

รายการอ้างอิง

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ภาคผนวก

ศูนย์วิทยทรัพยากร
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ภาคผนวก ก
Competition Act 1984
Of Canada

PART VI
OFFENCES IN RELATION TO COMPETITION

Conspiracy

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Idem

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

Evidence of

(2.1) In a prosecution under subsection (1), the court may infer the existence of a

- conspiracy conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.
- Proof of intent (2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).
- Defence (3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:
- (a) the exchange of statistics;
 - (b) the defining of product standards;
 - (c) the exchange of credit information;
 - (d) the definition of terminology used in a trade, industry or profession;
 - (e) cooperation in research and development;
 - (f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;
 - (g) the sizes or shapes of the containers in which an article is packaged;
 - (h) the adoption of the metric system of weights and measures; or
 - (i) measures to protect the environment.
- Exception (4) Subsection (3) does not apply if the conspiracy, combination, agreement or

arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

- (a) prices,
- (b) quantity or quality of production,
- (c) markets or customers, or
- (d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

Defence (5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

Exception (6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.
- (d) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 30]

Defences (7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary

for the protection of the public

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

Exception (7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).

Exception (8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.

R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714.

Where application made under section 79 or 92 45.1 No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection. R.S., 1985, c. 19 (2nd Supp.), s. 31.

Foreign directives 46. (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Limitation (2) No proceedings may be commenced under this section against a particular

company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 46; R.S., 1985, c. 19 (2nd Supp.), s. 32; 1999, c. 2, s. 37.

Definition of
"bid-rigging"

47. (1) In this section, "bid-rigging" means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

Bid-rigging

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Exception

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.

R.S., 1985, c. C-34, s. 47; R.S., 1985, c. 19 (2nd Supp.), s. 33.

Conspiracy
relating to
professional
sport

48. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or

conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Matters to be considered

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

(a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

Application

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

1974-75-76, c. 76, s. 15.

Illegal trade practices

50. (1) Every one engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge,

directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or

(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Defence

(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

Cooperative
societies
excepted

(3) Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers.

R.S., 1985, c. C-34, s. 50; 1999, c. 31, s. 50(F).

Price
maintenance

61. (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a

business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

(a) the same corporation, partnership or sole proprietorship, or

(b) corporations, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

Suggested
retail price

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

Idem

(4) For the purposes of this section, the publication by a supplier of a product,

other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

Exception (5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply (6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

(7) and (8) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 36]

Offence and punishment (9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Where no unfavourable inference to be drawn (10) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other

products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person.

R.S., 1985, c. C-34, s. 61; R.S., 1985, c. 19 (2nd Supp.), s. 36; 1990, c. 37, s. 30; 1999, c. 31, s. 51(F).

Definition of
"anti-
competitive
act"

78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, that are specified under paragraph (2)(a); and

(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms.

Regulations

(2) The Governor in Council may, on the recommendation of the Minister and the Minister of Transport, make regulations

(a) specifying acts or conduct for the purpose of paragraph (1)(j); and

(b) specifying facilities or services that are essential to the operation of an air service for the purpose of paragraph (1)(k).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13.

Prohibition where abuse of dominant

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or

position	any area thereof, a class or species of business,
	(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
	(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
	the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.
Additional or alternative order	(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.
Limitation	(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.
Administrative monetary penalty	(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than \$15 million.
Aggravating or mitigating factors	(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

- (a) the frequency and duration of the practice;
- (b) the vulnerability of the class of persons adversely affected by the practice;
- (c) injury to competition in the relevant market;
- (d) the history of compliance with this Act by the entity; and
- (e) any other relevant factor.

Purpose of order	(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.
Superior competitive performance	(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.
Exception	(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.
Limitation period	(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.
Where proceedings commenced under section 45 or 92	<p>(7) No application may be made under this section against a person</p> <ul style="list-style-type: none"> (a) against whom proceedings have been commenced under section 45, or (b) against whom an order is sought under section 92 <p>on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.</p>

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4.

Unpaid
monetary
penalty

79.1 The amount of an administrative monetary penalty imposed on an entity under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that entity in a court of competent jurisdiction.

2002, c. 16, s. 11.5.



ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

ภาคผนวก ข

ACT CONCERNING PROHIBITION OF PRIVATE MONOPOLIZATION
AND MAINTENANCE OF FAIR TRADE

(Act No. 54 of 14 April 1947)

CHAPTER 1 GENERAL PROVISIONS

Sec.1 [Purpose]

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

Sec.2 [Definitions]

(1) The term "entrepreneur" as used in this Act shall mean a person, who carries on a commercial, industrial, financial or any other business. Any officer, employee, agent or any other person who acts for the benefit of any entrepreneur shall be deemed to be an entrepreneur in regard to the application of the provisions of the following subsection and of Chapter III [trade associations] of the Act.

