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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPETITION POLICY REFORM BILL 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Hon George Gear, MP, Assistant Treasurer)

**THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
SENATE TO THE BILL AS INTRODUCED**

COMPETITION POLICY REFORM BILL 1995

OUTLINE

This Bill makes major amendments to the *Trade Practices Act 1974* (the Principal Act) and the *Prices Surveillance Act 1983*, and provides a mechanism for the application by the States, the Northern Territory and the Australian Capital Territory of the competition provisions of Part IV, and ancillary provisions, of the Principal Act to areas of business activity currently outside the cover of Part IV and for the conferring of jurisdiction in these matters on a new institution.

Major Elements of the Legislation

There are six major components of the Bill:

(a) *Australian Competition and Consumer Commission*

The Trade Practices Commission and the Prices Surveillance Authority will be abolished and their powers and functions, and additional functions, will be conferred on a new body, the Australian Competition and Consumer Commission (the Commission). The Bill provides for the constitution and operation of the new Commission.

(b) *National Competition Council*

A new body is to be established having advisory and research functions, and the role of making recommendations in relation to access and pricing. The provisions establishing the National Competition Council (the Council) will be inserted in the Principal Act as a new Part IIA.

(c) *Access Regime*

These provisions provide for the declaration of certain services provided by facilities which are of national significance, and for the means by which persons may seek access to declared services. The Council will have a recommendatory role in the declaration process, and the Commission will be the body which determines whether access should be given where this is disputed, and on what terms and conditions. Provision is made for appeals to the Australian Competition Tribunal (formerly the Trade Practices Tribunal) and for the enforcement of access determinations by the Federal Court.

The provisions also recognise that service providers may wish to provide access without recourse to declaration and accordingly, establish a mechanism whereby providers can give the Commission an undertaking which sets out the terms of access.

The access provisions will become Part IIIA of the Principal Act.

(d) *Amendments to the Competitive Conduct Rules and their Application*

The competitive conduct rules are set out in Part IV of the Principal Act. The amendments provide for: the authorisation, on public benefit grounds, of price fixing for goods and of resale price maintenance; the repeal of the specific provisions relating to price discrimination (section 49 of the Principal Act); the extension of the competitive conduct rules to the resupply of things in the nature of services; the application of the notification provisions to third line forcing; and removal of shield

of the Crown immunity for the States, the Northern Territory and the Australian Capital Territory in so far as the Crown in those capacities carries on a business.

(e) Extension of the Application of the Competitive Conduct Rules

Provisions are included to facilitate the application of the competitive conduct rules and related provisions of the Principal Act to areas within State and Territory jurisdiction, and to ensure that the Commission and the Federal Court can exercise administrative and judicial powers respectively. These powers are expected to be conferred by State and Territory legislation.

(f) Prices Oversight

The monitoring powers will be formalised. And, the coverage of the prices surveillance and monitoring provisions of the Prices Surveillance Act will be extended to State and Territory owned businesses.

Commencement Dates

The Bill is structured upon different commencement dates for different Parts:

(a) 28 days after the Royal Assent

Coming into operation at this time will be:

- (i) the amendments to the competitive conduct rules; and
- (ii) the enactment of the Schedule version of the Part IV competitive conduct rules and the Commonwealth facilitation provisions. This provides a text that the States and Territories can apply by way of their own application laws.

(b) A date to be fixed by Proclamation, but no later than 6 months after the Royal Assent

Coming into operation at this time will be:

- (i) the establishment of the Commission and the abolition of the Trade Practices Commission and the Prices Surveillance Authority;
- (ii) the establishment of the Council;
- (iii) the vesting of prices surveillance functions in the Commission;
- (iv) the amendments to the Prices Surveillance Act to cover State and Territory owned businesses and to formalise the monitoring power;
- (v) the consequential amendments to other legislation; and
- (vi) the commencement of the access regime.

(c) Twelve months after the Royal Assent

Coming into operation at this time will be the application of Part IV of the Principal Act to State and Territory business activities.

Transitional Arrangements

The Bill, and State and Territory applications laws, will result in conduct that is now outside the scope of the competitive conduct rules becoming subject to those rules. It is therefore proposed to have certain transitional arrangements, which are set out in the Bill and are as follows:

- (a) Contracts which have been entered into before 19 August 1994 and which were outside the scope of Part IV of the Principal Act (other than by reason of a legislated exception made pursuant to subsection 51(1)) will be 'grandfathered', so that any anti-competitive conduct which such contracts may entail will not be subject to the new prohibitions. However, variations to the contract which increase or extend the anti-competitive effect of the contract will be subject to the conduct rules.
- (b) If Commonwealth, State or Territory law is made pursuant to current subsection 51(1) of the Principal Act and does not meet the new requirements in the amended subsection 51(1), conduct excepted by the law will be protected for 3 years after the date of Royal Assent. This will give all jurisdictions the opportunity to review the existing exceptions within a reasonable time frame. Laws made pursuant to subsection 51(1), which do meet the new requirements in amended subsection 51(1), will continue to except conduct from Part IV.
- (c) The State and Territory application laws will come into operation twelve months after the Bill receives the Royal Assent.
- (d) Pecuniary penalties will not apply in respect of conduct which is being subjected to competition law for the first time for an extra twelve months (ie a total of two years after Royal Assent). Other remedies will, however, apply after the initial twelve months. Pecuniary penalties will not apply to the Crown at any stage; although, Crown authorities will be liable to pecuniary penalties.

Likewise, in order to protect contracts made before the national access regime became part of the legal landscape, the Commission, in its arbitration of an access dispute, will not be able to make a determination which deprives a person of a contractual right in existence at the beginning of 30 March 1995.

FINANCIAL IMPACT STATEMENT

The Bill will result in a substantial increase in the workload which is currently performed by the Trade Practices Commission. The Principal Act will extend to areas of the economy now excluded, both by virtue of the amendments directly made in the Bill and pursuant to the conferral of functions by State and Territory laws which the Bill facilitates. The Commission will also have important new functions under the access regime.

A new institution, the National Competition Council, is being established. This will require new resources for up to 5 Councillors and around 20 staff, and for administration.

The Australian Competition Tribunal (currently the Trade Practices Tribunal) is also being given an enhanced role. Additional resources for the Tribunal will be provided to enable it to properly undertake its role.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

Act:	<i>Competition Policy Reform Act 1995</i>
Australian Postal Corporation Act:	<i>Australian Postal Corporation Act 1989</i>
Commission:	Australian Competition and Consumer Commission
Council:	National Competition Council
Prices Surveillance Act:	<i>Prices Surveillance Act 1983</i>
Principal Act:	<i>Trade Practices Act 1974</i>
Public Service Act:	<i>Public Service Act 1922</i>
Telecommunications Act:	<i>Telecommunications Act 1991</i>
Tribunal:	Australian Competition Tribunal

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title etc.

1. This clause provides for the Act to be cited as the *Competition Policy Reform Act 1995*, and indicates that the phrase 'Principal Act' refers to the *Trade Practices Act 1974*.

Clause 2 - Commencement

2. The Bill provides for the following commencement times.
 - (a) Provisions commencing 28 days after the Bill receives the Royal Assent are:
 - (i) Part 1, dealing with preliminary matters;
 - (ii) Part 2, which among other things, amends the provisions in Part IV of the Principal Act dealing with anti-competitive conduct, and inserts a new Part XIA into the Principal Act to create the Competition Code;
 - (iii) Division 2 of Part 5, which provides transitional rules dealing with the extension of Part IV of the Principal Act to State and Territory businesses; and
 - (iv) Part 7, which permits regulations to be made under the Act.
 - (b) Part 3 of the Bill commences on a date to be fixed by Proclamation, or 6 months after the Bill receives the Royal Assent, whichever is earlier. Part 3 establishes new institutional arrangements and a regime providing for access to declared services.
 - (c) Part 4, which inserts gender-neutral language into the Prices Surveillance Act, commences immediately after Part 3.
 - (d) Division 1 of Part 5 of the Bill commences 12 months after the Bill receives the Royal Assent. These provisions apply Part IV of the Principal Act to State and Territory businesses with shield of the Crown, and introduce the concept of 'fully-participating jurisdiction'.
 - (e) Part 6, which inserts gender-neutral language into the Principal Act, commences immediately after Division 1 of Part 5.

PART 2 - AMENDMENTS COMMENCING AT THE FIRST COMMENCEMENT TIME

Division 1 - Amendments

Clause 3 - Insertion of new section (Object of the Principal Act)

3. Clause 3 inserts an objects clause as new section 2 of the Principal Act. It states that the object of the Principal Act is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.

Clause 4 - Interpretation

4. This clause amends section 4 of the Principal Act, by adding definitions of the Competition Principles Agreement and the Conduct Code Agreement. These inter-governmental agreements were executed by Australian governments at the Council of Australian Governments meeting on 11 April 1995.

Clause 5 - Acquisition, supply and re-supply

5. This clause amends section 4C of the Principal Act, by inserting a new paragraph (f) to provide a definition of 're-supply of services'. The definition is inserted to support the extension to the prohibitions against price-fixing, exclusive dealing and resale price maintenance to the re-supply of services.

6. It is clear that there are some services which cannot be re-supplied. For example, a person who receives a haircut cannot re-supply that haircut to another person. The definition of 're-supply of services' has no application in relation to such services.

7. There are, however, other services which are of such a nature as to be capable of re-supply. Section 4 of the Principal Act provides a wide definition of 'services', which includes any rights, benefits, privileges or facilities provided in trade or commerce. A re-supply of services might occur where, for example, an entertainment centre sells to a ticketing agent a bundle of tickets each entitling the bearer to sit in a particular seat at a particular time, and the ticketing agent on-sells those tickets. Another example is where person A supplies financial information by electronic means to person B and B then supplies that information, also by electronic means, to C.

8. There are three limbs to the definition of re-supply of services. The first limb is the natural meaning of re-supply of services. If A supplied services to B and B supplied services to C, to fall within this limb the service supplied by B to C would need to be exactly the same service supplied by A to B. The ticketing example given above might fall within this limb.

9. The second limb to the definition is provided by subparagraph (f)(i), which extends the definition to cover the re-supply of services in an altered form or condition. This subparagraph replicates the treatment of re-supply of goods in subparagraph (e)(i). A possible example of this might be where A supplies information electronically to B and B amplifies the signal and then supplies it to C.

10. The third limb of the definition is provided by subparagraph (f)(ii). This extends the definition of re-supply of services to cover a supply by B to C of services that are substantially similar to services supplied by A to B and could not have been supplied if B had not acquired those services from A. This covers cases where the re-supplied service is a different bundle of legal rights from the original service. A possible example might be where A supplies information in electronic form to B. B manipulates the information to transform it into a more easily understood form and then supplies the transformed information to C.

Clause 6 - Extended Application of Part IV, IVA and V

11. This clause amends section 6 of the Principal Act by inserting new subsection (2A) which provides for a limited withdrawal of the current coverage of the Principal Act in the Australian

Capital Territory and the Northern Territory. This withdrawal of coverage in each Territory is conditional upon, and only continues for as long as, the Territory participates fully in the co-operative scheme for applying the Competition Code to persons within its legislative competence.

Clause 7 - Associate members

12. This is a consequential amendment relating to the membership of the Commission for the purposes of making decisions concerning notification of third line forcing. This amendment flows from the amendments to the notification provisions made by clause 18.

Clause 8 - Insertion of new sections (Counsel assisting Tribunal and consultants)

13. Clause 8 amends the Principal Act to insert new sections 43A and 43B.

14. New section 43A will enable the President of the Tribunal (on behalf of the Commonwealth) to appoint a legal practitioner to assist the Tribunal in relation to its review functions (for example, the review of an access determination of the Commission).

