



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

**No. 59, 2009**

**An Act to amend the *Trade Practices Act 1974*, and  
for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



---

## Contents

1	Short title .....	1
2	Commencement .....	2
3	Schedule(s) .....	2
<b>Schedule 1—Amendments relating to cartel conduct etc.</b>		<b>3</b>
	<i>Proceeds of Crime Act 2002</i>	3
	<i>Telecommunications (Interception and Access) Act 1979</i>	3
	<i>Trade Practices Act 1974</i>	4
<b>Schedule 2—Other amendments</b>		<b>79</b>
	Part 1—Amendments	79
	<i>Trade Practices Act 1974</i>	79
	Part 2—Application	89





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

**No. 59, 2009**

---

---

## **An Act to amend the *Trade Practices Act 1974*, and for other purposes**

[Assented to 26 June 2009]

The Parliament of Australia enacts:

### **1 Short title**

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

---

## 2 Commencement

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

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	26 June 2009
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent.	24 July 2009
3. Schedule 2, items 1 to 49	The 28th day after the day on which this Act receives the Royal Assent.	24 July 2009
4. Schedule 2, items 50 and 51	The day after this Act receives the Royal Assent.	27 June 2009
5. Schedule 2, items 52 and 53	The 28th day after the day on which this Act receives the Royal Assent.	24 July 2009

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

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

## 3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendments relating to cartel conduct etc.**

### ***Proceeds of Crime Act 2002***

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

Insert:

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

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

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

Insert:

##### ***Cartel offences***

(5B) An offence is also a *serious offence* if it is:

- (a) an offence against section 44ZZRF or 44ZZRG of the *Trade Practices Act 1974*; or
- (b) an offence under subsection 79(1) of the *Trade Practices Act 1974* that relates to an offence covered by paragraph (a); or
- (c) an offence against section 44ZZRF or 44ZZRG of the text set out in Part 1 of the Schedule to the *Trade Practices Act 1974*, so far as that section applies as a law of a State, the Northern Territory or the Australian Capital Territory; or
- (d) an offence under subsection 79(1) of the *Trade Practices Act 1974* (so far as that subsection applies as a law of a State, the Northern Territory or the Australian Capital Territory) that relates to an offence covered by paragraph (c).

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

## ***Trade Practices Act 1974***

### **3 Subsection 4(1)**

Insert:

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

### **4 Subsection 5(1)**

Repeal the subsection, substitute:

(1) Each of the following provisions:

- (a) Part IV;
- (b) Part IVA;
- (c) Part V (other than Division 1AA);
- (d) Part VB;
- (e) Part VC;
- (f) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b), (c), (d) or (e));

extends to the engaging in conduct outside Australia by:

- (g) bodies corporate incorporated or carrying on business within Australia; or
- (h) Australian citizens; or
- (i) persons ordinarily resident within Australia.

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

### **5 Subsection 5(4)**

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

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

Add “and”.

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

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

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

Add “and”.

---



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

Add “and”.

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

Add “and”.

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

Add “and”.

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

Add “and”.

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

Add “and”.

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

Insert:

- (2C) In addition to the effect that this Act (other than Parts IIIA, VIIA and X) has as provided by another subsection of this section, this Act (other than Parts IIIA, VIIA and X) has, by force of this subsection, the effect it would have if:
- (a) the reference in paragraph 44ZZRD(2)(c) to goods or services supplied, or likely to be supplied, were, by express provision, confined to goods or services supplied, or likely to be supplied, to corporations or classes of corporations; and
  - (b) the reference in paragraph 44ZZRD(2)(d) to goods or services acquired, or likely to be acquired, were, by express provision, confined to goods or services acquired, or likely to be acquired, from corporations or classes of corporations; and
  - (c) the reference in paragraph 44ZZRD(2)(e) to goods or services re-supplied, or likely to be re-supplied, were, by express provision, confined to goods or services re-supplied, or likely to be re-supplied, to corporations or classes of corporations; and
  - (d) the reference in paragraph 44ZZRD(2)(f) to goods or services likely to be re-supplied were, by express provision, confined to goods or services likely to be re-supplied to corporations or classes of corporations; and