(2) The term "trade association" as used in this Act shall mean any combination or federation of combinations of two or more entrepreneurs having as its principal purpose the furtherance of their common business interest as entrepreneurs and includes one taking either of the following forms: Provided, That a combination or federation of combinations of two or more entrepreneurs, whose stock or other paid-up capital is owned by the constituent entrepreneurs, and whose principal purpose is to operate and which is actually operating a

commercial, industrial, financial or any other business for profit shall not be included:

(i) Any association incorporated or not incorporated of which two or more entrepreneurs are members (including any position similar thereto);

(ii) Any foundation with or without juridical personality of which two or more entrepreneurs control the appointment or dismissal of directors or managers, the execution or continuation of business activities;

(iii) Any partnership of which two or more entrepreneurs are members, or any contractual combination of two or more entrepreneurs.

(3) The term "officer" as used in this Act shall mean a director, a partner with unlimited liabilities and executive power, an auditor, or any person with a similar position, a manager, or other employee in charge of business of the main or branch office.

(4) The term "competition" as used in this Act shall mean a situation in which two or more entrepreneurs do or may, within the normal scope of their business activities and without undertaking any significant change in their business facilities or kinds of business activities, engage in any act prescribed in any one of the following paragraphs.

(i) Supplying the same or similar goods or services to the same consumers or users;

(ii) Getting supplies of the same or similar goods or services from the same supplier.

(5) The term "private monopolization" as used in this Act shall mean such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

(6) The term "unreasonable restraint of trade" as used in this Act shall mean such business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

(7) The term "monopolistic situation" as used in this Act shall mean circumstances in which each of the following market structures and undesirable market performances exist in any particular field of business where the aggregate total amount of prices (this term refers to the prices of the goods concerned less a sum equivalent to the amount of taxes levied directly on such goods) of goods of the same description (including goods capable of being supplied without making any significant change to their business facilities or kinds of business activities; hereinafter in this subsection referred to as "particular goods") and those of any other goods having a strikingly similar function and utility thereto, which are supplied in Japan (excluding those exported) or the total amount of prices (this term refers to the prices of the services concerned less a sum equivalent to the amount of taxes levied on the recipient of such services with respect thereto) of services of the same description which are supplied in Japan, during the latest one-year period designated by a Cabinet Ordinance, is in excess of hundred billion yen:

(i) where the market share (this refers to the ratio accounted for by the aggregate volume (in case it is not appropriate to be calculated by the quantity, the quantity shall be represented in terms of the amount of their prices; the same shall apply hereinafter in this paragraph) of the particular goods and any other goods having a strikingly similar function and utility thereto or by the volume of the services, which are supplied by the entrepreneur or entrepreneurs concerned, to total volume of those supplied in Japan (excluding those exported) of an entrepreneur exceeds one-half or where the combined market share of two entrepreneurs exceeds three-fourths during a given one-year period;

(ii) Where there exists conditions which make it extremely difficult for any other entrepreneur to be newly engaged in the said particular field of business;

(iii) Where the increase in the price of the particular goods or services supplied by the entrepreneur concerned has been remarkable or the decrease therein has been slight for a considerable period of time in the light of changes occurred in the supply and demand, or in the cost of supplying for such goods or services during such period, and where, in addition thereto, the said entrepreneur has fallen under any one of the following requirements during said period:

(a) That the entrepreneur has earned profit rate far exceeding that which is established by a Cabinet Ordinance as the norm for the class of business designated by such Cabinet Ordinance to which the said entrepreneur belongs; or

(b) That the entrepreneur has expended a level of selling costs and general and administrative expenses far exceeding one which is considered as the norm for the field of business to which the entrepreneur belongs.

(8) In the event any change has occurred in the economic conditions resulting in a drastic change in domestic industrial shipments and wholesale prices, the amount of prices as prescribed in the preceding subsection may be revised by virtue of a Cabinet Ordinance to reflect such change.

(9) The term "unfair trade practices" as used in this Act shall mean any act coming under any one of following paragraphs, which tends to impede fair competition and which is designated by the Fair Trade Commission as such:

(i) Unjustly discriminating against other entrepreneurs;

(ii) Dealing at unjust prices;

(iii) Unjustly inducing or coercing customers of a competitor to deal with oneself;

(iv) Dealing with another party on such terms as will restrict unjustly the business activities of the said party;

(v) Dealing with another party by unjust use of one's bargaining position;

(vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and his another transacting party; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interest of such company.

CHAPTER II

PRIVATE MONOPOLIZATION AND UNREASONABLE RESTRAINT OF TRADE

Sec.3 [Prohibition of private monopolization or unreasonable restraint of trade]

No entrepreneur shall effect private monopolization or unreasonable restraint of trade.

Sec.4 [Prohibition of particular concerted practices]

CHAPTER V UNFAIR TRADE PRACTICES

Sec.19 [Prohibition of unfair trade practices]

No entrepreneur shall employ unfair trade practices.

Sec.20 [Measures against unfair trade practices]

(1) When there exists any act in violation of the preceding section, the Fair Trade Commission may, in accordance with the procedures as provided for in Division II [procedures], Chapter VIII, order the entrepreneur concerned to cease and desist from the said act, to delete the clauses concerned from the contract and to take any other measures necessary to eliminate the said act.