15. New section 43B will enable the Registrar of the Tribunal to engage consultants (on behalf of the Commonwealth) to assist the Tribunal.

Clause 9 - Contracts, arrangements or understandings that restrict dealings or affect competition

16. Clause 16 makes it possible for the Commission to authorise resale price maintenance. Accordingly, paragraph 9(a) of the Bill replaces paragraph 45(5)(c) of the Principal Act, inserting a new paragraph which ensures that authorised resale price maintenance will not contravene the section 45 prohibition against certain anti-competitive contracts, arrangements or understandings.

17. Clause 18 makes it possible for persons proposing to engage in conduct which constitutes exclusive dealing as defined in subsections 47(6) and (7) of the Principal Act to obtain the immunity for the conduct by giving the Commission notification. Paragraph 9(b) of the Bill amends paragraph 45(6)(b) of the Principal Act to ensure that notified exclusive dealing will not contravene section 45 while the notice is in force.

Clause 10 - Contracts, arrangements or understandings in relation to prices

18. Subsection 45A(1) of the Principal Act deems agreements between competitors which fix, control or maintain a price to substantially lessen competition. Agreements which substantially lessen competition are prohibited by section 45 of the Principal Act. There are three categories of exceptions to the subsection 45A(1) deeming provision: joint venture pricing, certain recommended price agreements and buying group pricing. This clause makes a technical amendment to the joint venture pricing exception, removes the recommended price exception and extends the operation of the section to re-supply of services wherever it already deals with the re-supply of goods.

19. Subsection 45A(2) provides that in certain circumstances parties to a joint venture agreement may fix a price for the product of the joint venture, without being deemed to substantially lessen competition. Paragraphs (2)(a) and (b) currently provide this exemption from the deeming provision in two cases. The first is when the product is jointly supplied by the parties to the joint venture. The second case is when the product is supplied by the joint venture parties in proportion to their

respective interests in the joint venture. This clause amends paragraphs 45A(2)(a) and (b) so that, in the first case, the exemption will apply where the product is jointly supplied by only some (ie two or more) of the parties to the joint venture. The clause also clarifies the second case by providing that the product must be supplied by all of the joint venture parties.

20. Current subsection 45A(3) provides that the deeming provision in subsection 45A(1) does not apply to an agreement which recommends a price provided there are not less than 50 parties to the agreement.

21. This clause repeals subsection 45A(3). As a result of this amendment, recommended price agreements which have the purpose, effect or likely effect of fixing, controlling or maintaining prices, will be deemed by subsection 45A(1) to substantially lessen competition, and will thus be prohibited by section 45. Some recommended price agreements operating between competitors will not have the purpose or likely effect of fixing, controlling or maintaining prices and will not be prohibited. But some price recommendations operating between competitors could, for example, have the likely effect of maintaining prices if it were expected that all of the parties would comply with the recommendations. Recommended price agreements will continue to be able to be authorised.

22. Subsection 45A(4) provides that the deeming provision in subsection 45A(1) does not apply to an agreement which establishes the price for goods or services to be collectively acquired, or an agreement which establishes a price for advertising for the re-supply of goods so acquired. This clause amends the provision dealing with the re-supply of goods to extend it to the re-supply of services. Re-supply of services is defined in new paragraph 4C(f), inserted by clause 5.

23. Subsection 45A(7) deems a provision of a contract to have the purpose, effect or likely effect of fixing, controlling or maintaining a price if, among other things, the provision has the purpose or likely effect of fixing, controlling or maintaining the price in relation to a re-supply of goods. This clause extends that subsection to the re-supply of services.

Clause 11 - Covenants affecting competition

24. Like paragraph 9(b) in relation to section 45, clause 11 amends section 45B so that notified exclusive dealing does not contravene section 45B.

Clause 12 - Covenants in relation to prices

25. Section 45C, in conjunction with section 45B, prohibits price-fixing covenants. In certain circumstances involving the re-supply of goods, subsection 45C(4) deems certain covenants to be price-fixing covenants. This clause amends subsection 45C(4) to also apply to circumstances involving the re-supply of services.

Clause 13 - Exclusive dealing

26. The section 47 prohibition against exclusive dealing covers various forms of conduct, some of which involve the re-supply of goods. This clause amends section 47 to also apply to conduct involving the re-supply of services.

27. This clause also inserts new subsection (10A) into section 47. Subsection (10A) provides that here there is a notice in force in respect of the exclusive dealing conduct described in

subsection 47(6) or (7) or paragraph 47(8)(c) or (9)(d), a corporation can engage in that conduct without contravening subsection 47(1) of the Principal Act.

Clause 14 - Price discrimination

28. This clause repeals section 49 of the Principal Act, which prohibits certain forms of price discrimination.

Clause 15 - Exceptions

29. This clause amends subsection 51(1) of the Principal Act, which provides for exceptions from Part IV of the Principal Act for conduct which is excepted by laws (ie Acts, enactments, Ordinances or regulations) of the Commonwealth, a State or a Territory. The law must specify the excepted thing and specifically authorise it.

30. Although the Principal Act does not provide a general definition of 'specified in, and specifically authorised by', new subsection (1A) provides an inclusive definition in respect of licensing regimes established by Act, enactment or Ordinance. It provides that where conduct is excepted from Part IV under such a licensing regime, the Act, enactment or Ordinance which establishes the licensing regime does not necessarily need to identify the person who is authorised to engage in the specified conduct or the geographical dimension of that conduct. Those attributes can be identified in licences issued or made under the Act, enactment or Ordinance.

31. The clause inserts new subsection 51(1C) which introduces limitations on the operation of subsection 51(1). These are:

- (a) Laws which purport to except conduct from the Principal Act must expressly refer to the Principal Act.
- (b) Exceptions from sections 50 (mergers and acquisitions) and 50A (mergers and acquisitions outside Australia) may only be made by Commonwealth Act.
- (c) Exceptions made by regulations are only effective for two years. The principal reason for permitting such regulations is to deal with situations in which there is an urgent need to grant exception and parliamentary timetables would prevent the timely passage of an excepting Act. Two years provides a sufficient opportunity for an excepting Act to be passed, to provide enduring protection.
- (d) Exceptions made by regulations cannot be extended or remade to continue exception beyond the initial two years.
- (e) Laws of the States, the Australian Capital Territory and the Northern Territory will not be effective in granting immunity from the Principal Act to particular conduct unless at the time of the alleged contravention, the jurisdiction was a Party to the inter-governmental Competition Principles Agreement and Conduct Code Agreement.

There is one exception to this limitation, providing for a transitional period following a State or Territory ceasing to be a Party to the Competition Principles Agreement or the Conduct Code Agreement. The making of a contract, and an action under a contract, which was protected

under law in force immediately before the State or Territory ceased to be a Party, will continue to be protected for twelve months from when the State or Territory ceased to be a Party.

- (f) Exceptions made by States or Territories may be over-ridden by Commonwealth regulations made under the Principal Act, as is currently the case.

32. This clause should be considered with clause 33, which preserves for three years the operation of existing subsection 51(1) exceptions which do not comply with the new limitations.

33. Existing subsection 51(1) exceptions which already comply with the new limitations, will continue to be effective in excepting conduct from Part IV, unless the Commonwealth passes over-riding regulations. This is made clear by new subsection 51(1B) in combination with new subsection 51(1C).

Clause 16 - Power of Commission to grant authorisations

34. This clause amends section 88 of the Principal Act, which sets out the types of conduct that the Commission may authorise. Authorisation grants immunity from prohibitions in Part IV of the Principal Act (that is, the competitive conduct rules).

35. The amendments permit the Commission to authorise conduct which would otherwise contravene the prohibitions against price fixing agreements involving goods (section 45A with section 45), price-fixing covenants involving goods (section 45C with section 45B) and resale price maintenance (section 48). The Commission may authorise price-fixing for services under the present law.

Clause 17 - Determination of applications for authorisations

36. This clause amends section 90 of the Principal Act, which sets out the circumstances in which the Commission may grant an authorisation for particular conduct. It inserts new subparagraph 90(8)(a)(iv), to provide the test to be used by the Commission in determining applications for authorisation of resale price maintenance. This amendment is consequential upon the amendments made by clause 16. The new provision provides that the Commission may authorise proposed resale price maintenance if satisfied the conduct would result, or would be likely to result, in such a benefit to the public that the authorisation should be made. The clause makes other amendments to section 90 which are consequential upon this amendment.

Clause 18 - Notification of exclusive dealing

37. This clause amends section 93 of the Principal Act to extend the notification provisions to the conduct described in subsections 47(6) and (7), and paragraphs 47(8)(c) and (9)(d) of the Principal Act. This conduct is generally referred to as 'third line forcing'. (Although those provisions also cover other forms of tying, for brevity, the explanatory memorandum will refer to the conduct as 'third line forcing'.)

38. Currently, third line forcing is prohibited, regardless of its effect on competition. Authorisation, but not notification, is available.

39. Third line forcing will remain a *per se* prohibition. However, notification will be permitted.

40. Where a corporation wishes to engage in third line forcing conduct it can give the Commission notice under subsection 93(1) of the Principal Act setting out particulars of the proposed conduct. While the notification is in force, the corporation can engage in the conduct set out in the notice (see new subsection 47(10A) inserted by paragraph 13(h) of the Bill).

41. In recognition of the separate treatment accorded to third line forcing, the Bill inserts special provisions into section 93 to deal with third line forcing notifications.

42. Unlike for other forms of exclusive dealing, the protection will not commence as soon as the corporation gives notice to the Commission. Rather, the corporation must wait for its notice to 'come into force' (see paragraphs 47 to 49). This ensures that conduct which is now illegal cannot be protected until after the Commission has had the opportunity to consider the proposed conduct.

43. Once the Commission considers the proposed conduct, if it is satisfied that the likely public benefit from the proposed conduct will not outweigh the likely public detriment, it can give the corporation a notice to that effect under new subsection 93(3A). The Commission's notice can be given before or after the corporation's notice comes into force.

44. Before, however, the Commission can give a notice under subsection 93(3A), it must follow the processes in section 93A. Under section 93A, the Commission must give the corporation a draft notice under subsection 93A(2) and allow the corporation the opportunity to respond before giving a notice under subsection 93(3A). Once those processes are complete, the Commission must decide whether or not to give notice under subsection 93(3A).

45. If the Commission gives notice under new subsection 93(3A), then the conduct will not be protected from the third line forcing prohibition or, if the conduct is already protected (because the corporation's notification has come into force), that protection will cease on the 31st day after the Commission gave notice (or at a later specified date).

46. New subsection 93(3B) provides that, where the Commission gives notice under subsection 93(3A), it must also give a written statement of reasons.

47. New subsections 93(7A) and (7B) explain when the corporation's notification comes into force.

48. Where the Commission does not issue a draft notice under subsection 93A(2) within a specified period of time after the corporation gave notice (referred to as the 'prescribed period'), the corporation's notification will come into force at the end of the prescribed period, unless the notice is withdrawn at an earlier time. The prescribed period will be specified in the regulations.

49. Where the Commission gives the corporation a draft notice under subsection 93A(2) within the prescribed period, the protection will only commence if, after completing the procedures in section 93A, the Commission decides not to give notice under subsection 93(3A). If instead, the Commission decides to give notice under subsection 93(3A), the corporation's notification will never come into force.

50. New subsection 93(7C) explains when the corporation's notice ceases to be in force.

51. The Commission can, at any time after the notification comes into force, give notice under subsection 93(3A) (even if it has previously decided to the contrary). Where the Commission gives

notice under subsection 93(3A) after the corporation's notice has come into force, the corporation's notification will continue in force until the 31st day after the Commission gives notice (or such later date as permitted by the Commission).