- (e) the following paragraphs were added at the end of subsection 44ZZRD(2):
    - “; or (g) goods or services re-supplied, or likely to be re-supplied, by corporations or classes of corporations to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
    - (h) goods or services likely to be re-supplied by corporations or classes of corporations to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.”; and
    - (f) the reference in subparagraph 44ZZRD(3)(a)(i) to the production, or likely production, of goods were, by express provision, confined to the production, or likely production, of goods for supply to corporations or classes of corporations; and
    - (g) the reference in subparagraph 44ZZRD(3)(a)(ii) to the supply of services were, by express provision, confined to the supply of services to corporations or classes of corporations; and
    - (h) each reference in subparagraphs 44ZZRD(3)(a)(iii), (b)(i) and (ii) to persons or classes of persons were, by express provision, confined to corporations or classes of corporations; and
    - (i) the reference in subparagraph 44ZZRD(3)(b)(iii) to the geographical areas in which goods or services are supplied, or likely to be supplied, were, by express provision, confined to the geographical areas in which goods or services are supplied, or likely to be supplied, to corporations or classes of corporations; and
    - (j) the reference in subparagraph 44ZZRD(3)(b)(iv) to the geographical areas in which goods or services are acquired, or likely to be acquired, were, by express provision, confined to the geographical areas in which goods or services are acquired, or likely to be acquired, from corporations or classes of corporations; and
    - (k) the reference in paragraph 44ZZRD(3)(c) to the supply or acquisition of goods or services were, by express provision, confined to supply of goods or services to, or the acquisition of goods or services from, corporations or classes of corporations; and
-

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

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

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

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

**15 Subsection 6(3)**

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

**16 Subsection 6(4)**

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

**17 After subsection 6(5)**

Insert:

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

**18 Subsection 6AA(2)**

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

**19 Part IV (after heading)**

---

Insert:

## **Division 1—Cartel conduct**

### **Subdivision A—Introduction**

#### **44ZZRA Simplified outline**

The following is a simplified outline of this Division:

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

#### **44ZZRB Definitions**

In this Division:

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

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

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

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

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

**bid** includes:

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

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

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

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

includes a possibility that is not remote.

**obtaining** includes:

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

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

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

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

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

#### **44ZZRD Cartel provisions**

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

##### *Purpose/effect condition*

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

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

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

*Purpose condition*

- (3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
- (a) preventing, restricting or limiting:
    - (i) the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
    - (ii) the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or
    - (iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or
  - (b) allocating between any or all of the parties to the contract, arrangement or understanding:
    - (i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or
    - (ii) the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or
    - (iii) the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
    - (iv) the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
  - (c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:
    - (i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or



- (ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or
- (iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or
- (iv) 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or
- (v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

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

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

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

#### *Competition condition*

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

- (f) if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods; or
- (g) if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services; or
- (h) if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services; or
- (i) if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services; or
- (j) if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services.

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

*Immaterial whether identities of persons can be ascertained*

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

*Recommending prices etc.*

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

*Immaterial whether particular circumstances or particular conditions*

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

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

*Considering related provisions—purpose/effect condition*

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

*Considering related provisions—purpose condition*

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

*Purpose/effect of a provision*

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

purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:

- (a) the form of the provision; or
- (b) the form of the contract, arrangement or understanding; or
- (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

*Purpose of a provision*

- (11) For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:

- (a) the form of the provision; or
- (b) the form of the contract, arrangement or understanding; or
- (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

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

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

**Subdivision B—Offences etc.**

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

*Offence*

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

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

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

*Penalty*

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

*Indictable offence*

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

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

*Offence*

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

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

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

*Penalty*

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

3 times that total value;

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

*Pre-commencement contracts etc.*

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

*Indictable offence*

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

#### **44ZZRH Determining guilt**

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

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

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

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

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

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

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

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

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

A corporation contravenes this section if:

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

Note: For enforcement, see Part VI.

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

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

Note: For enforcement, see Part VI.

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

## **Subdivision D—Exceptions**

### **44ZZRL Conduct notified**

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

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

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

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

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

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

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

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

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

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

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



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

**44ZZRO Joint ventures—prosecution**

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

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

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

- (1A) Section 44ZZRF does not apply in relation to an arrangement or understanding containing a cartel provision if:
- (a) the arrangement or understanding is not a contract; and
  - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
    - (i) intended the arrangement or understanding to be a contract; and
    - (ii) reasonably believed that the arrangement or understanding was a contract; and
  - (c) the cartel provision is for the purposes of a joint venture; and
  - (d) the joint venture is for the production and/or supply of goods or services; and

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

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

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

- (1B) Section 44ZZRG does not apply in relation to giving effect to a cartel provision contained in an arrangement or understanding if:
- (a) the arrangement or understanding is not a contract; and
  - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
    - (i) intended the arrangement or understanding to be a contract; and
    - (ii) reasonably believed that the arrangement or understanding was a contract; and
  - (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
  - (d) the cartel provision is for the purposes of a joint venture; and
  - (e) the joint venture is for the production and/or supply of goods or services; and
  - (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
  - (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for

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

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

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

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

*Notice to prosecutor*

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

- (b) a commissioner for taking affidavits.

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

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

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

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

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

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

- (1B) Section 44ZZRK does not apply in relation to giving effect to a cartel provision contained in an arrangement or understanding if:
  - (a) the arrangement or understanding is not a contract; and
  - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
    - (i) intended the arrangement or understanding to be a contract; and
    - (ii) reasonably believed that the arrangement or understanding was a contract; and
  - (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
  - (d) the cartel provision is for the purposes of a joint venture; and
  - (e) the joint venture is for the production and/or supply of goods or services; and
  - (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
  - (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (e) jointly by means of:
    - (i) their joint control; or
    - (ii) their ownership of shares in the capital;of that body corporate.