(2) The provisions of Section 7(2) [measures against already ceased violations] shall apply mutatis mutandis to an act in violation of the preceding section.

AND ACQUISITIONS OF BUSINESS

Sec.9 [Restriction of holding company]

(1) Any holding company which may cause excessive concentration of economic power shall not be established.

(2) Any company (including a foreign company; hereinafter the same) shall not operate as a holding company which may cause excessive concentration of economic power in Japan.

(3) The term "holding company" as used in this section and the following section shall mean a company in which the total acquisition value (another price if it is listed so in the latest balance sheet; the same meaning shall apply hereinafter) of the stock [] including shares of partnership; hereinafter the same) and all subsidiaries (this term refers to other companies in Japan in which greater than 50 percent of the total voting rights of all partners; hereinafter the same) is held by the company; hereinafter the same meaning shall apply in this chapter) which the said company holds constitutes greater than 50 percent of the value of the total assets (this term refers to the total amount of assets arrived at by the procedure specified by the Rules of the Fair Trade Commission; hereinafter the same meaning shall apply in subsection (6) of the said company.).

(4) Any other companies in which greater than 50 percent of the total voting rights of all stock holders is held by a company and any one or more subsidiaries of the said company, or by any one or more subsidiaries of a company shall be regarded as a subsidiary of the said company; the provisions stipulated in this Section shall be applied to any such companies.

(5) The term "excessive concentration of economic power" in the first and second subsections shall mean a situation in which the extreme largeness of the overall business scale over a significant number of fields of business of a holding company and its subsidiaries and other domestic companies whose business activities are controlled by the holding company by means of holding of stock, the remarkably large influence of the said companies on other entrepreneurs due to transactions relating to finance or the occupancy of influential positions over a significant number of mutually related fields of business by the said companies has a large effect on the national economy and impedes promotion of free and fair competition.

(6) A holding company whose value of total assets, together with that of its subsidiaries (restricted to total assets of the companies in Japan), calculated according to the procedure specified by the Rules of the Fair Trade Commission, is greater than the amount so prescribed by a Cabinet Ordinance as not to be lower than 300 billion yen, shall submit, in accordance with the Rules of Fair Trade Commission, a report for the business of the said holding company and its subsidiaries to the Fair Trade Commission within three months from the end of each business year.

(7) A holding company that corresponds to the descriptions prescribed in the preceding subsection when it is newly established shall, in accordance with the Rules of the Fair Trade Commission, file a report with the Fair Trade Commission to that effect within 30 days from its establishment.

Sec.9-2 [Restriction on total amount of stockholding by a giant non-financial company]

(1) Any stock company (excluding those being a holding company) whose business is other than financial (this term refers to those engaged in banking, trust banking, insurance, mutual financing and securities businesses; the same meaning shall apply hereinafter) and whose

capital is larger than thirty-five billion yen or whose assets (this term refers to the sum of amount arrived at by deducting the total liabilities from the total assets listed in the latest balance sheet and by adding, if any, the amount by which, after the final day of the business year related to the balance sheet, the net assets have increased as a result of an issuance of new stock in accordance with the provisions of Section 280-2 of the Commercial Code (Act No. 48 of 1899) or as a result of an issuance of new stock by the exercise of pre-emptive right endowed by cum right corporate bonds; or as a result of a stock swap, merger, succession of business by a acquisition division or the conversion of corporate bonds; hereinafter the same meaning shall apply in this Section) are larger than one hundred and forty billion yen shall not acquire or hold stock of other companies in Japan in excess of its capital or its net assets, whichever is larger (hereinafter referred to as "the base amount"), if by so doing total amount of acquiring price of such stocks (another price if it is listed so in the latest balance sheet; the same meaning shall apply hereinafter) which it has acquired or holds exceeds the base amount: Provided, That the foregoing shall not apply to the acquisition or holding of such stock in the cases provided for in any one of the following paragraphs;

(i) The acquisition or holding of stock of a company in Japan which has been prescribed by a Cabinet Ordinance and which has been invested in by a juridical person established by the government, or a local public authority, or a juridical person established under a special law whose total amount of capital is owned by the government or whose liabilities may be contractually guaranteed by the government;

(ii) The acquisition or holding of stock of a company in Japan, as prescribed by a Cabinet Ordinance, engaged in a business contributive to the development of industries and the progress of economy and societies, which requires large sum of funds of such a magnitude as to make it difficult to procure by ordinary means;

(iii) The acquisition or holding of stock of a company in Japan whose purpose is to engage in any one or two or more of the following businesses, and which performs business activities pursuant to the objective thereof;