Clause 19 - Commission to afford opportunity for a conference before giving notice in relation to exclusive dealing

52. This clause makes amendments to section 93A which are consequential to the amendments to the notification provisions. These amendments, however, apply in relation to all forms of exclusive dealing.

53. Where the Commission gives a corporation a draft notice under subsection 93A(2) it must, following completion of the processes set out in section 93A, make a decision whether or not to give a notice under subsection 93(3) or (3A).

Clause 20 - Register of notifications

54. This clause makes amendments to section 95 which are consequential to the amendments to the notification provisions. Where the Commission gives the corporation notice under subsection 93(3A) which causes a corporation's notification to cease to be in force, the Commission can permit the corporation a period of grace in excess of 30 days before the corporation's notification ceases to be in force. Where the Commission grants such permission, details must be included on the public register.

Clause 21 - Insertion of new section (Resale price maintenance in relation to services)

55. Part VIII of the Principal Act defines the practice of resale price maintenance. This clause inserts a new section 96A into the Principal Act, which applies the Part to conduct involving services.

56. The new provision indicates that the Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods. The provision also indicates that the Part is to be read with appropriate modifications, including replacement of references to goods by references to services and replacement of references to the sale of goods by references to the re-supply of services.

57. As an example of the operation of this provision, consideration may be given to paragraph 96(3)(a). Paragraph 96(3)(a) currently provides that resale price maintenance includes:

'the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier.'

58. As a result of the modification, resale price maintenance would also include:

'the supplier making it known to a second person that the supplier will not supply services to the second person unless the second person agrees not to re-supply those services at a price less than a price specified by the supplier.'

59. Similar variations are to be made to the other provisions of the Part to give effect to the intention to create a prohibition against maintaining the price at which services are re-supplied.

Clause 22 - Application for review under subsection 93(3) or (3A)

60. This clause amends section 101A to permit a person dissatisfied with the Commission's determination to give a subsection 93(3A) notice to seek a review of that decision by the Tribunal.

Clause 23 - Functions and powers of Tribunal

61. This clause amends section 102 to instruct the Tribunal on how it should review Commission decisions to give a subsection 93(3A) notice.

62. The Tribunal must (and can only) set aside the notice where the person seeking review satisfies the Tribunal that the likely public benefit from the proposed third line forcing conduct will outweigh the likely public detriment.

63. Where the notice is set aside the Commission is deemed to have decided not to give the notice and not to have given the notice.

Clause 24 - Regulations as to certain matters

64. This clause amends section 104 of the Principal Act to make it clear that regulations can be made with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (personally or by means of a written report). This will permit the making of regulations which, for instance, enable the Tribunal to commission and receive experts' reports as evidence.

Clause 25 - Participants in proceedings before Tribunal

65. This clause amends section 109 of the Principal Act to entitle a person who was given a notice under subsection 93(3A) to be able to participate in the review proceedings.

Clause 26 - Insertion of new Part (The Competition Code)

66. This clause inserts new Part XIA into the Principal Act. The object of new Part XIA (as spelt out in new section 150B) is to facilitate application of the Competition Code text by the States and Territories participating in the national scheme.

67. The Competition Code text is a modified version of the competitive conduct rules of the Principal Act, (that is, Part IV and provisions which relate to Part IV). The modifications reflect the different constitutional basis that will underpin the State and Territory application laws. Whereas the prohibitions in Part IV of the Principal Act are expressed to apply to corporations, the prohibitions in the Competition Code are expressed to apply to persons.

Definitions

68. Key concepts relevant to this new Part are 'Competition Code', 'participating jurisdiction' and 'application law'. These are defined in new section 150A.

69. The definition of Competition Code refers to new section 150C which defines the text of the Competition Code. That text consists of:

- (a) the Schedule version of Part IV (ie the new Schedule to the Principal Act);
- (b) the remaining provisions of the Principal Act (except sections 2A, 5, 6 and 172) so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV; and
- (c) regulations that relate to any provision covered by paragraph (a) or (b)

as in force from time to time.

70. The reference in paragraph (b) to the remaining provisions of the Principal Act includes the interpretation provisions, and the provisions of Parts VI, VII, VIII, IX and XII.

71. The Schedule version of Part IV has been 'personalised' so that its provisions apply to all persons, including corporations. However, this process has been limited to Part IV. Accordingly, new subsection 150C(2) provides that the provisions referred to in paragraphs (b) and (c) are to be modified as necessary to fit in with the Schedule version of Part IV. For example, 'corporation' is to include persons who are not corporations.

72. The definition of 'Competition Code' in new section 150A has two meanings. It means the text described in section 150C or that text applying as a law of a participating jurisdiction, either with or without modifications. The appropriate meaning will depend on the context.

73. The term 'participating jurisdiction' (defined in new section 150A) means a participating State or Territory. Those terms are then defined to mean a State or Territory that:

- (a) is a Party to the Conduct Code Agreement; and
- (b) applies the Competition Code as a law of that jurisdiction under an application law.

74. A State or Territory law applying the Competition Code, and any regulation or legislative instrument made under that law, is referred to as an 'application law'. Application must be by way of reference to the Competition Code.

New Sections 150D (Federal Court may exercise jurisdiction under application laws), 150E (Exercise of jurisdiction under cross-vesting provisions) and 150F (Application laws may confer functions on Commonwealth authorities and officers)

75. New sections 150D and 150F facilitate the conferral of jurisdiction on Commonwealth bodies and officers by the State and Territory application laws. Section 150D covers the Federal Court and section 150F covers authorities of the Commonwealth (for example, the Commission, the Tribunal, and the Administrative Appeals Tribunal) and officers of the Commonwealth. The term 'officer' in relation to the Commonwealth is defined in new section 150A.

76. The Federal Court is to have exclusive jurisdiction conferred on it by State and Territory application laws, subject to the existing scheme for 'cross-vesting' of jurisdiction between Commonwealth and State and Territory courts.

New Section 150G (Application laws may operate concurrently with this Act)

77. This provides for the concurrent operation of application laws and the Principal Act. This provision is in the same terms as section 75 of the Principal Act. An application law will be capable of operating concurrently with the Principal Act unless it is directly inconsistent with a provision of the Principal Act.

New Section 150H (No doubling-up of liabilities)

78. This new section states that a person who has been punished for an offence under an application law cannot be punished for the like offence under the Principal Act. Likewise, a person who has been ordered to pay a pecuniary penalty under an application law, will not be liable to a pecuniary penalty under the Principal Act in respect of the same conduct. (Similarly State and Territory laws will provide the reverse protection for persons punished or subject to a pecuniary penalty under the Principal Act.)

New Section 150I (References in instruments to the Competition Code)

79. This new section means that, unless a contrary intention appears, instruments do not need to specifically refer to the Competition Code of each participating jurisdiction. For example, an authorisation could simply refer to the Principal Act and the Competition Code. This is intended to facilitate administration of the Commonwealth and State and Territory provisions.

New Section 150J (Authorisations etc. under this Act may relate also to Competition Code)

80. This new section means that it is not necessary to determine whether an authorisation, notification or any other thing, is given or done under the Principal Act or under the Competition Code. For example, an authorisation could refer to both the Principal Act and the Competition Code: it would not matter that the authorisation could only have been given under the Competition Code.

New Section 150K (Gazetted of jurisdictions that excessively modify the Code)

81. Each State and Territory participating in the co-operative scheme will, by executing the Conduct Code Agreement, agree to apply the text of the Competition Code to all persons within the legislative competence of its jurisdiction.

82. It is envisaged that, in applying the Competition Code, participating jurisdictions may need to make minor modifications to enable the Competition Code to fit in with the jurisprudence of that jurisdiction.

83. Where, however, the Commonwealth Minister is satisfied that the laws of a participating jurisdiction have made significant modifications to the Competition Code in its application to persons within the legislative competence of that jurisdiction, the Commonwealth Minister may publish a notice in the Commonwealth of Australia Gazette stating that he or she is so satisfied.

84. The Conduct Code Agreement provides that the Commonwealth Minister is to publish such a notice before the end of two months from the date on which that jurisdiction notifies the Commonwealth Minister of the modification.

85. While a section 150K notice is in force, the participating jurisdiction will not be a fully-participating jurisdiction.

86. The concept of 'fully-participating jurisdiction' is introduced to the Principal Act twelve months after the Bill receives the Royal Assent. From that date, if a State or Territory is not a fully-participating jurisdiction, it cannot participate in the appointment of members and associate members to the Commission and cannot except conduct under subsection 51(1) of the Principal Act (whether by new or existing legislation). For example, if a section 150K notice was published in respect of State 'A', a law of State 'A' which excepts conduct from Part IV of the Principal Act would, for the purposes of subsection 51(1) of the Principal Act, become ineffective twelve months after the section 150K notice is published.

87. New subsection 150K(2) enables the Minister to revoke the notice.

Clause 27 - Power to obtain information, documents and evidence

88. This clause amends section 155 of the Principal Act consequential upon amendments to the notification provisions. The amendment enables the Commission to use its information gathering powers in relation to a decision whether or not to issue a notice under new subsection 93(3A) of the Principal Act.

Clause 28 - Protection of members of Tribunal, counsel and witnesses

89. This clause amends subsection 158(2) of the Principal Act to ensure that legal practitioners assisting the Tribunal also receive the protection accorded to persons appearing before the Tribunal on behalf of other persons.

Clause 29 - Annual report by Commission

90. Under the Conduct Code Agreement, the Commonwealth, the States and the Territories agree to notify the Commission of laws which are enacted or made in reliance upon subsection 51(1) of the Principal Act or subsection 51(1) of the Competition Code.

91. New subsection 171(2) requires the Commission to publish in its annual report a cumulative list of all laws that it knows about that authorise things for the purposes of subsection 51(1) of the Principal Act or subsection 51(1) of the Competition Code.

Clause 30 - Regulations

92. The amendment made by this clause removes the ability for regulations to be made under subsection 172(2) exempting conduct or contracts from provisions of Part IV of the Principal Act.

Clause 31 - Addition of Schedule

93. This clause inserts the Schedule version of Part IV as a Schedule to the Principal Act.

Clause 32 - Other amendments

94. This clause provides that the Australian Postal Corporation Act is amended in accordance with Schedule 2. The amendments up-date the subsection 51(1) exception which currently exists in that Act by inserting provisions which comply with the new transparency rules for exceptions.

95. This clause also provides that the *Jurisdiction of Courts (Cross-vesting) Act 1987* is amended in accordance with Schedule 2. The amendments ensure that jurisdiction conferred on the Federal Court by State and Territory application laws will be treated in the same manner as jurisdiction conferred on the Federal Court by the Principal Act.

Division 2 - Transitional rules

Clause 33 - Transitional rule for changes to section 51 exceptions

96. Laws which currently except acts or things from provisions of Part IV of the Principal Act by subsection 51(1) of that Act may not comply with the requirements of new subsection 51(1C).

97. This clause preserves the effect of those laws for a transitional period of three years from the date on which this Bill receives the Royal Assent. It also caters for the possibility that the Commonwealth, a State or a Territory may wish to reform those laws.

98. A two tier test is applied in determining whether clause 33 preserves a particular exception during the three year transitional period. A particular thing will be disregarded for the purposes of a provision of Part IV if:

- (a) it would have been disregarded if section 51 had not been amended by clause 15 of the Bill (paragraph (2)(a)); and
- (b) it would have been disregarded if it had happened immediately before the amendment to section 51 made by clause 15 of this Bill (paragraph (2)(b)).

99. This clause commences at the same time as the amendments to section 51 made by clause 15 of the Bill.

100. To understand the operation of this clause, consider the example of an existing State law which specifically authorises a class of businesses to engage in exclusive dealing, and which does not expressly refer to the Trade Practices Act (ie it does not comply with the requirements of new subsection 51(1C)).