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

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

#### **44ZZRQ Covenants affecting competition**

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

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

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

#### **44ZZRR Resale price maintenance**

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

- (a) conduct that contravenes section 48; or
- (b) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
- (c) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.

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

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

#### **44ZZRS Exclusive dealing**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
- (a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); and
  - (b) either:
    - (i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or
    - (ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.

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

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

**Division 2—Other provisions**

**20 Subsection 45(3)**

Omit “and section 45A”.

**21 Section 45A**

Repeal the section.

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

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

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

Insert:

- (aa) for each act or omission to which this section applies that relates to section 44ZZRJ or 44ZZRK—the greatest of the following:
  - (i) \$10,000,000;

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

## 24 Subsection 76(3)

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

## 25 Subsection 76(4)

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

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

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

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

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

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

## 28 At the end of section 76B

Add:

(6) In this section:

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

## 29 Section 76D

Repeal the section.

## 30 Subparagraph 78(a)(i)

---

Repeal the subparagraph, substitute:

- (i) a provision of Part IV (other than section 44ZZRF or 44ZZRG);
- (ia) a provision of Part V (other than section 65Q or 65R or subsection 65F(9));

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

Insert:

- (aa) attempts to contravene; or

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

**32 Subsection 79(1)**

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

**33 Subsection 79(1)**

Omit “punishable accordingly.”, substitute:

punishable:

- (e) in a case where:
  - (i) the provision is a cartel offence provision; and
  - (ii) the person is not a body corporate;by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both; or
- (f) in any other case—accordingly.

**34 After subsection 79(1)**

Insert:

- (1AA) For the purposes of the application of subsection (1) to a case where:
  - (a) the provision is a cartel offence provision; and
  - (b) the person is a body corporate other than a corporation;assume that each reference in paragraph 44ZZRF(3)(c) or 44ZZRG(3)(c) to a corporation were read as a reference to a body corporate.
- (1AB) Subsections 11.1(2) to (6) (inclusive) of the *Criminal Code* apply in relation to paragraph (1)(aa) in the same way that they apply in

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

**35 Subsection 79(5)**

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

**36 At the end of section 79**

Add:

(7) In this section:

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

**37 Subsection 79A(1)**

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

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

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

**39 At the end of section 80**

Add:

- (9) If the Director of Public Prosecutions makes an application to the Court for the grant of an injunction under this section in relation to:
- (a) a person’s contravention, or proposed contravention, of section 44ZZRF or 44ZZRG; or
  - (b) a person’s involvement, or proposed involvement, in a contravention of section 44ZZRF or 44ZZRG;
- the Court must not require the Director of Public Prosecutions or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

**40 Section 83**

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

**41 Subsection 84(1)**

Repeal the subsection, substitute:

(1) If, in:

- (a) a prosecution for an offence against section 44ZZRF or 44ZZRG in respect of conduct engaged in by a body corporate; or
- (b) a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 44ZZRJ, 44ZZRK, 46 or 46A or Part IVA, IVB, V, VB or VC applies;

it is necessary to establish the state of mind of the body corporate, it is sufficient to show that:

- (c) a director, employee or agent of the body corporate engaged in that conduct; and
- (d) the director, employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
- (e) the director, employee or agent had that state of mind.

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

#### **42 Subsection 84(2)**

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

#### **43 Subsection 84(3)**

Repeal the subsection, substitute:

(3) If, in:

- (a) a prosecution for an offence against section 44ZZRF or 44ZZRG in respect of conduct engaged in by a person other than a body corporate; or
- (b) a proceeding under this Part in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which section 44ZZRJ or 44ZZRK or Part IVA, IVB, V, VB or VC applies;

it is necessary to establish the state of mind of the person, it is sufficient to show that:

- (c) an employee or agent of the person engaged in that conduct; and
  - (d) the employee or agent was, in engaging in that conduct, acting within the scope of his or her actual or apparent authority; and
  - (e) the employee or agent had that state of mind.
-

**44 Paragraph 84(4)(a)**

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

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

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

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

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

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

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

**48 After subsection 84(4)**

Insert:

(4A) If:

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

**49 Subsection 86(1AA)**

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

**50 After subsection 86(3)**

Insert:

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

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

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

Insert:

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

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

Insert:

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

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

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

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

Insert:

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

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

Insert:

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

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

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

**56 Subsection 86E(2)**

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

**57 Subsection 86E(3)**

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

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

Insert:

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

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

**59 Subsection 87(1)**

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

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

Add “or”.

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

Insert:

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

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

Insert:



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

- (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of section 44ZZRF or 44ZZRG; and
- (b) have, before the application is made, consented in writing to the making of the application.