- (a) Business undertaken outside Japan (including the business undertaken in Japan which is closely connected with, and incidental to, such business);
- (b) Business of investment or long-term loans to foreign governments or foreign juridical persons (including those businesses which are closely connected with, and incidental to, such businesses, hereinafter referred to as "investment and financing business");
- (c) Investment and financing business to the companies provided for in the preceding paragraph; or
- (d) Investment and financing business to the companies which fall under the purview of this paragraph;
- (iv) The acquisition or holding of stock of a company in Japan, as prescribed by a Cabinet Ordinance, engaged in the business provided for in paragraph (ii) above, and in the investment and financing business as provided for in the preceding paragraph;
- (v) The acquisition or holding of stock of a company in Japan, established by partially separating the business actually performed by itself, and another company respectively, whose issued stock is partially acquired or owned simultaneously with the establishment of the said company: Provided, That this shall apply only to cases where the said company has been continuously engaged in the business in which it was engaged at the time of its establishment;
- (vi) The acquisition or holding of the entire outstanding stock of a company in Japan;
- (vii) The acquisition or holding of stock of a company in Japan, established by joint investment with a foreign government, foreign juridical person or foreign national (referred to as "co-investment company" in subsection (5) below) when it is particularly necessary for the operation of its business to take the form of such a co-investment company therein: Provided,

That this shall apply only to such cases where authorization of the Fair Trade Commission is obtained in advance in accordance with the provisions of the Rules of the Commission;

(viii) The acquisition or holding of new stock acquired or held due to a stockholder allocation on currently held stock (excluding the stock held under the provisions of the paragraphs (i) to (iv) inclusive, of the preceding paragraph): Provided, That this shall apply only to cases where such stock is held for two years or less from the date of its acquisition;

(ix) The acquisition or holding of stock as a result of the enforcement of a lien, pledge, mortgage, or as a result of payment in kind: Provided, That this shall apply only to cases where such stock is held for one year or less from the date of its acquisition (or for one year or less from the date on which it is decided to conclude rehabilitation procedures, in case the stock is deemed to have been acquired through payment in kind under the provision of Section 265

[special provisions to Section 9-2 or Section 11 of the Act] of the Company Rehabilitation Act (Act No.172 of 1952)); or

(x) The acquisition or holding of stock of stock companies whose stock is neither listed on the stock exchanges specified in Section 2(11) of the Securities and Exchange Act (Act No.25 of 1948), nor registered in the over-the-counter negotiable securities registration ledger in accordance with Section 75(1) of the same Act, and whose amount of capital is below the value prescribed by a Cabinet Ordinance, and in which the ratio of total amount of expenditure for experiments, research, and others prescribed by a Cabinet Ordinance to the revenue prescribed by a Cabinet Ordinance exceeds the ratio prescribed by a Cabinet Ordinance, or which was established within one year, in which the number of full-time researchers is not less than the number prescribed by a Cabinet Ordinance, and in which the ratio of the number of the said researchers to the total number of full-time officers and employees is not less than the ratio prescribed by a Cabinet Ordinance.

(xi) The acquisition or holding of stock of a company in Japan for an imperative reason; Provided, That this shall apply only to cases where approval of the Fair Trade Commission is

obtained in advance (or without delay after the acquisition of such stock, in case it is acquired under urgent and imperative circumstances) in accordance with provisions of the Rules of the Fair Trade Commission, and where such stock is held for the period or less stipulated by such approval.

(2) If, as a result of a decrease in the base amount of the stock company as provided for in the preceding subsection, the total amount of the acquisition price of stock held in companies in Japan (excluding the holdings which fall under any one of the paragraphs of the said subsection; the same shall apply in the following subsection) turns out to be in excess of the base amount, the total amount of such acquisition price shall be deemed as the base amount for the purpose of applying the provisions of the preceding subsection during the five years beginning from the date on which the acquisition price exceeded the base amount.

(3) In case the base amount decreases still more during the five-year period under the preceding subsection, the base amount determined prior to such decrease or the total amount of the acquisition price of stock held in companies in Japan as of the date on which the period as provided for in the preceding subsection expired, whichever is the smaller, shall be deemed as the base amount for the purpose of applying the provisions of subsection (1) above during the five-year period. The same shall apply to cases where the base amount decreased still more during the five-year period immediately following such decrease.

(4) The provisions of the preceding two subsections shall not apply to cases where the base amount has increased beyond the amount which is deemed as the base amount then effective under these provisions.

(5) When the Fair Trade Commission grants authorization under subsection (1) (vii), it shall, in advance, consult with the Minister of Finance and the competent minister having jurisdiction over the business in which the co-investment company is engaged.

(6) When the Fair Trade Commission grants authorization under subsection (1) (vii) or approval under paragraph (xi) of the said subsection, the Commission shall, in advance,

consult with the minister or ministers who are empowered by virtue of a special law to make recommendations or give instructions with respect to the financial management of the companies which seek to acquire stock and are subject to such authorization or approval.

(7) In case a company which falls under subsection (1) (iii) above ceases to become subject thereto, the provision of the said subsection shall not apply to the holding of stock of such company for one year immediately following the date on which such company ceased to fall thereunder.

(8) In case any company acquires stock of another company in Japan under urgent and imperative circumstances that are subject to an ex post facto approval under subsection (1) (xi) above but fails to obtain such approval, the provision of the said subsection shall not apply to the holding of such stock for one month immediately following the date on which such company failed to obtain such approval.