101. If the State does not amend the law, those businesses will continue to be able to engage in exclusive dealing for three years, but after three years they will lose the protection from Part IV of the Principal Act.

- (a) Exclusive dealing by those businesses would have been disregarded under old section 51 (ie paragraph (2)(a) is satisfied) because the conduct is specifically authorised by a State law.
- (b) Exclusive dealing by those businesses would have been disregarded if it had happened immediately before section 51 was amended (ie paragraph (2)(b) is satisfied), for the same reason.

102. Alternatively, during the three years, the State might amend that law, to restrict the class of businesses which are specifically authorised to engage in exclusive dealing, or the State might repeal the law. In such a case it would be inappropriate to preserve the exception for businesses that are no longer within the scope of the State law. The terms of paragraph (2)(a) ensure that such businesses do not enjoy the protection of the exception: exclusive dealing by businesses that are no longer within the scope of the State law would not have been disregarded under the old section 51 because the conduct is no longer specifically authorised by a State law.

103. Finally, during the three years, the State might amend the law to enlarge the class of businesses which are specifically authorised to engage in exclusive dealing. In such a case, it would be inappropriate to extend protection to persons who were not within the scope of the original State law. The terms of paragraph (2)(b) ensure that those persons do not enjoy the protection of the exception: exclusive dealing by businesses that were not in the originally protected class of businesses would not have been disregarded if it had happened immediately before section 51 was amended, because at that time the State exception only applied to the narrower class of businesses. Of course, businesses that were in the originally protected class of businesses will continue to be protected for the three year period.

Clause 34 - Existing contracts not affected by amendments

104. Along with clause 89, this provision 'grandfathers' contracts entered into before 19 August 1994 which are outside the current coverage of the Principal Act other than by reason of a law which specifically authorises the contract under subsection 51(1) of the Principal Act. (Conduct protected by laws made for the purposes of subsection 51(1) which do not comply with the new rules for subsection 51(1) exceptions are dealt with under clause 33.)

105. If the making of, and giving effect to, the contract did not contravene the Principal Act before the commencement of Division 1 of this Part (other than by reason of a subsection 51(1) exception), the amendments made by this Bill will not make the contract unenforceable, and will not prevent the parties giving effect to the contract.

106. Clause 89 covers contracts, the making of which did not contravene the Principal Act because, when they were made, the Principal Act did not cover contracts entered into by the Crown in right of the States or Territories, or by State or Territory bodies with shield of the Crown protection. Clause 34 covers contracts, the making of which did not contravene the Principal Act because, when they were made, the Principal Act did not deal with the re-supply of services.

107. Subclause (2) is directed to the prohibitions in the Principal Act which prevent parties to a contract giving effect to certain contractual terms; for example, the prohibitions in paragraph 45(2)(b), and sections 47 and 48.

108. Subclause (4) is directed to the provisions of Part IV of the Principal Act which make contractual provisions unenforceable; for example, subsection 45(1).

109. Subclause (3) caters for simple variations to existing contracts; that is, variations which do not amount to a rescission of the existing contract followed by the making of a new contract. Such variations are permitted, but conduct is only grandfathered under the varied contract if it was grandfathered under the original contract; that is, the anti-competitive scope of contracts cannot be extended by a variation to the contract.

110. It is expected that State and Territory application legislation will also contain provisions grandfathering contracts entered into before 19 August 1994 which are outside the current coverage of the Principal Act.

PART 3 - AMENDMENTS COMMENCING AT THE SECOND COMMENCEMENT TIME

Division 1 - Amendments

Clause 35 - Application of Act to Commonwealth and Commonwealth authorities

111. Subsection 2A(1) of the Principal Act provides that the Principal Act binds the Crown in right of the Commonwealth in so far as it carries on a business. New section 44E inserted by clause 59 provides, among other things, that the access provisions in new Part IIIA bind the Crown in right of the Commonwealth, with no requirement that the Crown be carrying on a business. This clause amends subsection 2A(1) to ensure that it is subject to new section 44E.

Clause 36 - Interpretation

112. This clause amends section 4 of the Principal Act by substituting the names of the new institutions; that is, the Australian Competition and Consumer Commission and the Australian Competition Tribunal.

113. This clause up-dates references in section 4 to the Chairman by substituting 'Chairperson'.

114. This clause also inserts definitions for the National Competition Council, Councillor and Council President.

Clause 37 - Extended application of Parts IV, IVA and V

115. Clause 37 amends section 6 of the Principal Act to provide that the provisions of section 6 (which extend the application of the Principal Act) do not apply to new Part IIIA. The application of Part IIIA is set out within that Part.

Clause 38 - Heading to Part II

116. This clause omits the heading of Part II of the Principal Act, substituting 'PART II - THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'.

Clause 39 - Establishment of Commission

117. This clause omits subsection 6A(1) of the Principal Act (which establishes the Trade Practices Commission), substituting new subsection 6A(1) which establishes the Australian Competition and Consumer Commission. This amendment abolishes the existing Trade Practices Commission.

Clause 40 - Constitution of Commission

118. This clause up-dates the reference to Chairman by substituting 'Chairperson'.

119. This clause also amends the appointment provisions of section 7:

- (a) by inserting a consumer protection qualification and requiring at least one of the members of the Commission to be a person who has knowledge of, or experience in, consumer protection (new paragraph 7(3)(a) and new subsection 7(4)); and
- (b) by requiring the Governor-General, before making the appointment, to be satisfied that a majority of the States and Territories that are Parties to the Conduct Code Agreement support the appointment (new paragraph 7(3)(b)). This means that appointments require the approval of both the Commonwealth and the requisite number of other jurisdictions.

120. New paragraph 7(3)(b) is only transitional; it will again be amended 12 months after the Bill receives the Royal Assent to require the Governor-General to be satisfied that a majority of the fully-participating jurisdictions support the appointment (see clause 83).

121. Clause 4 of the Conduct Code Agreement supplements this paragraph. It provides that the Commonwealth will invite the fully-participating jurisdictions (as defined in that Agreement) to suggest persons for appointment. It also provides that before an appointment is made, the Commonwealth will send to those jurisdictions written notice of persons whom it desires to put forward to the Governor-General for appointment as Chairperson or member of the Commission. Those jurisdictions will then have 35 days (from the date on which the notice was sent) to reply. If a jurisdiction does not reply within that time, it will be taken to have supported the appointment.

Clause 41 - Terms and conditions of appointment

122. This clause amends subsection 8(1) by reducing the maximum appointment term from seven years to five years, which is in accordance with current practice. This clause also omits subsection 8(2), removing the 65 years age barrier for members.

Clause 42 - Associate members

123. This clause amends section 8A by inserting new subsection 8A(1A) which states that the Commonwealth Minister cannot appoint a person as an associate member unless satisfied that a majority of the States and Territories that are Parties to the Conduct Code Agreement support the appointment.

124. Like new paragraph 7(3)(b), new subsection 8A(1A) is only transitional. After 12 months from when the Bill receives the Royal Assent, the Commonwealth Minister will have to be satisfied that a majority of the fully-participating jurisdictions support the appointment (see clause 84).

125. Clause 4 of the Conduct Code Agreement supplements this new subsection. It provides that the Commonwealth will invite the fully-participating jurisdictions (as defined in that Agreement) to suggest persons for appointment. It also provides that before an appointment is made, the Commonwealth will send to those jurisdictions written notice of persons whom it desires to put forward to the Commonwealth Minister for appointment as an associate member of the Commission. Those jurisdictions will then have 35 days (from the date on which the notice was sent) to reply. If a jurisdiction does not reply within that time, it will be taken to have supported the appointment.

Clause 43 - Deputy Chairperson

126. This clause up-dates the reference to Chairman by substituting 'Chairperson'.

127. This clause also inserts new subsection 10(1A) which provides that the Governor-General, before appointing a Deputy Chairperson, must be satisfied that a majority of the Parties to the Conduct Code Agreement support the appointment. Like new paragraph 7(3)(b), an appointment must be supported by the Commonwealth and the requisite number of other jurisdictions.

128. Also, like new paragraph 7(3)(b) and new subsection 8A(1A), new subsection 10(1A) is only transitional. After 12 months from when the Bill receives the Royal Assent, the Governor-General must be satisfied that a majority of the fully-participating jurisdictions support the appointment (see clause 85).

129. Clause 4 of the Conduct Code Agreement supplements this paragraph in the manner outlined under the heading 'Clause 40'.

Clause 44 - Acting Chairperson

130. This clause up-dates the reference to Chairman by substituting 'Chairperson'.

Clause 45 - Termination of appointment of members of the Commission

131. This corrects an incorrect subsection reference made by the *Industrial Relations Legislation Amendment Act 1991*. That Act sought to amend paragraph 13(2)(d) of the Principal Act, but instead referred to a non-existent provision, paragraph 13(1)(d).

Clauses 46, 47, 48 and 49 - Arrangement of business, Disclosure of interests by members, Meetings of Commission, and Chairperson may direct Commission to sit in Divisions

132. These clauses up-date the reference to Chairman by substituting 'Chairperson'.

Clause 50 - Insertion of new section (Part XI of Audit Act not to apply to Commission)

133. This clause inserts new section 20 which provides that Part XI of the *Audit Act 1901* does not apply to the Commission. The reason for this provision is that the Commission operates as part of the Commonwealth public account.

Clause 51 - Staff of Commission

134. This clause up-dates the reference to Chairman by substituting 'Chairperson'.

135. This clause also amends the reference to Public Service Act 1922 by omitting '-1973'.

Clause 52 - Insertion of new section (Consultants)

136. This clause inserts new section 27A which authorises the Commission, on behalf of the Commonwealth, to engage consultants.

Clause 53 - Functions of Commission in relation to dissemination of information, law reform and research

137. The Commission will perform functions conferred by the Principal Act as well as other pieces of legislation, including the Prices Surveillance Act and the application laws. Accordingly, this clause omits the words 'by this Act' from subsection 28(1).

138. This clause also inserts new paragraph 28(1)(ca) which permits the Commission to conduct research and undertake studies on matters that are referred to the Commission by the Council, providing those matters relate to the Commission's other functions.

Clause 54 - Commission to comply with directions of Minister and requirements of the Parliament

139. The purpose of this clause is to remove the power of the Commonwealth Minister to give directions under section 29 in relation to competition matters. The reason for this is to give equality of treatment between Commonwealth, State and Territory Ministers once the reach of the Principal Act is extended.

Clause 55 - Insertion of new Part

140. This clause inserts new Part IIA which provides for the National Competition Council.

New Section 29A (Establishment of Council)

141. New section 29A establishes the National Competition Council.

New Section 29B (Functions and powers of Council)

142. New section 29B provides that the functions of the Council include:

- (a) carrying out research into matters referred to the Council by the Commonwealth Minister;
- (b) providing advice on matters referred to the Council by the Commonwealth Minister; and
- (c) functions conferred on it by a law of a State or Territory.

143. Other provisions of the Principal Act and other Commonwealth legislation will also confer functions on the Council; for example, the access provisions of the Principal Act and provisions of the Prices Surveillance Act.

144. New section 29B should be considered along with new section 29J and clause 10 of the Competition Principles Agreement which provide that:

- (a) each Party to the Competition Principles Agreement will refer proposals for the Council to undertake work (other than work relating to a function under Part IIIA of the Principal Act or under the Prices Surveillance Act) to the Parties for possible inclusion in the work program;
- (b) the Parties to that Agreement will determine the work program of the Council;

(c) the Commonwealth Minister will only refer matters to the Council under new subsection 29B(1) in accordance with the work program; and

(d) the Parties to that Agreement will only put forward to their legislatures legislation conferring additional functions on the Council where those functions form part of the work program.