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

Insert:

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

**64 Before subsection 88(1)**

Insert:

- (1A) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorisation to the corporation:
- (a) to make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding would be, or might be, a cartel provision; or
  - (b) to give effect to a provision of a contract, arrangement or understanding if the provision is, or may be, a cartel provision;
- and, while such an authorisation remains in force:
- (c) in the case of an authorisation to make a contract or arrangement, or to arrive at an understanding—sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not prevent the corporation from making the contract or arrangement, or arriving at the understanding, in accordance with the authorisation; or
  - (d) in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding—sections 44ZZRG

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

**65 Subsection 88(10)**

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

**66 After subsection 90(5)**

Insert:

- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
- (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
- (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

**67 Subsection 91A(4)**

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

**68 Subsection 91B(5)**

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

---

**69 Subsection 91C(7)**

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

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

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

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

Insert:

*Notice to Commission—cartel provisions*

(1A) A corporation that:

- (a) has made, or proposes to make, a contract (the *initial contract*) that contains a cartel provision that:
  - (i) has the purpose; or
  - (ii) has or is likely to have the effect;  
mentioned in subsection 44ZZRD(2); or
- (b) has made, or proposes to make, a contract (the *initial contract*) that contains a cartel provision that has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c); or
- (c) proposes to give effect to a provision of a contract (the *initial contract*) where the provision is a cartel provision that:
  - (i) has the purpose; or
  - (ii) has or is likely to have the effect;  
mentioned in subsection 44ZZRD(2); or
- (d) proposes to give effect to a provision of a contract (the *initial contract*) where the provision is a cartel provision that has the purpose mentioned in a paragraph of subsection 44ZZRD(3) other than paragraph (c);

may give the Commission a notice (the *collective bargaining notice*) setting out particulars of the contract or proposed contract, but only if the 3 requirements set out in subsections (2), (3) and (4) are satisfied.

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

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

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

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

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

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

Insert:

*Purpose/effect of a provision*

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

*Purpose of a provision*

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

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

Omit “a collective bargaining notice in relation to”.

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

Insert:

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

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

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

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

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

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

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

---

Repeal the paragraph.

**79 Subsection 93AC(2)**

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

**80 Subsection 93AC(2)**

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

**81 Subsection 93AC(6)**

Repeal the subsection.

**82 After section 93AE**

Insert:

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

If:

- (a) a corporation gives the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a contract or proposed contract; and
- (b) either:
  - (i) the Commission gives the corporation an objection notice in relation to the contract or proposed contract; or
  - (ii) the collective bargaining notice is taken to be withdrawn under subsection 93AE(3);

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

**83 Paragraph 93AF(a)**

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

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

**84 Section 93AF**

---

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

**85 Subsection 93A(12)**

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

**86 Subsection 101(1A)**

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

**87 Subsection 101(2)**

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

**88 Section 10.01A**

Omit:

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

substitute:

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

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

Insert:

- (aa) that is a provision where the following conditions are satisfied in relation to the provision:
  - (i) the purpose/effect condition set out in subsection 44ZZRD(2);

- (ii) the competition condition set out in subsection 44ZZRD(4); or
- (ab) that is a provision where the following conditions are satisfied in relation to the provision:
  - (i) the purpose condition set out in subsection 44ZZRD(3);
  - (ii) the competition condition set out in subsection 44ZZRD(4); or

**90 Subsection 10.08(1)**

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

**91 Subsection 10.17(1)**

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

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

**92 Subsection 10.17(2)**

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

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

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

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

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

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

**95 Subsection 10.19(1)**

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

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

**96 Subsection 10.19(2)**

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

**97 Subsection 10.24(1)**

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

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

**98 Subsection 10.24(2)**

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

**99 Subsection 10.24A(1)**

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

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

**100 Subsection 10.24A(2)**

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

**101 Subsections 10.24A(3)**

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

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

Repeal the paragraph, substitute:

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

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

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

**104 Subsection 151AJ(4)**

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

**105 Subsection 151AJ(4)**

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

the following assumptions are to be made:

- (a) the assumption that each reference to a corporation in:
  - (i) those sections; and



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

**106 Subsection 151AJ(7)**

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

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

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

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

Omit “93.”, substitute “93; or”.

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

Add:

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

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

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

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

Add:

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

**112 Subsection 157(1)**

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

**113 After subsection 157(1)**

Insert:

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

- (1A) If a request under subsection (1) relates to a document containing protected cartel information, the Commission may refuse to comply with the request.
- (1B) In exercising its powers under subsection (1A), the Commission must have regard to the following matters:
- (a) the fact that the protected cartel information was given to the Commission in confidence;
  - (b) Australia's relations with other countries;
  - (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
  - (d) in a case where the protected cartel information was given by an informant:
    - (i) the protection or safety of the informant or of persons associated with the informant; and
    - (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
  - (e) the legitimate interests of the corporation which, or the person who, made the request under subsection (1);
  - (f) such other matters (if any) as the Commission considers relevant.