(9) In the event, as a result of a change in economic conditions, any drastic increase or decrease occurs in the amounts of capital and net assets of the stock companies which rank among the largest two hundred in terms of the size of their capital and net assets (excluding those engaged in financial business; the same shall apply in this subsection), the amount stipulated in subsection (1) may be revised by virtue of a Cabinet Ordinance to reflect such change.

Sec.10 [Prohibition of particular stockholding by a company, filing requirement]

(1) No company shall acquire or hold stock of any other companies where the effect of such acquisition or holding of stock may be substantially to restrain competition in any particular field of trade, or shall acquire or hold stock of other companies through unfair trade practices.

(2) Every company whose business is other than financial and whose total assets (meaning total amount of the assets according to the latest balance sheet; hereinafter the same) exceeds the amount, not less than two billion yen, as provided for in the provision in the cabinet ordinance, as well as the sum of

the total amount of assets of the said company, subsidiaries of the said company, and a company in Japan which holds more than 50 percent of the total voting rights of all stockholders of the said company (hereinafter "total assets"); exceeds the amount (this company is called "stockholding company" in this Section), not less than ten billion yen, as provided for in the provision in the cabinet ordinance, in case that it acquires or holds the stock (including the stock held in the form of trust property of pecuniary or security trust of which it is a trustor or beneficiary and can exercise its voting rights or where such trustor or beneficiary can issue instructions regarding the exercise of such voting rights) of other companies in Japan whose total amount of assets exceeds the amount, not less than one billion yen, as provided for in the provision in the cabinet ordinance (hereinafter in this Section "issuing company"), so that the ratio of shares acquired or held by the stockholding company to the total outstanding stock of the issuing company is to exceed the ratio, not less than 10 percent, as provided for in the provision in the cabinet ordinance (in case that more than one value is provided, each numerical value as provided for in the provision in the cabinet ordinance), shall submit, in accordance with the Rules of the Fair Trade Commission, a report on such stock within thirty days as from the date of exceeding: Provided, That the foregoing shall not apply to a case where the issuing company establishes the acquired company and the former acquires all of the outstanding stock of the latter concurrently with the establishment.

(3) The provisions of the preceding Subsection shall apply mutatis mutandis in case that stockholding company acquires or holds the stock of a foreign company whose net sales in the profit and loss statement which is made with the latest balance sheet of its business offices in Japan (including its business offices of subsidiaries)(hereinafter "domestic sales") exceeds the amount, not less than one billion yen, as provided for in the provision in the cabinet ordinance.

CHAPTER X PENAL PROVISIONS

Sec.89 [Penalties against private monopolization or unreasonable restraint of trade, or substantial restraint of competition by a trade association]

(1) Any person committing one of the following offenses shall be punished by penal servitude for not more than three years or by a fine of not more than five million yen:

(i) Any person who, in violation of the provisions of Section 3 [prohibition of private monopolization or unreasonable restraint of trade], effected private monopolization or unreasonable restraint of trade; or

(ii) Any person who, in violation of the provisions of Section 8(1) [prohibited acts of a trade association] (i), effected substantial restraint of competition in any particular field of trade.

(2) An attempt to commit an offense falling under the preceding subsection shall be punished.

Sec.90 [Penalties against prohibited international agreements or contracts, prohibited acts of trade association, or non-observance of final and conclusive decision]

Any person committing one of the following offenses shall be punished by penal servitude for not more than two years or by a fine of not more than three million yen:

(i) Any person who, in violation of the provisions of Section 6 [prohibition of particular international agreements or contracts] or Section 8(1)(ii) [prohibition of particular international agreements or contracts by a trade association] entered into an international agreement or an international contract which contains such matters as constitute unreasonable restraint of trade;

(ii) Any person who violated the provision of Section 8(1) (iii) [limiting the number of entrepreneurs by a trade association] or (iv) [restriction on function or activity of the constituent entrepreneur by a trade association]; or

(iii) Any person who failed to comply with the decision as provided for in Section 48(4) [recommendation decision], Section 53-3 [consent decision] or Section 54(1) or (2) [formal decision], after it has become final and conclusive.

Sec.91 [Penalties against holding company, prohibited stockholding or interlocking directorates, etc.]

Any person committing one of the following offenses shall be punished by penal servitude for not more than one year or by a fine of not more than two million yen:

(i) Any person who, in violation of the provisions of Section 9-2(1) [restriction on total amount of stockholding by a giant non-financial company], acquired or held stock;

(i) Any person who, in violation of the provisions of the first part of Section 10(1) [prohibition of particular stockholding by a company], acquired or held stock;

(iii) Any person who, in violation of the provisions of Section 11(1) [restriction on stockholding rate by a financial company], acquired or held stock; or who, in violation of the provisions of subsection (2) of the said section, held stock;

(iv) Any person who, in violation of the provisions of Section 13(1) [prohibition of particular interlocking directorates], held concurrently positions as an officer of a company;

(v) Any person who, in violation of the provisions of the first part of Section 14 [prohibition of particular stockholding by a person other than a company], acquired or held stock; or

(vi) Any person who, in violation of the provisions of Section 17 [prohibition of evasion], committed such prohibitions or restrictions prescribed in the paragraphs above.

