (b) preventing the entry of a person into that or any other market; or
  - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
- (1A) For the purposes of subsection (1):
  - (a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

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

(2) If:

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

the first person 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 person (the first person) or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the first person or of any of those bodies corporate in that market is constrained by the conduct of:

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

(4) In this section:

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

(5) Without extending by implication the meaning of subsection (1), a person shall not be taken to contravene that subsection by reason only that the person acquires plant or equipment.

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- (6) This section does not prevent a person from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, by reason that an authorization is in force or by reason of the operation of section 93.
- (7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a person may be taken to have taken advantage of the person's 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 person or of any other person or from other relevant circumstances.

**47. Exclusive dealing**

- (1) Subject to this section, a person shall not, in trade or commerce, engage in the practice of exclusive dealing.
- (2) A person (the first person) engages in the practice of exclusive dealing if the first person:
- (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 first person;

on the condition that the person (the second person) to whom the first person supplies, or offers or proposes to supply, the goods or services or, if the second 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 first person or from a competitor of a body corporate related to the first person;
- (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 first person or from a competitor of a body corporate related to the first person; or
- (f) in the case where the first person 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 person (the first person) also engages in the practice of exclusive dealing if the first person refuses:
- (a) to supply goods or services to a second person;
  - (b) to supply goods or services to a second 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 second person;
- for the reason that the second person or, if the second 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 first person or from a competitor of a body corporate related to the first person;
  - (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 first person or from a competitor of a body corporate related to the first person; 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 first person to any person, or has re-supplied, or has not agreed not to re-supply, goods or

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services, or goods or services of a particular kind or description, acquired from the first person:

- (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 person (the first person) also engages in the practice of exclusive dealing if the first person:

- (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 (the second person) from whom the first person acquires or offers to acquire the goods or services or, if the second 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 person (the first person) also engages in the practice of exclusive dealing if the first person refuses:

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

for the reason that the second person or, if the second 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 person (the first person) also engages in the practice of exclusive dealing if the first person:

- (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 first person;

on the condition that the person (the second person) to whom the first person supplies or offers or proposes to supply the goods or services or, if the second person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person.

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

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

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

(8) A person (the first person) also engages in the practice of exclusive dealing if the first person grants or renews, or makes it known that the first person 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:



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- (i) acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the first person or from a competitor of a body corporate related to the first person; 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 first person or from a competitor of a body corporate related to the first person;
  - (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 first person.
- (9) A person (the first person) also engages in the practice of exclusive dealing if the first person 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 first person or from a competitor of a body corporate related to the first person;
  - (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 first person or from a competitor of a body corporate related to the first person;

- (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 first person.
- (10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a person 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 person 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 person in that conduct, and the engaging by the person, or by a body corporate related to the person, 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 person engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:
- (a) the person 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

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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 person engaging in the conduct or any body corporate related to that person; 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 person engaging in the conduct or any other person whose business dealings are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those persons, 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 person shall not engage in the practice of resale price maintenance.

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

- (1) A person 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.
- (3) Without limiting the matters that may be taken into account for the purposes of subsection (1) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:
- (a) the actual and potential level of import competition in the market;
  - (b) the height of barriers to entry to the market;
  - (c) the level of concentration in the market;
  - (d) the degree of countervailing power in the market;
  - (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
  - (f) the extent to which substitutes are available in the market or are likely to be available in the market;
  - (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
  - (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
  - (i) the nature and extent of vertical integration in the market.
- (4) Where:
- (a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;
  - (b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorization to acquire the shares or assets; and

- (c) the person applied for the grant of such an authorization before the expiration of 14 days after the contract was entered into;

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

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

whichever first happens.

- (5) For the purposes of subsection (4), an application for an authorization shall be taken to be disposed of:
  - (a) in a case to which paragraph (b) of this subsection does not apply—at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorization; or
  - (b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the authorization—at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.
- (6) In this section:

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

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

## **51. Exceptions**

- (1) In deciding whether a person has contravened this Part, the following must be disregarded:
  - (a) anything that is disregarded for the purposes of Part IV of the *Trade Practices Act 1974* because of subsection 51(1) of that 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 a State Act, enactment or Ordinance.