145. New subsection 29J(1) provides that the Council President may give directions as to the arrangement of the Council's business in order to perform its functions.

New Section 29C (Membership of Council)

146. New subsections 29C(1) and (2) provide that the Council consists of the Council President and up to four other Councillors, each of whom can be appointed for a term of up to five years. The Governor-General makes the appointment.

147. New paragraph 29C(3)(a) sets out the qualifications for appointment. The Governor-General must be satisfied that the appointee qualifies for appointment because of his or her knowledge of, or experience in, industry, commerce, economics, law, consumer protection or public administration.

148. New paragraph 29C(3)(b) provides that the Governor-General must not make an appointment unless satisfied that a majority of the States and Territories that are Parties to the Competition Principles Agreement support the appointment. That is, all appointments will need to be approved by the Commonwealth and the requisite number of those States and Territories.

149. Clause 9 of the Competition Principles Agreement supplements this paragraph. It provides that the Commonwealth will invite the Parties to that Agreement to suggest persons for appointment. Before an appointment is made, the Commonwealth will send to those Parties written notice of persons whom it desires to put forward to the Governor-General for appointment as Council President or Councillor of the Council. Those Parties will then have 35 days (from the date on which the notice was sent) to reply. If a Party does not reply within that time, it will be taken to have supported the appointment.

New Section 29D (Term and conditions of office)

150. This new section provides for the appointment of Councillors, including the Council President, on a full-time or part-time basis. The Governor-General may determine terms and conditions on which a Councillor holds office.

New Section 29E (Acting Council President)

151. This new section provides for the appointment of a Councillor as an acting Council President.

New Section 29F (Remuneration of Councillors)

152. This new section provides that Councillors are to be paid the remuneration determined by the Remuneration Tribunal. In the absence of a determination, Councillors will be paid such remuneration as is prescribed. This new section also provides that Councillors are to be paid such allowances as are prescribed.

New Section 29G (Leave of Absence)

153. New subsection 29G(1) states that full-time Councillors have such recreation leave entitlements as are determined by the Remuneration Tribunal (subject to section 87E of the Public Service Act). New subsection 29G(2) permits the Commonwealth Minister to grant a full-time Councillor leave of absence.

New Section 29H (Termination of appointment of Councillors)

154. New subsection 29H(1) provides that the Governor-General may terminate the appointment of a Councillor for misbehaviour or physical or mental incapacity. If, however, one of the events specified in new subsection 29H(2) happens, the Governor-General must terminate the Councillor's appointment.

New Section 29I (Resignation of Councillors)

155. This new section provides that a Councillor may resign by giving the Governor-General a signed resignation notice.

New Section 29J (Arrangement of Council business)

156. This new section has been explained above along with new section 29B.

New Section 29K (Disclosure of interests by Councillors)

157. This new section provides for the disclosure of pecuniary interests by Councillors.

New Section 29L (Council meetings)

158. New section 29L provides for the holding of Council meetings. The quorum is 3 Councillors. Questions are decided on a majority of votes of those present and voting. If the votes are equally divided, the Council President has the casting vote.

New Sections 29M (Staff to help Council) and 29N (Consultants)

159. These new sections provide for the staff of the Council and for the engagement of consultants. Staff are appointed or employed under the Public Service Act and consultants are engaged under the Principal Act.

New Section 29O (Annual report)

160. The Council will be required to present a report on its operations to the Commonwealth Minister within 60 days after the end of each financial year.

Clause 56 - Heading to Part III

161. This clause changes the heading to reflect the Tribunal's name change.

Clause 57 - Constitution of Tribunal

162. This clause changes the name of the Trade Practices Tribunal to the Australian Competition Tribunal.

Clause 58 - Staff of Tribunal

163. This clause amends the reference to the Public Service Act by omitting '-1973'.

Clause 59 - Insertion of new Part

164. This clause inserts a new Part IIIA into the Principal Act. The new Part contains the provisions relating to the national access regime.

165. This regime establishes two mechanisms for the provision of third party access, namely:

- (a) a process for declaration of services which provides a basis for negotiation of access. This is backed up by compulsory arbitration where the parties cannot agree on an aspect of access; and
- (b) a procedure whereby service providers can offer undertakings which set out the terms on which a provider will grant access to third parties.

Division 1 - Preliminary

166. This Division deals with various definitional and preliminary matters.

New Section 44B (Definitions)

167. Definitions relevant to the national access regime are given in this section.

168. An important definition is that for 'service'. It specifies that 'service' means a service provided by means of a facility and includes such things as the use of a road or railway line, the handling or transporting of goods and people, and communications services. The definition of 'service' does not, however, include the supply of goods, the use of intellectual property, or the use of a production process except to the extent that such a service is an integral but subsidiary part of the service.

169. The term 'constitutional trade or commerce' means trade or commerce among the States, or between two Territories, a State and a Territory, or Australia and places outside Australia.

170. The 'provider' of the service is the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service.

New Section 44C (How this Part applies to partnerships and joint ventures)

171. In cases where the provider is a partnership or joint venture this section outlines how the access regime applies to participants in the partnership or joint venture.

New Section 44D (Meaning of "designated Minister")

172. Where the provider is a State or Territory body, the designated Minister who decides whether to declare the service, or to revoke an existing declaration of the service, is the responsible Minister of the State or Territory, providing the State or Territory is a Party to the Competition Principles Agreement. In all other cases the designated Minister responsible for declaring a service, or revoking a declaration, is the Commonwealth Minister.

New Section 44E (This Part binds the Crown)

173. This section provides that the access provisions bind the Crown in right of the Commonwealth, the States, the Australian Capital Territory and the Northern Territory. Unlike section 2A and new section 2B of the Principal Act, there is no requirement that the Crown be carrying on a business.

174. The section also provides that the access provisions do not make the Crown liable to be prosecuted for an offence. This protection does not extend to Commonwealth, State and Territory authorities.

Division 2 - Declared services

175. Where a provider and a third party cannot agree on access to a service, either of them can seek declaration of the service. Once a service has been declared, if the provider and third party still cannot agree on access, the matter can then be arbitrated by the Commission (where the provider and third party do not agree on private arbitration).

176. The first step is to seek declaration. This Division is concerned with the declaration process.

Subdivision A - Recommendation by the Council

New Section 44F (Person may request recommendation)

177. Any person (including the designated Minister) may make a written application to the Council seeking a recommendation that a service be declared. Where the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if he or she thinks that the application was not made in good faith.

178. It is only in response to an application from a person, or the designated Minister, that the Council can recommend the declaration of a service. The Council cannot, at its own initiative, recommend declaration of a service.

179. Where the applicant is not the provider, the Council must tell the provider that the Council has received the application.

180. In considering the application the Council must consider the matters set out in section 44G before recommending that the service be declared. If the Council is satisfied of all of the matters set out in subsection 44G(2), it has a discretion whether to recommend that the service be declared. In exercising that discretion, the Council must consider whether it would be economical for anyone to develop a facility that could provide part of the service. If the Council decides that it would be economical for someone to develop a facility that could provide part of the service, it could decline

to recommend declaration of the service as defined by the applicant. The applicant could then seek declaration of the service redefined to exclude that part that is economical for someone to provide.

New Section 44G (Limits on the Council recommending declaration of a service)

181. The Council cannot recommend that the service be declared if the service is the subject of an operative access undertaking. Also, there are a number of matters *all* of which the Council must be satisfied on before it can recommend that the service be declared. These are:

- (a) that access to the service would promote competition in a market (other than the market for the service);
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the facility is of national significance having regard to its size, the importance of the facility to constitutional trade and commerce, or its importance to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime; and
- (f) that access to the service would not be contrary to the public interest.

182. In determining whether access would promote competition, the Council may consider Australian and international markets. For example, access may facilitate the entry of Australian businesses into overseas markets.

183. In determining whether it would be economical for anyone to develop another facility to provide the service the Council may be satisfied that, while another facility could be developed to provide part of the service, it is not economical to develop another facility to provide the full service. In such a case, the Council would be satisfied as required by paragraph 44G(2)(b) but may, in the exercise of its discretion, decide not to recommend declaration of the service. For this reason, subsection 44F(4) requires the Council to consider whether anyone could economically develop another facility to provide part of the service.

184. Where the access regime applying to a facility is established by a State or Territory that is a Party to the Competition Principles Agreement, the Council must apply the guiding principles for access regimes set out in that Agreement in considering whether that regime is effective or not. In other cases the Council is free to determine how it assesses the effectiveness of an access regime - it might, for example, consider the outcomes produced by that regime.

185. An effective access regime could be a regime established under other Commonwealth legislation; for example, the access regime for the Moomba-Sydney gas pipeline.

Subdivision B - Declaration by the designated Minister

New Section 44H (Designated Minister may declare a service)

186. The Council will provide its recommendation to the designated Minister. When the designated Minister receives a recommendation from the Council he or she has 60 days in which to decide either to declare or not to declare the service in question.

187. The designated Minister cannot declare a service if the service is the subject of an operative access undertaking. Further, the designated Minister cannot declare a service unless satisfied of *all* the following matters:

- (a) that access to the service would promote competition in a market (other than the market for the service);
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
- (c) that the facility is of national significance having regard to its size, the importance of the facility to constitutional trade and commerce, or its importance to the national economy;
- (d) that access to the service can be provided without undue risk to human health or safety;
- (e) that access to the service is not already the subject of an effective access regime; and
- (f) that access to the service would not be contrary to the public interest.

188. Once the designated Minister is satisfied of all these matters, he or she has a discretion whether or not to declare the service. As is the case for the Council, the Minister must consider whether it would be economical for anyone to develop another facility to provide part of the service.

189. A declaration must specify its expiry date.

190. If the designated Minister does not publish a decision within 60 days he or she is taken as having decided not to declare the service.

191. The designated Minister must publish his or her decision and provide the reasons for the decision (including a copy of the Council's recommendation) to the provider and the applicant (where the applicant is not the provider).

New Section 44I (Duration and effect of declaration)

192. If there is a decision in favour of declaration, the declaration begins to operate at the time specified in the declaration, however, this must be at least 21 days after the declaration is published. If there is an application to the Tribunal for a review of the decision it must be made within 21 days after the decision is published and the declaration does not begin to operate until the Tribunal completes its review.

193. A declaration continues in operation until its specified expiry date or until it is revoked. The expiry or revocation of a declaration does not affect the arbitration of any access dispute in relation

to the declaration that is already under way or the operation of any determination already made in the arbitration of an access dispute.

New Section 44J (Revocation of declaration)

194. The Council may recommend to the designated Minister that a declaration be revoked if it believes that the designated Minister would no longer be satisfied on one or more of the matters specified in subsection 44H(4). On receiving a revocation recommendation the designated Minister must either decide to revoke or not to revoke the declaration. The designated Minister must publish the decision and, in the case of a decision not to revoke, give the provider reasons for that decision. This enables the provider to decide whether to seek a review of that decision under section 44L.

195. The designated Minister cannot revoke a declaration without receiving a recommendation to that effect from the Council.

New Section 44K (Review of declaration)

196. If the designated Minister decides to declare a service the provider may apply in writing within 21 days to the Tribunal for a review of the decision. Alternatively, if the designated Minister decides not to declare a service, an application to the Tribunal for a review may be made by the person who applied for the declaration recommendation. This could be the provider or a third party seeking access to the service.

197. A review by the Tribunal is a reconsideration of the matter and a declaration, or varied declaration, made by the Tribunal is to be taken as a declaration by the designated Minister.

198. If requested, the Council must assist the Tribunal with the review.

New Section 44L (Review of decision not to revoke a declaration)

199. If the designated Minister decides not to revoke a declaration the provider may apply in writing to the Tribunal within 21 days of publication of the decision for a review of the decision. Any review by the Tribunal is a reconsideration of the matter and for the purposes of the review the Tribunal has the same powers as the designated Minister.