**114 Subsection 157(2)**

After "subsection (1)", insert "otherwise than because of a refusal under subsection (1A)".

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

**115 At the end of section 157**

Add:

*Definition*

- (6) In this section:

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

**116 After section 157A**

Insert:

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

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

- (1) The Commission or a Commission official is not to be required:
  - (a) to produce to a court or tribunal a document containing protected cartel information; or
  - (b) to disclose protected cartel information to a court or tribunal; except with the leave of the court or tribunal.
- (2) In exercising its powers to grant leave under subsection (1), the court or tribunal must have regard to the following matters:
  - (a) the fact that the protected cartel information was given to the Commission in confidence;
  - (b) Australia's relations with other countries;
  - (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
  - (d) in a case where the protected cartel information was given by an informant:
    - (i) the protection or safety of the informant or of persons associated with the informant; and
    - (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
  - (e) in the case of a court—the interests of the administration of justice;
  - (f) in the case of a tribunal—the interests of securing the effective performance of the tribunal's functions;and must not have regard to any other matters.

(3) If:

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

*Commission or a Commission official may disclose protected cartel information*

(4) The Commission or a Commission official may:

- (a) produce to the court or tribunal a document containing protected cartel information; or
- (b) disclose protected cartel information to the court or tribunal.

(5) In exercising the powers conferred by subsection (4), the Commission or Commission official must have regard to the following matters:

- (a) the fact that the protected cartel information was given to the Commission in confidence;
- (b) Australia's relations with other countries;
- (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
- (d) in a case where the protected cartel information was given by an informant:
  - (i) the protection or safety of the informant or of persons associated with the informant; and
  - (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
- (e) in the case of production or disclosure to a court—the interests of the administration of justice;

- (f) in the case of production or disclosure to a tribunal—the interests of securing the effective performance of the tribunal’s functions;

and must not have regard to any other matters.

(6) If:

- (a) a document is produced; or
- (b) information is disclosed;

to a court or tribunal as a result of an exercise of power under subsection (4) in relation to particular proceedings, the document or information must not be adduced in other proceedings before the court or tribunal except:

- (c) in accordance with leave granted under subsection (1) in relation to the other proceedings; or
- (d) as a result of an exercise of power under subsection (4) in relation to the other proceedings.

#### *Definitions*

(7) In this section:

***Commission official*** means:

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

***disclose*** means divulge or communicate.

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

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

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

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

(1) If:

- (a) a person is a party to proceedings before a court; and

(b) the Commission is not a party to the proceedings;  
the Commission or a Commission official is not to be required, in connection with the proceedings, to:

- (c) make discovery (however described) to the person of a document containing protected cartel information; or
- (d) produce to the person a document containing protected cartel information.

(2) If:

(a) a person is considering instituting proceedings before a court;  
and

(b) the proceedings have not yet been instituted;  
the Commission or a Commission official is not to be required, in connection with the prospective proceedings, to:

- (c) make discovery (however described) to the person of a document containing protected cartel information; or
- (d) produce to the person a document containing protected cartel information.

*Commission or Commission official may disclose protected cartel information*

(3) If:

(a) a person is a party to proceedings before a court; and

(b) the Commission is not a party to the proceedings;  
the Commission or a Commission official may, on application by the person:

- (c) make a copy of a document containing protected cartel information; and
- (d) give the copy to the person.

(4) If:

(a) a person is considering instituting proceedings before a court;  
and

(b) the proceedings have not yet been instituted;  
the Commission or a Commission official may, on application by the person:

- (c) make a copy of a document containing protected cartel information; and
  - (d) give the copy to the person.
-

- (5) In exercising the powers conferred by subsection (3) or (4), the Commission or Commission official must have regard to the following matters:
- (a) the fact that the protected cartel information was given to the Commission in confidence;
  - (b) Australia's relations with other countries;
  - (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence and criminal investigation;
  - (d) in a case where the protected cartel information was given by an informant:
    - (i) the protection or safety of the informant or of persons associated with the informant; and
    - (ii) the fact that the production of a document containing protected cartel information, or the disclosure of protected cartel information, may discourage informants from giving protected cartel information in the future;
  - (e) the interests of the administration of justice;
- and must not have regard to any other matters.
- (6) If a copy of a document is given to a party, or prospective party, to proceedings before a court as a result of an exercise of power under subsection (3) or (4), the copy must not be adduced in other proceedings before:
- (a) the court; or
  - (b) another court; or
  - (c) a tribunal;
- except:
- (d) as a result of an exercise of power under subsection (3) or (4) in relation to the other proceedings; or
  - (e) in accordance with leave granted under subsection 157B(1) in relation to the other proceedings; or
  - (f) as a result of an exercise of power under subsection 157B(4) in relation to the other proceedings.