- (1B) Subsections (1) and (1A) apply regardless of when the State Acts, enactments, Ordinances, regulations or instruments referred to in those subsections were passed, made or issued.
- (1C) The operation of subsection (1) (other than paragraph (1)(a)) is subject to the following limitations:

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- (a) in order for something to be regarded as specifically authorised for the purposes of subsection (1), the authorising provision must expressly refer to the Competition Code;
  - (b) paragraphs (1)(b), (c), (d) and (e) do not apply in deciding whether a person has contravened section 50;
  - (c) regulations referred to in subparagraph (1)(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)(b)(ii), (c)(ii) or (d)(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 that:
    - (i) were made for the purposes of the subparagraph concerned; and
    - (ii) came into operation more than 2 years before the particular thing happened.
- (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 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 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.

### Notes

- <sup>1</sup> This reprint is a compilation as at 2 December 2005 of the *Competition Policy Reform (Western Australia) Act 1996* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

#### Compilation table

| Short title  | Number and year | Assent      | Commencement   |
|--|-----------------|-------------|--|
| <i>Competition Policy Reform (Western Australia) Act 1996</i>  | 52 of 1996      | 31 Oct 1996 | 21 Jul 1996 (see s. 2)   |
| <i>Federal Courts (State Jurisdiction) Act 1999 s. 16<sup>2</sup></i>  | 32 of 1999      | 13 Jul 1999 | 13 Jul 1999 (see s. 2(1))  |
| <i>New Tax System Price Exploitation Code (Western Australia) Act 1999 s. 37</i>   | 51 of 1999      | 7 Dec 1999  | 17 Dec 1999 (see s. 2 and <i>Gazette</i> 17 Dec 1999 p. 6176)  |
| <b>Reprint of the <i>Competition Policy Reform (Western Australia) Act 1996</i> as at 6 Jul 2001</b><br>(includes amendments listed above) |                 |             |  |
| <i>Acts Amendment (Federal Courts and Tribunals) Act 2001 Pt. 2<sup>3</sup></i>  | 32 of 2001      | 21 Dec 2001 | 21 Dec 2001 (see s. 2(1))  |
| <i>Statutes (Repeals and Minor Amendments) Act 2003 s. 38</i>  | 74 of 2003      | 15 Dec 2003 | 15 Dec 2003 (see s. 2)   |
| <i>Courts Legislation Amendment and Repeal Act 2004 s. 141</i>   | 59 of 2004      | 23 Nov 2004 | 1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)   |
| <i>State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 Pt. 2 Div. 23<sup>4</sup></i>                   | 55 of 2004      | 24 Nov 2004 | 1 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7130)   |
| <i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004 s. 80</i>  | 84 of 2004      | 16 Dec 2004 | 2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53)) |
| <b>Reprint 2: The <i>Competition Policy Reform (Western Australia) Act 1996</i> as at 2 Dec 2005</b><br>(includes amendments listed above) |                 |             |  |

- <sup>2</sup> The *Federal Courts (State Jurisdiction) Act 1999* s. 18, which would have amended this Act, did not come into operation and was repealed by the *Acts Amendment (Federal Courts and Tribunals) Act 2001* s. 16.
- <sup>3</sup> The *Acts Amendment (Federal Courts and Tribunals) Act 2001* s. 39, which would have amended this Act, was expressed to come into operation on the commencement of Pt. 4-10 of the *Administrative Review Tribunal Act 2001* of the Commonwealth. As that Commonwealth Act has not been passed, s. 39 has not come into operation.
- <sup>4</sup> The *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* Pt. 5, the *State Administrative Tribunal Act 2004* s. 167 and 169, and the *State Administrative Tribunal Regulations 2004* r. 28 and 42 deal with certain transitional issues some of which may be relevant for this Act.