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Trade Practices Act 1974
of Australia

Part IV—Restrictive trade practices

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

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

- (a) is an exclusionary provision; or
- (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;

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

(2) A corporation shall not:

- (a) make a contract or arrangement, or arrive at an understanding, if:
 - (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
 - (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or
- (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:
 - (i) is an exclusionary provision; or
 - (ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition.

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

- (i) conduct that contravenes section 48; or
 - (ii) conduct that would contravene section 48 but for the operation of subsection 88(8A); or
 - (iii) conduct that would contravene section 48 if this Act defined the acts constituting the practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or supply.
- (6) The making of a contract, arrangement or understanding does not constitute a contravention of this section by reason that the contract, arrangement or understanding contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) or 88(8) or section 93, constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract, arrangement or understanding by way of:
- (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) or 88(8) or section 93 contravene, section 47; or
 - (b) doing an act by reason of a breach or threatened breach of a condition referred to in subsection 47(2), (4), (6) or (8), being an act done by a person at a time when:
 - (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (7) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding

provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

- (8) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, the only parties to which are or would be bodies corporate that are related to each other.
- (9) The making by a corporation of a contract that contains a provision in relation to which subsection 88(1) applies is not a contravention of subsection (2) of this section if:
- (a) the contract is subject to a condition that the provision will not come into force unless and until the corporation is granted an authorization to give effect to the provision; and
 - (b) the corporation applies for the grant of such an authorization within 14 days after the contract is made;

but nothing in this subsection prevents the giving effect by a corporation to such a provision from constituting a contravention of subsection (2).

45A Contracts, arrangements or understandings in relation to prices

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

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

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

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in subparagraph 4J(a)(ii):

(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

(ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:

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

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

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

- (a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract, arrangement or understanding; or
 - (b) for the joint advertising of the price for the re-supply of goods or services so acquired.
- (5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:
- (a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or
 - (b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.
- (6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

- (7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.
- (8) The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

45B Covenants affecting competition

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

the covenant, supply or acquire, or be likely to supply or acquire, goods or services.

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

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

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

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

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

(b) a person associated with the corporation referred to in paragraph (a) or a corporation associated with the person referred to in that paragraph;

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

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

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

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

- (i) an authorization under subsection 88(8) is in force in relation to conduct engaged in by that person on that condition; or
 - (ii) by reason of subsection 93(7) conduct engaged in by that person on that condition is not to be taken to have the effect of substantially lessening competition within the meaning of section 47; or
 - (iii) a notice under subsection 93(1) is in force in relation to conduct engaged in by that person on that condition.
- (6) This section does not apply to or in relation to a covenant or proposed covenant where the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant are persons who are associated with each other or are bodies corporate that are related to each other.
- (7) For the purposes of this section, section 45C and subparagraph 87(3)(a)(ii), a person and a corporation shall be taken to be associated with each other in relation to a covenant or proposed covenant if, and only if:
- (a) the person is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the corporation in relation to the covenant or proposed covenant; or
 - (b) the person is a body corporate in relation to which the corporation is in the position mentioned in subparagraph 4A(1)(a)(ii).
- (8) The requiring by a person of the giving of, or the giving by a person of, a covenant in relation to which subsection 88(5) applies is not a contravention of subsection (2) of this section if:
- (a) the covenant is subject to a condition that the covenant will not come into force unless and until the person is granted an authorization to require the giving of, or to give, the covenant; and

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

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

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

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

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

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

45C Covenants in relation to prices

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

the covenant, supply or acquire, or be likely to supply or acquire, goods or services" were omitted.

- (2) In the application of subsection 45B(2) in relation to a proposed covenant that has the purpose, or would have or be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired by the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant, or by any of them, or by any persons associated with any of them, in competition with each other, paragraph 45B(2)(a) has effect as if all the words after the words "require the giving of a covenant, or give a covenant" were omitted.
- (3) For the purposes of this Act, a covenant shall not be taken not to have, or not to be likely to have, the effect, or a proposed covenant shall not be taken not to have the purpose, or not to have, or not to be likely to have, the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:
- (a) the form of the covenant or proposed covenant; or
 - (b) any description given to the covenant by any of the persons who are, or but for subsection 45B(1) would be, bound by or entitled to the benefit of the covenant or any description given to the proposed covenant by any of the persons who would, or would but for subsection 45B(1), be bound by or entitled to the benefit of the proposed covenant.
- (4) For the purposes of the preceding provisions of this section, but without limiting the generality of those provisions:
- (a) a covenant shall be deemed to have, or to be likely to have, the effect of fixing, controlling or maintaining, or providing for the fixing,

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

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

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

in competition with each other in relation to the supply or acquisition of the goods or services.

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

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

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person);
or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person);
and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

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

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

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

(3) Subsection (1) applies if the fourth person is a corporation.

(4) Subsection (1) also applies if:

(a) the third person is a corporation and the fourth person is not a corporation; and

(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.