*Definitions*

- (7) In this section:

***Commission official*** means:

---

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

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

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

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

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

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

### *Stay order—criminal proceeding*

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

### *Stay order—civil proceeding*

- (3) A refusal by a court to grant leave under subsection 157B(1) does not prevent the court from later ordering that a civil proceeding be stayed on the ground that the refusal would have a substantial adverse effect on the hearing in the proceeding.
- (4) In deciding whether to order a stay of the civil proceeding, the court must consider:
  - (a) the extent of any financial loss that a party would suffer as a result of the proceeding being stayed; and
  - (b) whether a party has reasonable prospects of obtaining a remedy in the proceeding; and
  - (c) any other matter the court considers relevant.

## **117 Subsection 163(2)**

Repeal the subsection, substitute:

---



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

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

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

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

Insert:

- (aa) the Director of Public Prosecutions; or

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

Add “or”.

**121 At the end of section 163**

Add:

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

## 122 Subsection 163A(3A)

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

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

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

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

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

## 123 After subsection 163A(4)

Insert:

*Jurisdiction of State/Territory Supreme Courts etc.*

- (4A) In so far as this section has effect as a law of the Commonwealth, the Supreme Court of a State or Territory does not have jurisdiction to hear and determine proceedings under this section otherwise than in accordance with subsection (4B) or (4C). This subsection has effect despite any other law, including section 39 of the *Judiciary Act 1903*.
- (4B) If a decision to prosecute a person for an offence against section 44ZZRF or 44ZZRG has been made and the prosecution is proposed to be commenced in the Supreme Court of a State or Territory:
- (a) the Federal Court does not have jurisdiction with respect to any matter in which a person seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to that decision; and
  - (b) if the Supreme Court is the Supreme Court of a State—in so far as this section has effect as a law of the Commonwealth, the Supreme Court is invested with federal jurisdiction with respect to any such matter; and
  - (c) if the Supreme Court is the Supreme Court of a Territory, then:
    - (i) in so far as this section has effect as a law of the Commonwealth; and
    - (ii) subject to the Constitution;

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

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

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

the following apply:

- (c) the Federal Court does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks the making of a paragraph (1)(aa) declaration, or a paragraph (1)(b) order, in relation to a related criminal justice process decision;
- (d) if the Supreme Court is the Supreme Court of a State—in so far as this section has effect as a law of the Commonwealth, the Supreme Court is invested with federal jurisdiction with respect to any such matter;
- (e) if the Supreme Court is the Supreme Court of a Territory, then:
  - (i) in so far as this section has effect as a law of the Commonwealth; and
  - (ii) subject to the Constitution;

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

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

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

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

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

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

Add:

(6) In this section:

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

**125 After Part XII**

Insert:

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

**Division 1—Cartel conduct**

**174 Definitions**

In this Division:

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

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

The following provisions of this Act:

- (a) paragraph 88(1A)(b);
- (b) paragraph 93AB(1A)(c);
- (c) paragraph 93AB(1A)(d);

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

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

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

---

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

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

- (1) This section applies if:
  - (a) an authorisation (the *pre-commencement authorisation*) was granted to a person to give effect to a provision of a contract, arrangement or understanding; and
  - (b) the provision is a cartel provision; and
  - (c) the authorisation was in force immediately before the commencement time.
- (2) This Act has effect, after the commencement time, as if:
  - (a) the Commission had, at the commencement time, granted to the person an authorisation under subsection 88(1A) to give effect to the cartel provision; and
  - (b) the day specified in the subsection 88(1A) authorisation as the day the authorisation comes into force were the day on which Division 1 of Part IV commenced; and
  - (c) if, immediately before the commencement time, the pre-commencement authorisation was expressed to be in force for a period (the *initial period*) specified in that authorisation—the subsection 88(1A) authorisation were expressed to be in force for a period specified in the subsection 88(1A) authorisation, and that period were the period:
    - (i) starting at the commencement time; and
    - (ii) ending at the end of the initial period; and
  - (d) any requirements for the granting of the subsection 88(1A) authorisation were satisfied.
- (3) Subsection (2) does not prevent the subsection 88(1A) authorisation from being varied, revoked or set aside in accordance with this Act.

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

- (1) This section applies if:

- (a) a person gave the Commission a collective bargaining notice under subsection 93AB(1) in relation to a proposal to give effect to a provision of a contract, arrangement or understanding; and
  - (b) the provision is a cartel provision of the kind referred to in paragraph 93AB(1A)(c) or (d); and
  - (c) the subsection 93AB(1) notice is in force immediately before the commencement time.
- (2) This Act has effect, after the commencement time, as if:
- (a) the person had, at the commencement time, given the Commission a collective bargaining notice under subsection 93AB(1A) in relation to a proposal to give effect to the cartel provision; and
  - (b) despite subsections 93AD(1) and (2), the subsection 93AB(1A) notice had come into force at the commencement time; and
  - (c) despite paragraph 93AD(3)(c), the period applicable to the subsection 93AB(1A) notice for the purposes of paragraph 93AD(3)(c) were the period:
    - (i) starting at the commencement time; and
    - (ii) ending at the end of the period of 3 years starting on the day the person gave the subsection 93AB(1) notice to the Commission; and
  - (d) any requirements for the giving of the subsection 93AB(1A) notice were satisfied.
- (3) Subsection (2) does not prevent the subsection 93AB(1A) notice from ceasing to be in force in accordance with this Act.