200. There is no right of review of a decision by the designated Minister to revoke a declaration of a service since a person disagreeing with such a decision could apply to the Council for the service to be (re)declared. This then gives rise to a right of review.

201. If requested, the Council must assist the Tribunal with the review.

Subdivision C - Miscellaneous

New section 44M (Recommendation for a Ministerial decision on effectiveness of access regime)

202. Under new section 44M, where a State or Territory that is a Party to the Competition Principles Agreement has established a regime for access to a service, the responsible Minister of that State or Territory can ask the Council to consider whether the regime is effective. (The responsible Minister is the Premier - in the case of a State - and the Chief Minister - in the case of a Territory.)

203. In determining whether the regime is effective, the Council must apply the guiding principles set out in the Competition Principles Agreement.

204. Once the Council has applied those principles, it must recommend to the Commonwealth Minister whether the Commonwealth Minister should decide that the regime for access to the service is effective and the period for which that decision should be in force.

New section 44N (Ministerial decision on effectiveness of access regime)

205. New section 44N provides that on receiving the Council's recommendation, the Commonwealth Minister must decide, by applying the principles in the Competition Principles Agreement, whether or not the regime for access to the service is effective. New subsection 44N(3) requires the decision to specify the period for which it is in force.

206. The Commonwealth Minister must publish his or her decision and give reasons for the decision to the responsible Minister who applied to the Council for the decision.

207. The consequence of a decision by the Commonwealth Minister that a State or Territory regime is effective is set out in new subsections 44G(4) and 44H(6). These subsections provide that where the Commonwealth Minister decides that the regime applying to a service is effective, the Council and the designated Minister are bound by that decision while it is in force (ie the designated Minister cannot declare the service) unless the Council or the designated Minister believe that since the Commonwealth Minister's decision was published there have been:

- (a) substantial modifications of the regime; or
- (b) substantial modifications of the principles set out in the Competition Principles Agreement.

New section 44O (Review of Ministerial decision on effectiveness of access regime)

208. New section 44O provides that the Commonwealth Minister's decision is reviewable by the Tribunal upon application of the responsible Minister in writing within 21 days after publication of the Commonwealth Minister's decision. The review is a reconsideration of the matter, with the Tribunal having the same powers as the Commonwealth Minister.

New section 44P (State or Territory ceasing to be a party to Competition Principles Agreement)

209. New section 44P provides that if a State or Territory ceases to be a Party to the Competition Principles Agreement, a decision by the Commonwealth Minister that an access regime of that State or Territory is effective ceases to be in force. And, if at that time, the Council, the Commonwealth Minister or the Tribunal is considering an application by the responsible Minister of that State or

Territory for a decision by the Commonwealth Minister that a regime is effective, the Council, Commonwealth Minister or Tribunal (as the case may be) need not take any further action in relation to the application.

New section 44Q (Register of decisions and declarations)

210. Decisions by the Commonwealth Minister that an access regime is effective must be placed on a public register which is also to contain access declarations.

Division 3 - Access to declared services

211. The declaration of a service for access does not mean that there is an automatic right of access to the service for third parties. Rather, there is a right for third parties to negotiate terms of access in good faith. In some cases access to a declared service for a third party (and, there could be more than one third party that seeks access over time) will not be possible or practical for one reason or another. In other cases the third party may decide that the terms of access are unacceptable in which case they do not have to proceed.

212. Where the parties cannot agree on access (or the terms of access), they may decide to refer the dispute to private arbitration.

213. Where, however, the parties cannot agree on access (or the terms of access) and do not agree to refer the dispute to private arbitration, an access dispute may be notified to the Commission. The Commission can then determine whether access should be provided and, if so, the appropriate terms for access. This Division deals with the arbitration process.

Subdivision A - Scope of Division

New Section 44R (Constitutional limits on operation of this Division)

214. This section specifies the Constitutional basis for this Division. For this Division to apply to access to a service either the provider or the third party seeking access must be a corporation, or the access must be in the course of, or for the purposes of, constitutional trade or commerce.

Subdivision B - Notification of access disputes

New Section 44S (Notification of access disputes)

215. If a third party and provider are unable to agree on any aspect of access to a declared service, either the provider or the third party may notify the Commission in writing that there is an access dispute.

216. The dispute may be in relation to the initial terms and conditions for access or it may be in relation to an existing determination: where the parties cannot agree to the variation of a determination, one of the parties can notify the Commission of an access dispute.

217. The Commission, once it has received a notification of an access dispute, must give notice in writing of the dispute to the provider, the third party and any other person the Commission thinks might want to become a party to the arbitration.

New Section 44T (Withdrawal of notifications)

218. The party who notified the dispute may terminate the arbitration by withdrawing the notification any time before the Commission makes its determination on the dispute. Further, where the provider notified the dispute, the third party can terminate the arbitration by withdrawing the provider's notification any time after the Commission issues a draft determination, but before the Commission makes a final determination. For example, if the access price set out in the draft determination is not acceptable to the third party, the third party could terminate the arbitration before the Commission makes a determination requiring the third party to pay those charges.

219. Subsection (2) provides that where the dispute is about the variation of a determination, only the party who notified the dispute can withdraw the notification.

Subdivision C - Arbitration of access disputes

New Section 44U (Parties to the arbitration)

220. The parties to the arbitration of an access dispute are the provider, the third party seeking access, and any other person who applies in writing to be made a party and who is accepted by the Commission as having a sufficient interest.

New Section 44V (Determination by Commission)

221. Unless the Commission terminates the arbitration of an access dispute for one of the reasons set out in section 44Y it must, in writing, make both a draft determination and a determination in relation to the dispute. The determination does not have to require the provider to give access.

222. A determination by the Commission may deal with any matter relating to access by the third party to a declared service and not necessarily just the particular matter that was the subject of dispute. This is because the making of a determination in relation to a particular matter in dispute (for example, the price of access) may involve varying other matters on which the parties to the dispute had otherwise agreed (for example, the quantity of the declared service to be provided).

223. The Commission must give the parties reasons for its determination.

New Section 44W (Restrictions on access determinations)

224. This section specifies a number of constraints on the Commission in making a determination in relation to an access dispute. If a determination by the Commission breaches any of the constraints it is of no effect.

225. The constraints basically relate to existing rights and the ownership of the facility used to provide the declared service. The Commission must not make a determination that would have any of the following effects:

- (a) preventing an existing user (which includes the provider) from being able to obtain its reasonably anticipated requirements for the declared service at the time the dispute was notified; or

- (b) preventing a person from using the service by the exercise of a right under a contract or determination that was in force at the time the dispute was notified (referred to as a 'pre-notification right') in so far as the person will actually use the service; or
- (c) depriving a person of a protected contractual right under a contract that was in force at the beginning of 30 March 1995; or
- (d) resulting in a third party becoming the owner, or part-owner, of the facility or extensions to it without the consent of the provider; or
- (e) requiring the provider to bear some or all of the costs of extending the facility to meet the access requirements of the third party.

226. In summary these provisions give protection to:

- (a) reasonably anticipated usage of a declared service as at the time a dispute was notified - this reasonably anticipated usage, including by the provider, could be greater or less than actual usage at the time the dispute was notified;
- (b) future use of the service by the exercise of rights that existed at the time the dispute was notified in so far as the holder of those rights will actually use the service; and
- (c) all contractual rights relating to access to a declared service, either of the provider or of the third party, that existed at the beginning of 30 March 1995.

227. In addition, these provisions guard against the provider being required, against his or her wishes, to pay for extensions to the facility and they also guard against a third party becoming an owner, or part owner, of a facility against the wishes of the provider.

228. Where, for example, a third party seeking access to the declared service has had to pay the cost of an extension to the facility, or has had to pay fair compensation to another party for the loss of a right, this should be taken into account by the Commission in determining (under section 44V) the price of access by the third party to the declared service.

229. Without infringing paragraphs (1)(b) and (c) the Commission may make a determination which deprives a person of a pre-notification right (which is not a protected contractual right) in so far as the person will not actually need to exercise the right to meet his or her actual requirements.

230. Where the determination deprives a person of such a right, the third party must pay that person (referred to as 'the second person') an amount of fair compensation as determined by the Commission. In addition, the third party must undertake to reimburse the provider and the Commonwealth for any compensation that the provider or the Commonwealth pays the second person under an agreement or by way of court determined compensation for the loss of that right. This could occur if the provider or the Commonwealth agreed, or a court determined that, the fair compensation determined by the Commission was not adequate to compensate the second person for the loss of that right.

231. Subsection (2) provides that where there is a dispute between the provider and third party about an earlier determination between them, the Commission can over-ride the rights and obligations of the provider and the third party under the earlier determination.

New Section 44X (Matters that the Commission must take into account)

232. The Commission is required to take into account in making a determination the following matters:

- (a) the legitimate business interests of the provider;
- (b) the public interest;
- (c) the interests of all persons who have existing rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the value to the provider of extensions to the facility paid for by someone else;
- (f) the requirements necessary for the safe and reliable operation of the facility; and
- (g) the economically efficient operation of the facility.

233. The references here to the 'legitimate' business interests of the provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

234. The section also provides that the Commission, in making a determination, may take into account any other matters that it thinks are relevant in addition to those it must take into account.

New Section 44Y (Commission may terminate arbitration in certain cases)

235. The Commission may terminate an arbitration of an access dispute at any time if it thinks the dispute is lacking in substance, misconceived or vexatious or that access to the service should continue to be governed by an existing contract or determination between the provider and the third party.

236. In addition, and importantly, the Commission may terminate the arbitration if it feels the party who notified the dispute has not engaged in negotiations in good faith.

Subdivision D - Procedure in arbitrations

237. This subdivision deals with the procedure for Commission arbitrations.

New Section 44Z (Constitution of Commission for conduct of arbitration)

238. An arbitration is to be heard before at least two Commission members (unless one of the events in subsection 44ZB(1) occurs).

New Section 44ZA (Member of the Commission presiding at an arbitration)

239. Where the Commission hearing the arbitration includes the Chairperson, the Chairperson presides at the arbitration. In other cases, the Chairperson must nominate a member of the Commission to preside at the arbitration.

New Section 44ZB (Reconstitution of Commission)

240. Where a Commission member hearing an arbitration ceases to be a member or is unavailable for the arbitration, the Chairperson can direct that the arbitration continue in the absence of that member, or that another member join the hearing.

New Section 44ZC (Determination of questions)

241. Questions before the Commission are to be decided by a majority of the members. Where they are evenly divided, the decision is to be in accordance with the opinion of the presiding member.

New Section 44ZD (Hearing to be in private)

242. Arbitration hearings will be in private unless the parties otherwise agree. Where the hearing is in private, the Commission may determine the persons who may be present.

New Section 44ZE (Right to representation)

243. Parties to an arbitration may be represented.

New Section 44ZF (Procedure of Commission)

244. The arbitration will be conducted in accordance with the procedure determined by the Commission.

New Section 44ZG (Particular powers of Commission)

245. This section confers powers on the Commission for the purposes of an arbitration. A person who contravenes a confidentiality order commits an offence. Likewise, a person who does any act or thing which would constitute a contempt of court (if the Commission were a court of record) also commits an offence.

New Section 44ZH (Power to take evidence on oath or affirmation)

246. The Commission can summons a witness and can take evidence on oath or affirmation.

New Section 44ZI (Failing to attend as a witness)

247. A summonsed witness must attend as required by the summons until excused or released by a Commission member unless the witness has a reasonable excuse for not doing so.

New Section 44ZJ (Failing to answer questions etc.)