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

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

(a) that hinders or prevents:

(i) a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person);

or

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person);

and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

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

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

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

(3) Subsection (1) applies if:

(a) the third person or the fourth person is a corporation, or both of them are corporations; and

(b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of one of those persons who is a corporation.

45DB Boycotts affecting trade or commerce

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

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

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

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

45DC Involvement and liability of employee organisations

Certain organisations taken to be acting in concert

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

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

- (2) The consequences of an organisation of employees engaging, or being taken by subsection (1) to engage, in conduct in concert with any of its members or officers in contravention of subsection 45D(1), 45DA(1) or 45DB(1) are as set out in subsections (3), (4) and (5).

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

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

Taking proceedings if organisation is a body corporate

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

Taking proceedings if organisation is not a body corporate

- (5) If the organisation is not a body corporate:
- (a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all the persons who were members of the organisation at the time when the conduct was engaged in; and
 - (b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and
 - (c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in paragraph (a) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and
 - (d) except as provided by paragraph (a), a proceeding in respect of the conduct must not be brought under section 77 or 82 against any of the members or officers of the organisation; and
 - (e) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in paragraph (a) that was brought under section 77 or 82, process may be issued and executed against the

following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:

- (i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or however otherwise held;
 - (ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or however otherwise held;
 - (iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity as members, whether vested in trustees or however otherwise held; and
- (f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

45DD Situations in which boycotts permitted

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

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

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

- (2) If:

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

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

Dominant purpose of conduct relates to environmental protection or consumer protection

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

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

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

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

- (a) it is not a "person" and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but

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

Meaning of industrial action—basic definition

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

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

For this purpose, *industrial body*, *industrial dispute* and *industrial instrument* have the meanings given by subsection 298B(1) of the *Workplace Relations Act 1996*.

Meaning of industrial action—further clarification

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

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

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

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

Defences to contravention of subsection 45DB(1)

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

Each person to prove defence

- (8) If:
 - (a) a person engages in conduct in concert with another person; and

(b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct;

in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

Note: Section 170MT of the *Workplace Relations Act 1996* limits the right to bring actions under this Act in respect of industrial action that is protected action for the purposes of that section.

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

Situations to which section applies

(1) This section applies in the following situations:

(a) a **supply situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to supply goods or services to another person (the **second person**); or

(b) an **acquisition situation**—in this situation, a person (the **first person**) has been accustomed, or is under an obligation, to acquire goods or services from another person (the **second person**).

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

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

Prohibition in a supply situation

(2) In a supply situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or

(b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:

(i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

Prohibition in an acquisition situation

(3) In an acquisition situation, the first person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or

(b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:

(i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

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

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

Meaning of accustomed to supply

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

Exception to subsection (5)

- (6) If:
- (a) goods or services have been supplied by a person to a second person under a contract between them that required the first person to supply such goods or services over a period; and
 - (b) the period has ended; and
 - (c) after the end of the period, the second person has been supplied with such goods or services by another person and has not also been supplied with such goods or services by the first person;
- then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first person is not to be taken to be a person who has been accustomed to supply such goods or services to the second person.

Meaning of accustomed to acquire

(7) In this section, a reference to a person who has been *accustomed to acquire* goods or services from a second person includes (subject to subsection (8)):

- (a) a regular acquirer of such goods or services from the second person; or
- (b) a person who, when last acquiring such goods or services, acquired them from the second person; or
- (c) a person who, at any time during the immediately preceding 3 months, acquired such goods or services from the second person.

Exception to subsection (7)

(8) If:

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

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

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

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

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

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

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

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

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

46 Misuse of market power

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

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

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

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

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

- (4) In this section:

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

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

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

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

- (1) In this section:

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

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

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

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

- (2) A corporation that has a substantial degree of market power in a trans-Tasman market must not take advantage of that power for the purpose of:
- (a) eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation, in an impact market; or

- (b) preventing the entry of a person into an impact market; or
- (c) deterring or preventing a person from engaging in competitive conduct in an impact market.

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

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

(3) If:

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

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

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

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

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

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

- (1) It is hereby declared, for the avoidance of doubt, that the Commonwealth, the States, the Australian Capital Territory and the Northern Territory, and their authorities, are not immune, and may not claim immunity, from the

jurisdiction of the courts of Australia and New Zealand in relation to matters arising under sections 36A, 98H and 99A of the Commerce Act 1986 of New Zealand.

(2) This section applies in and outside Australia.

47 Exclusive dealing

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

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

(a) supplies, or offers to supply, goods or services;

(b) supplies, or offers to supply, goods or services at a particular price; or

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

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

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

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

(f) in the case where the corporation supplies or would supply goods or services, will not re-supply the goods or services to any person, or will not, or will not except to a limited extent, re-supply the goods or services:

- (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.
- (3) A corporation also engages in the practice of exclusive dealing if the corporation refuses:
- (a) to supply goods or services to a person;
 - (b) to supply goods or services to a person at a particular price; or
 - (c) to give or allow a discount, allowance, rebate or credit in relation to the supply or proposed supply of goods or services to a person;
- for the reason that the person or, if the person is a body corporate, a body corporate related to that body corporate:
- (d) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
 - (e) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation; or
 - (f) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation to any person, or has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired from the corporation:
 - (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
 - (ii) in particular places or classes of places or in places other than particular places or classes of places.