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

Insert:

### **Division 1—Cartel conduct**

#### **Subdivision A—Introduction**

##### **44ZZRA Simplified outline**

The following is a simplified outline of this Division:

---

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

#### **44ZZRB Definitions**

In this Division:

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

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

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

---

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

***bid*** includes:

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

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

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

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

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

includes a possibility that is not remote.

***obtaining*** includes:

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

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

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

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

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

#### **44ZZRD Cartel provisions**

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



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

*Purpose/effect condition*

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

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

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

*Purpose condition*

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

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

least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or

- (v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

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

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

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

#### *Competition condition*

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

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

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

*Immaterial whether identities of persons can be ascertained*

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

*Recommending prices etc.*

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

*Immaterial whether particular circumstances or particular conditions*

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

*Considering related provisions—purpose/effect condition*

- (8) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if
-

the provision, when considered together with any or all of the following provisions:

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

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

*Considering related provisions—purpose condition*

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

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

has that purpose.

*Purpose/effect of a provision*

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

- (a) the form of the provision; or
- (b) the form of the contract, arrangement or understanding; or
- (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

*Purpose of a provision*

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

purpose mentioned in a paragraph of subsection (3) by reason only of:

- (a) the form of the provision; or
- (b) the form of the contract, arrangement or understanding; or
- (c) any description given to the provision, or to the contract, arrangement or understanding, by the parties.

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

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

### **Subdivision B—Offences etc.**

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

##### *Offence*

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

##### *Penalty*

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

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

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

*Indictable offence*

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

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

*Offence*

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

*Penalty*

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

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

*Pre-commencement contracts etc.*

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

*Indictable offence*

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

**44ZZRH Determining guilt**

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

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

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

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

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

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



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

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

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

A person contravenes this section if:

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

Note: For enforcement, see Part VI.

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

(1) A person contravenes this section if:

- (a) a contract, arrangement or understanding contains a cartel provision; and
- (b) the person gives effect to the cartel provision.

Note: For enforcement, see Part VI.

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

## **Subdivision D—Exceptions**

### **44ZZRL Conduct notified**

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

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

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

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

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

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

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

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

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

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

- (1A) Section 44ZZRF does not apply in relation to an arrangement or understanding containing a cartel provision if:
  - (a) the arrangement or understanding is not a contract; and
  - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
    - (i) intended the arrangement or understanding to be a contract; and
    - (ii) reasonably believed that the arrangement or understanding was a contract; and
  - (c) the cartel provision is for the purposes of a joint venture; and
  - (d) the joint venture is for the production and/or supply of goods or services; and
  - (e) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
  - (f) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (d) jointly by means of:
    - (i) their joint control; or
    - (ii) their ownership of shares in the capital;of that body corporate.

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

- (1B) Section 44ZZRG does not apply in relation to giving effect to a cartel provision contained in an arrangement or understanding if:
- (a) the arrangement or understanding is not a contract; and
  - (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:
    - (i) intended the arrangement or understanding to be a contract; and
    - (ii) reasonably believed that the arrangement or understanding was a contract; and
  - (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
  - (d) the cartel provision is for the purposes of a joint venture; and
  - (e) the joint venture is for the production and/or supply of goods or services; and
  - (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
  - (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (e) jointly by means of:
    - (i) their joint control; or
    - (ii) their ownership of shares in the capital;of that body corporate.

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

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

*Notice to prosecutor*

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

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

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

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

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

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

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

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

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

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

- (a) the arrangement or understanding is not a contract; and
- (b) when the arrangement was made, or the understanding was arrived at, each party to the arrangement or understanding:

- (i) intended the arrangement or understanding to be a contract; and
- (ii) reasonably believed that the arrangement or understanding was a contract; and
- (c) when the cartel provision was given effect to, each party to the arrangement or understanding reasonably believed that the arrangement or understanding was a contract; and
- (d) the cartel provision is for the purposes of a joint venture; and
- (e) the joint venture is for the production and/or supply of goods or services; and
- (f) in a case where subparagraph 4J(a)(i) applies to the joint venture—the joint venture is carried on jointly by the parties to the arrangement or understanding; and
- (g) in a case where subparagraph 4J(a)(ii) applies to the joint venture—the joint venture is carried on by a body corporate formed by the parties to the arrangement or understanding for the purpose of enabling those parties to carry on the activity mentioned in paragraph (e) jointly by means of:
  - (i) their joint control; or
  - (ii) their ownership of shares in the capital;of that body corporate.