248. A witness must not, without a reasonable excuse, refuse or fail to be sworn, answer Commission questions or produce documents required by a summons. An individual can refuse to answer a question or produce a document on the ground that the answer or production of the document may tend to incriminate him or her, or expose him or her to a pecuniary penalty. In light of the recent High Court decision in *Environment Protection Authority v. Caltex Refining Co Pty Limited* (1993) 178 CLR 477 and the Full Federal Court decision in *Trade Practices Commission v. Abbco Ice Works Pty Limited* (1994) ATPR ¶41-342, subsection (2) is limited to individuals.

New Section 44ZK (Intimidation etc.)

249. It is an offence to intimidate witnesses (or proposed witnesses) and persons who produce (or who propose to produce) documents to the Commission for the purposes of an arbitration.

New Section 44ZL (Party may request Commission to treat material as confidential)

250. Where a party to an arbitration believes that a document contains confidential commercial information, the party can request the Commission to withhold the material from other parties. After considering the request and the views of other parties, the Commission can withhold so much of the document as contains the confidential commercial information as it thinks is appropriate.

New Section 44ZM (Sections 18 and 19 do not apply to the Commission in an arbitration)

251. This section excludes the operation of sections 18 and 19 of the Principal Act, which are general procedural provisions, in respect of arbitration hearings as these matters are dealt with more specifically for the purposes of arbitration by Subdivision D.

New Section 44ZN (Parties to pay costs of an arbitration)

252. This permits regulations to be made providing for the payment of costs of an arbitration proceeding.

Subdivision E - Effect of determinations

New Section 44ZO (Operation of determinations)

253. The determination of an access dispute by the Commission has effect 21 days after the determination is made unless one of the parties to the arbitration applies to the Tribunal under section 44ZP for a review.

Subdivision F - Review of determinations

New Section 44ZP (Review by Tribunal)

254. A party to a determination of an access dispute may apply in writing to the Tribunal for a review of the determination. This application must be made within 21 days after the Commission makes the determination. A review by the Tribunal is a re-arbitration of the access dispute with the decision of the Tribunal taking effect from when it is made.

255. If requested, the Commission must assist the Tribunal with the review.

New Section 44ZQ (Provisions that do not apply in relation to a Tribunal review)

256. The current provisions in the Principal Act dealing with Tribunal proceedings will not apply to the review of Commission determinations. The regulations will make provision in relation to those reviews (see section 44ZZP).

New Section 44ZR (Appeals to Federal Court from determinations of the Tribunal)

257. A party to an arbitration of an access dispute may appeal to the Federal Court, on a question of law, from the decision of the Tribunal under section 44ZP. The appeal must be instituted within 28 days of the Tribunal's decision.

New Section 44ZS (Operation and implementation of a determination that is subject to appeal)

258. If there is an appeal to the Federal Court from a decision of the Tribunal, the Tribunal's decision still operates unless the Federal Court orders otherwise.

New Section 44ZT (Transmission of documents)

259. If an appeal is instituted in the Federal Court, the Tribunal must provide to the Court all relevant documents with these being returned to the Tribunal upon completion of the Court's proceedings.

Subdivision G - Variation of determinations

New Section 44ZU (Variation of determinations)

260. The Commission may vary a determination on the application of any party to the determination but only if all other parties to the determination agree.

261. The restrictions on access determinations in section 44W and the matters the Commission must take into account under section 44X in making a determination also apply to a variation of a determination.

262. If the parties to a determination disagree on making a variation to the determination it can be notified to the Commission under section 44S as an access dispute.

Division 4 - Registered contracts for access to declared services

263. Where the provider and a third party cannot agree on access to a declared service, they may agree to refer the dispute to private arbitration, rather than Commission arbitration. In accordance with the arbitration decision, the parties may enter into a contract for access. Alternatively, the provider and the third party may reach a private agreement on access, embodied in a contract, rather than notify an access dispute to the Commission.

264. This Division provides for the registration of these access contracts between the provider and a third party. Once an access contract is registered, it is treated as a Commission determination for the purposes of the enforcement provisions of Part IIIA of the Principal Act. Registration of an access contract by the Commission does not give the contract any status that it would not otherwise have had.

New Section 44ZV (Constitutional limits on operation of this Division)

265. This Division applies to contracts dealing with access to a declared service which are made after the service was declared where the parties are the provider and a third party. At least the

provider or the third party must be a corporation, or access must be (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

New Section 44ZW (Registration of contract)

266. All the parties to a contract need to apply to the Commission for registration of the contract. In deciding whether to register the contract the Commission must take into account the public interest and the interests of other users of the service.

267. Registration is within the discretion of the Commission.

268. If the Commission decides to register a contract, the following details need to be entered on a public register:

- (a) the names of the parties to the contract;
- (b) the service to which the contract relates; and
- (c) the date on which the contract was made.

269. If the Commission decides not to register the contract, it must publish that decision and give its reasons to the parties.

New Section 44ZX (Review of decision not to register contract)

270. Where the Commission decides not to register a contract, a party can, in writing, apply to the Tribunal for a review within 21 days of publication of the decision. A review by the Tribunal is a reconsideration of the matter.

271. If requested, the Commission must assist the Tribunal with the review.

New Section 44ZY (Effect of registration of contract)

272. Once registered, the parties can enforce the contract under Division 7 as if it were a Commission determination. By registering the contract, the parties substitute the enforcement provisions of Division 7 for contract law enforcement remedies.

Division 5 - Hindering access to declared services

273. This Division deals with providers and users hindering third party access to a declared service.

New Section 44ZZ (Prohibition on hindering access to declared services)

274. A provider or user (or a related body corporate) must not engage in conduct for the purpose of preventing or hindering a third party's access to a service under a determination.

Division 6 - Access undertakings for non-declared services

275. This Division sets out a process whereby a provider can give the Commission an access undertaking setting out the terms and conditions on which it will offer access to any third party. If the Commission accepts the undertaking, access will be regulated by the terms of the undertaking.

Third parties can then enter into access arrangements with the provider in accordance with the terms of the undertaking.

276. While an undertaking is in force, the Council cannot recommend that the service be declared (subsection 44G(1)) and the Minister cannot declare the service (subsection 44H(3)).

New Section 44ZZA (Access undertakings by providers)

277. A provider (or expected provider) of a service can give a written undertaking to the Commission setting out details of the proposed terms and conditions for access to the service and specifying the expiry date of the undertaking.

278. The Commission may accept the undertaking if it thinks it appropriate having regard to:

- (a) the legitimate business interests of the provider;
- (b) the public interest;
- (c) the interests of all persons who might want access to the service;
- (d) whether access is already the subject of an access regime; and
- (e) any other matters that the Commission thinks are relevant.

279. Before accepting the undertaking, the Commission must publish the undertaking and invite people to make submissions within a specified time. The Commission must consider all submissions which it receives within that time.

280. There is no obligation on the Commission to accept the undertaking. If the Commission does so, the undertaking comes into operation at the time the Commission accepts it. The provider may, with the Commission's consent, withdraw or vary the undertaking at any time.

281. The undertaking may set out a dispute resolution process. Where the undertaking confers a dispute resolution role on the Commission, subsection (6) enables the Commission to perform that role.

New Section 44ZZB (Undertakings cannot be accepted in certain cases)

282. The Commission cannot accept an undertaking in respect of a declared service.

New Section 44ZZC (Register of access undertakings)

283. The Commission is required to maintain a public register of all access undertakings, and variations to them.

Division 7 - Enforcement and remedies

284. This Division deals with enforcement and remedies.

New Section 44ZZD (Enforcement of determinations)

285. This section provides for the enforcement of determinations by parties. Enforcement is by way of application to the Federal Court.

286. If the Court is satisfied that a party's conduct or proposed conduct contravenes the determination the Court may make any order it thinks appropriate including, an order granting an injunction restraining the party from contravening the determination or requiring the party to do something, and an order directing the party to compensate the applicant for loss or damage suffered as a result of the contravention. Further, subsection (2) provides that the Court may make any other order that it thinks appropriate against a person who was involved in the contravention.

New Section 44ZZE (Enforcement of prohibition on hindering access)

287. This section permits any person to take action against a person whose conduct or proposed conduct would contravene the hindering prohibition in section 44ZZ (referred to as the 'obstructor').

288. If the Federal Court is satisfied that the obstructor's conduct or proposed conduct would contravene section 44ZZ, the court may make any order it thinks appropriate including, an order granting an injunction restraining the obstructor from engaging in the conduct or requiring the obstructor to do something, and an order directing the obstructor to compensate the applicant for loss or damage suffered as a result of the contravention. And, subsection (2) provides that the Court may make any other order that it thinks appropriate against a person who was involved in the contravention.

289. Subsection (3) provides that the Court may decline to make an order if it is of the opinion that the matter would be best dealt with as an access dispute under Division 3 or by declaration of the service under Division 2.

New Section 44ZZF (Consent injunctions)

290. This section confers power on the Federal Court to accept a consent injunction under section 44ZZD or 44ZZE whether or not the court is satisfied of the contravention.

New Section 44ZZG (Interim injunctions)

291. Subsection (1) confers power on the Court to grant an interim injunction in an application under section 44ZZD or 44ZZE.

292. Subsection (2) provides that when the Commission seeks an interim injunction in an application for an injunction under section 44ZZE, the Court must not require the Commission or any other person, as a condition of granting the interim injunction, to give an undertaking as to damages.

New Section 44ZZH (Factors relevant to granting a restraining injunction)

293. The Court may grant an injunction under section 44ZZD or 44ZZE restraining a person from engaging in conduct whether or not it appears likely that the person will engage in conduct of that kind in the future, or that there is imminent danger of substantial damage from the conduct.

New Section 44ZZI (Factors relevant to granting a mandatory injunction)

294. The Court may grant an injunction under section 44ZZD or 44ZZE requiring a person to do a thing whether or not it appears likely that the person will refuse or fail to do the thing in the future, or that there is imminent danger of substantial damage from the refusal or failure to do the thing.

New Section 44ZZJ (Enforcement of access undertakings)

295. This section provides a role for Commission to enforce breaches of access undertakings by application to the Federal Court.

296. If the Federal Court is satisfied that the provider has breached a term of the undertaking, it may make any order it thinks appropriate including, an order directing the provider to comply with the undertaking and an order directing the provider to compensate a person who has suffered loss or damage as a result of the breach.

297. Subsection (3) specifies the Constitutional basis for enforcement of access undertakings. The Court cannot make an order under this section unless satisfied that the provider is a corporation, that the breach relates to access by a third party that is a corporation or the breach involves access to the service in the course of, or for the purposes of, constitutional trade or commerce.

New Section 44ZZK (Discharge or variation of injunction or other order)

298. This section confers power on the Federal Court to discharge or vary an injunction or order granted under this Division.

Division 8 - Miscellaneous

299. This Division covers various miscellaneous issues.

New Section 44ZZL (Register of determinations)

300. This section requires the Commission to keep a public register of access determinations, setting out the names of the parties, the service and the date on which each determination was made.

New Section 44ZZM (Commission may perform functions under other access regimes)

301. Section 44ZZM permits a State or Territory law establishing an access regime to confer on the Commission functions related to that access regime providing they are in accordance with an agreement between the Commonwealth and the State or Territory concerned.

302. The Commonwealth can, of course, also confer on the Commission (by legislation) functions related to a specific access regime (such as in the *Moomba-Sydney Pipeline System Sale Act 1994*). No specific provision is required in the Principal Act for this purpose.

New Section 44ZZN (Compensation for acquisition of property)

303. This section protects a determination from being made invalid on the ground that it results in an acquisition of property without just terms compensation.

304. If a determination results in an acquisition of property and the person deprived of the property has not been sufficiently compensated, then the Commonwealth must pay the person a reasonable amount of compensation.