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) supplies, or offers to supply, goods or services;

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

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

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

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

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

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

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

- corporation or from a competitor of a body corporate related to the corporation; or
- (ii) re-supply goods or services, or goods or services of a particular kind or description, acquired directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
- (b) will not supply goods or services, or goods or services of a particular kind or description, to any person, or will not, or will not except to a limited extent, supply goods or services, or goods or services of a particular kind or description:
- (i) to particular persons or classes of persons or to persons other than particular persons or classes of persons; or
- (ii) in particular places or classes of places or in places other than particular places or classes of places; or
- (c) will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.
- (9) A corporation also engages in the practice of exclusive dealing if the corporation refuses to grant or renew, or exercises a power or right to terminate, a lease of, or a licence in respect of, land or a building or part of a building for the reason that another party to the lease or licence or, if that other party is a body corporate, a body corporate related to that body corporate:
- (a) has acquired, or has not agreed not to acquire, goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;
- (b) has re-supplied, or has not agreed not to re-supply, goods or services, or goods or services of a particular kind or description, acquired

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

(c) has supplied goods or services, or goods or services of a particular kind or description:

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

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

(d) has not acquired, or has not agreed to acquire, goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.

(10) Subsection (1) does not apply to the practice of exclusive dealing constituted by a corporation engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraph (8)(a) or (b) or (9)(a), (b) or (c) unless:

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

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

(10A) Subsection (1) does not apply to a corporation engaging in conduct described in subsection (6) or (7) or paragraph (8)(c) or (9)(d) if:

(a) the corporation has given the Commission a notice under subsection 93(1) describing the conduct; and

(b) the notice is in force under section 93.

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

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

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

(13) In this section:

- (a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;
- (b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:
 - (i) the corporation engaging in the conduct or any body corporate related to that corporation; or
 - (ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

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

- (c) a reference to competition, in relation to conduct to which subsection (8) or (9) applies, shall be read as a reference to

competition in any market in which the corporation engaging in the conduct or any other corporation the business dealings of which are restricted, limited or otherwise circumscribed by the conduct, or any body corporate related to either of those corporations, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

48 Resale price maintenance

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

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

(1) A corporation must not directly or indirectly:

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

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(2) A person must not directly or indirectly:

- (a) acquire shares in the capital of a corporation; or
- (b) acquire any assets of a corporation;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

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

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;

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

(4) Where:

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

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

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

whichever first happens.

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

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

market means a substantial market for goods or services in:

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

50A Acquisitions that occur outside Australia

- (1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the *first controlling interest*) in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest (the *second controlling interest*) in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that:
- (a) the person's obtaining the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and
 - (b) the person's obtaining the second controlling interest would not, in all the circumstances, result, or be likely to result, in such a benefit to the

public that the obtaining should be disregarded for the purposes of this section;

make a declaration accordingly.

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

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

(a) the Tribunal must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

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

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

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

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

(a) the Tribunal shall give to:

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

(ii) the Minister and the Commission;

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

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

- (3) An application under subsection (1) may be made at any time within 12 months after the date of the acquisition referred to in that subsection in relation to which the application is made.
- (4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under subsection (1).
- (5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under subsection (1).
- (6) After the end of 6 months after a declaration is made under subsection (1) in relation to the obtaining of a controlling interest in a corporation or 2 or more corporations by a person or, if the person, before the end of that period of 6 months, makes an application to a presidential member for an extension of that period, after the end of such further period (not exceeding 6 months) as the presidential member allows, the corporation or each of the corporations, as the case may be, shall not, while the declaration remains in force, carry on business in the market to which the declaration relates.
- (7) Subsection (1) does not apply in relation to an acquisition referred to in that subsection if section 50 applies in relation to that acquisition.
- (8) For the purposes of this section:
 - (a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A(1)(b)); and
 - (b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate:
 - (i) controls the composition of the board of directors of another body corporate;

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

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

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

(9) In this section:

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



ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย

ประวัติผู้เขียนวิทยานิพนธ์

นางสาวฐานัญญา หนูมาศ เกิดเมื่อวันที่ 11 กรกฎาคม 2522 สำเร็จการศึกษาในระดับชั้นมัธยมศึกษา ณ โรงเรียนสตรีวิทยา ในปีการศึกษา 2540 สำเร็จการศึกษาระดับปริญญานิติศาสตรบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย ในปี 2544 และเข้าศึกษาต่อในระดับชั้นปริญญานิติศาสตรมหาบัณฑิตในปีเดียวกัน ปัจจุบันประกอบอาชีพ ข้าราชการ ณ สำนักงานคณะกรรมการกฤษฎีกา ตำแหน่ง นิติกร ระดับ 4



ศูนย์วิทยทรัพยากร
จุฬาลงกรณ์มหาวิทยาลัย