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

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

#### **44ZZRQ Covenants affecting competition**

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

#### **44ZZRR Resale price maintenance**

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

#### **44ZZRS Exclusive dealing**

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



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

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

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

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

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

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

- (a) the cartel provision is a provision of a dual listed company arrangement; and
- (b) the giving effect to the cartel provision would, or would apart from subsection 88(8B), contravene section 49.

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

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

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

- (a) any shares in the capital of a body corporate; or
- (b) any assets of a person.

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

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

- (1) Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:
  - (a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in subsection 44ZZRD(2); and
  - (b) either:
    - (i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or
    - (ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.
- (2) A person who wishes to rely on subsection (1) bears an evidential burden in relation to that matter.

**Division 2—Other provisions**

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

Omit “and section 45A”.

**128 Section 45A of the Schedule**

Repeal the section.

## **Schedule 2—Other amendments**

### **Part 1—Amendments**

#### ***Trade Practices Act 1974***

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

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

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

Repeal the subsection.

##### **3 Section 83**

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

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

Insert:

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

##### **5 After section 86E**

Insert:

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

##### *Court proceeding*

- (1) In a civil or criminal proceeding under, or arising out of, this Act, a person is not entitled to refuse or fail to comply with a requirement:
- (a) to answer a question or give information; or
  - (b) to produce a document or any other thing; or
  - (c) to do any other act;

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

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

*Statutory requirement*

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

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

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

*Definition*

- (4) In this section:

*penalty* includes forfeiture.

**6 Subsection 87(1)**

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

**7 Section 154A**

Insert:

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

**8 Section 154A**

Insert:

*data* includes:

- (a) information in any form; or
- (b) any program (or part of a program).

## **9 Section 154A**

Insert:

*data held in a computer* includes:

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

## **10 Section 154A**

Insert:

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

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

Repeal the definition, substitute:

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

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

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

Repeal the definition, substitute:

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

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

**13 Subsection 154F(1)**

Repeal the subsection, substitute:

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

**14 Subsection 154F(2)**

Omit “evidential material”, substitute “data”.

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

Add “from the premises”.

**16 Subsection 154F(3)**

Omit “evidential material”, substitute “data”.

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

Insert:

- (1A) In executing a search warrant that is in force in relation to premises, the executing officer or an officer assisting may:
- (a) for a purpose incidental to the execution of the warrant; or
  - (b) with the written consent of the occupier of the premises;
- take photographs, or make video recordings, of the premises or of anything at the premises.
- (1B) If a search warrant in relation to premises is being executed, the executing officer and the officers assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises:
- (a) for not more than one hour; or
  - (b) for a longer period if the occupier of the premises consents in writing.

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

---

Repeal the paragraph, substitute:

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

## **19 After section 154G**

Insert:

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

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

#### *Notice to occupier*

- (2) If a thing is moved to another place for the purpose of examination or processing under subsection (1), the executing officer must, if it is practicable to do so:
  - (a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and

- (b) allow the occupier or his or her representative to be present during the examination or processing.

*Period of removal*

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

*Extensions*

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

**20 Subsection 154H(1)**

Repeal the subsection, substitute:

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

**21 Subsection 154H(3)**

Omit “evidential material”, substitute “data”.

**22 At the end of subsection 154H(3)**

Add “from the premises”.

**23 At the end of subsection 154H(3)**

---



Add:

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

**24 Subsection 154H(4)**

Omit “evidential material”, substitute “data”.

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

Add:

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

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

Omit “evidential material” (wherever occurring), substitute “data”.

**27 Section 154K**

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

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

Insert:

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

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

Repeal the penalty, substitute:

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

**30 Subsection 154R(4)**

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

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

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

**32 At the end of Subdivision D of Division 4 of Part XID**

Add:

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

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

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

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

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

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

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

---

After “seized”, insert “or moved”.

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

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

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

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

**37 Subsection 154V(2)**

Omit “a contravention of”.

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

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

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

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

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

Add “or”.

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

Insert:

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

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

Add:

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

**43 Subsection 155(7)**

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

**44 Subsection 155(7)**

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

**45 Subsection 155(7)**

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

**46 Subsection 155(7)**

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

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

Repeal the paragraphs, substitute:

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

**48 Subsection 159(1)**

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

**49 Subsection 159(2)**

Repeal the subsection, substitute:

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

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

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

**51 After subsection 165(3)**

Insert:

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

## **Part 2—Application**

### **52 Application—search warrants**

The amendments of the following provisions made by this Schedule:

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

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

### **53 Application—giving answers and producing documents etc.**

- (1) The amendments of subsection 155(7) of the *Trade Practices Act 1974* made by this Schedule apply in relation to notices under section 155 of that Act served after the commencement of this item.
- (2) The amendments of section 159 of the *Trade Practices Act 1974* made by this Schedule apply in relation to:
  - (a) requirements to give evidence; and
  - (b) requirements to produce documents;imposed after the commencement of this item.

---

[Minister's second reading speech made in—  
House of Representatives on 3 December 2008  
Senate on 12 February 2009]