305. Subsection (2) provides that in determining the compensation, the Court must take account of amounts recovered by the person in other proceedings or awarded under a determination.

306. Where the compensation relates to the deprivation of a pre-notification right, the determination may enable the Commonwealth to seek reimbursement from the third party to the determination in accordance with the terms of paragraph 44W(4)(b).

New Section 44ZZO (Conduct of directors, servants or agents)

307. This section permits conduct and state of mind of directors, servants and agents to be imputed to bodies corporate and individuals.

New Section 44ZZP (Regulations about review by Tribunal)

308. This section permits the making of regulations in relation to the functions of the Tribunal covering its constitution, arrangement of business, the disclosure of members' interests, the determination of questions, and procedure and evidence.

New Section 44ZZQ (Regulations about fees for inspection etc. of registers)

309. This section permits the making of regulations about the inspection of registers maintained under new Part IIIA, including the charging of fees.

Clause 60 - Opportunity for conference to be afforded before certain powers exercised

310. This clause up-dates the reference to the Chairman by substituting 'Chairperson'.

Clauses 61, 62 and 63 - Civil action for recovery of pecuniary penalties, Injunctions and Divestiture

311. To reflect the co-operative nature of the scheme, the Commonwealth Minister's special powers in respect of Part IV actions will be removed. This will place the Commonwealth Minister on the same footing as State and Territory Ministers. Clause 61 removes the Minister's special powers to institute proceedings for the recovery of pecuniary penalties; only the Commission will be able to institute those proceedings.

312. Clause 62 similarly removes the Minister's special powers to seek injunctions. Only the Commission will be able to institute injunction proceedings relating to mergers or other acquisitions that may contravene section 50, but any person may seek an injunction in relation to other provisions of the Principal Act (except section 50A).

313. For the same reason as applies in relation to the amendments in clause 61, the special power of the Commonwealth Minister to seek divestiture (in respect of section 50 contraventions) is being removed.

Clause 64 - Commission to afford opportunity for conference before determining application for authorisation

314. This clause up-dates the reference to the Chairman by substituting 'Chairperson'.

315. It also omits paragraph 90A(7)(d) which entitles the Commonwealth Minister or a representative of that Minister to participate in a pre-decision conference relating to an authorisation application, placing the Commonwealth Minister on the same footing as State and Territory Ministers.

Clause 65 - Notification of exclusive dealing

316. Notification under section 93 of exclusive dealing confers immunity from section 47. This clause simplifies current subsection 93(2). It prevents a corporation from giving notification under section 93 where:

- (a) the matter has already been dealt with by way of an authorisation determination of the Commission or of the Trade Practices Commission; and
- (b) the Tribunal or the Trade Practices Tribunal has reviewed that determination, or the time for making an application for review has expired without the making of an application.

Clause 66 - Commission to afford opportunity for conference before giving notice in relation to exclusive dealing

317. This clause up-dates the reference to the Chairman by substituting 'Chairperson'.

318. It also omits paragraph 93A(6)(d) which entitles the Commonwealth Minister or a representative of that Minister to participate in pre-decision conference relating to a notification decision of the Commission under subsection 93(3) or new subsection 93(3A), placing the Commonwealth Minister on the same footing as State and Territory Ministers.

Clause 67 - Evidentiary provisions

319. This clause removes the reference to the Commonwealth Minister in subsection 100(3), placing the Commonwealth Minister on the same footing as State and Territory Ministers.

Clause 68 - Functions and powers of Tribunal

320. This is a consequential amendment flowing from clause 54 which removes the Commonwealth Minister's power to give directions in relation to an authorisation or notification decision.

Clause 69 - Repeal of Part XI

321. Part XI was inserted in 1974 to deal with transitional matters. It is now spent. The regulations will deal with any residue issues.

Clause 70 - Power to obtain information, documents and evidence

322. The Commission will exercise functions under both the Principal Act and the Prices Surveillance Act and accordingly, will have compulsory information gathering powers under both Acts. (See sections 155 and 155A of the Principal Act and sections 32, 34 and 36 of the Prices Surveillance Act.) Under the Prices Surveillance Act a person may refuse to provide information if the person has a 'reasonable excuse' (see sections 32 and 36 of that Act) whereas, the information gathering powers conferred by section 155 of the Principal Act do not provide such an exception.

323. New subsections 32(2A) and 36(2) and (3) of the Prices Surveillance Act provide that, for an individual, 'reasonable excuse' includes non-compliance on the grounds of self-incrimination or exposure to a penalty.

324. New subsection 155(2A) of the Principal Act will make it clear that the Commission cannot use the section 155 powers merely because a person refuses to provide the information as required by a notice or summons under the Prices Surveillance Act on the grounds of self-incrimination or exposure to a penalty.

325. New subsection 155(7A) of the Principal Act will provide that the Commission cannot compel a person to give the Commission evidence or information, or produce or permit inspection of a document, which would disclose the deliberations of the Cabinet of a State or Territory. This protection also applies in respect of documents that were prepared for the purposes of a meeting of the Cabinet of a State or Territory.

326. The protection of new subsection 155(7A) does not extend to the Commonwealth which must rely on the doctrine of public interest immunity if it wishes to prevent the Commission from requiring the giving of evidence or information, or the production or inspection of documents, which would disclose the deliberations of the Commonwealth Cabinet.

327. This clause also up-dates references to the Chairman by substituting 'Chairperson'.

Clause 71 - Insertion of new section (Protection of Part IV information)

328. This new section provides that if, under section 155, the Commission obtains information relating to a Part IV matter, that information can only be disclosed by a Commission official performing duties or functions as a Commission official or when a Commission official, or the Commission, is required by law to disclose the information. Commission officials cannot, however, disclose protected Part IV information when performing a Commission function described in section 28 of the Principal Act. (Section 28 of the Principal Act confers information and research functions on the Commission.)

329. The provision should provide informants with confidence that the Commission will protect information which is disclosed to it in compliance with a notice issued under section 155.

Clause 72 - Power to obtain information and documents in New Zealand relating to trans-Tasman markets

330. This clause up-dates the reference to Chairman by substituting 'Chairperson'.

331. It also replaces the reference to the Trade Practices Commission with the Australian Competition and Consumer Commission.

Clause 73 - Australian Competition and Consumer Commission may receive information and documents on behalf of New Zealand Commerce Commission

332. This clause replaces references to the Trade Practices Commission with the Australian Competition and Consumer Commission.

Clause 74 - Refusal to be sworn or answer questions

333. This clause amends subsection 161(2) to ensure that the protection of subsection (2) is consistent with the recent cases (cited under the clause note to new section 44ZJ) which hold that the privileges against self-incrimination and exposure to a pecuniary penalty are limited to individuals.

Clause 75 - Jurisdiction of Court to make declarations and orders

334. This clause removes the special rights of the Commonwealth Minister to institute a proceeding under section 163A in relation to Part IV. This does not prevent the Commonwealth Minister from instituting proceedings under subsection 163A(1) in relation to Part IV; however, the Commonwealth Minister will be treated in the same way as other persons are treated.

335. Subsection 163A(2) confers on the Commonwealth Minister a special right to institute a proceeding seeking a declaration and a special right of intervention. This clause removes those rights in so far as the proceeding relates to Part IV. This means, for example, that where a proceeding relates to both Part IV and Part V, the Commonwealth Minister can only intervene in respect of the Part V issues.

Clause 76 - Judicial notice

336. This clause up-dates the reference to the Chairman by substituting 'Chairperson'.

Clause 77 - Amendments of other Acts

337. The Acts set out in Schedule 3 are amended to reflect the institutional changes.

338. Further, Schedule 3 also sets out the amendments to the Prices Surveillance Act which implement the national competition policy reforms. These amendments are explained below under the heading 'Schedule 3'.

339. And, the Australian Postal Corporation Act and the Telecommunications Act are amended to exempt certain services from the national access regime. These amendments are also explained below under the heading 'Schedule 3'.

Division 2 - Transitional rules

Clause 78 - Government rail transport of coal not covered by access system for first 5 years

340. This clause delays application of the access regime to coal-carrying rail services operated by a State or Territory, or an authority of a State or Territory, for 5 years from the commencement of the access regime.

PART 4 - AMENDMENTS COMMENCING AT THE THIRD COMMENCEMENT TIME

Clause 79 - Amendment of the Prices Surveillance Act: insertion of feminine pronouns

341. This clause up-dates the Prices Surveillance Act by inserting gender-neutral language.

PART 5 - AMENDMENTS COMMENCING AT THE FOURTH COMMENCEMENT TIME

Division 1 - Amendments

Clause 80 - Application of Act to Commonwealth and Commonwealth authorities

342. Currently, the Principal Act does not explicitly state that the Crown in right of the Commonwealth is not liable for a pecuniary penalty. This was not thought necessary because recovery of a pecuniary penalty is on behalf of the Commonwealth.

343. However, new section 2B provides that the Crown in right of the States will not be liable for a pecuniary penalty or to be prosecuted for an offence. Accordingly, for consistency, subsection 2A(3) will be amended to include the same provision for the Crown in right of the Commonwealth. This protection does not apply to authorities of the Commonwealth.

Clause 81 - Insertion of new sections (Application of the Principal Act to States and Territories and local government bodies)

344. The Principal Act does not currently bind the Crown in right of the States or Territories, or bodies which enjoy the same immunities as the Crown in right of the States or Territories. This provision removes that 'shield of the Crown' immunity. It inserts new subsection 2B(1), which applies Part IV and related provisions of the Principal Act to the Crown in right of the States, the Northern Territory and the Australian Capital Territory, so far as it carries on a business, directly or by an authority of the State or Territory.

345. New subsection 2B(2) provides that the Crown in right of the States and Territories will not be liable to a pecuniary penalty or to be prosecuted for an offence. There is, however, a range of alternative remedies which may be pursued against the Crown, including injunctions and damages. This protection does not apply to State or Territory authorities.

346. New section 2B does not commence until 12 months after the Bill receives the Royal Assent. This will enable State and Territory Crown businesses and authorities to undertake education and compliance programs, to modify any behaviour that might involve a contravention of Part IV and, where appropriate, to apply to the Commission for authorisation before the shield of the Crown is lifted. Clause 88 specifies a further transitional period of 12 months before pecuniary penalties for contravention of Part IV can be applied to State and Territory authorities that enjoy shield of the Crown immunity.

347. The Crown is only bound in so far as it carries on a business. This limitation applies where the Crown is carrying on business directly or through an authority. In determining whether the Crown (or such an authority) is carrying on a business reference should be made to the definition of business in subsection 4(1) and to new section 2C.

348. New section 2C makes it clear that certain activities of the Crown, or an authority of the Crown, are not business activities, namely:

- (a) the imposition or collection of taxes, or levies or licence fees;
- (b) licensing decisions;
- (c) transactions internal to the Crown in the same right (ie government departments and instrumentalities which do not have a legal identity separate from the Crown);
- (d) transactions internal to an authority of the Crown that has a legal identity separate from the Crown;
- (e) transactions between non-commercial authorities (which have separate legal identities) of the Crown in the same right;
- (f) transactions between non-commercial authorities (which have separate legal identities) of the Crown in the same right and the Crown in that right; and
- (g) acquisition of primary products by a government body under legislation, when the government body has no discretion as to whether to acquire the products.

349. A non-commercial authority is an authority which is constituted as a corporation sole (ie constituted by only one person) and which is neither a trading corporation nor a financial corporation.

350. An example of a transaction internal to the Crown in the same right is a 'transaction' between the Commonwealth Department of Defence and the Commonwealth Department of Administrative Services, both of which are part of the same legal entity (the Crown in right of the Commonwealth). This transaction is not to be regarded as a business activity.

351. This clause also inserts new section 2D into the Principal Act. New section 2D exempts local government licensing decisions and transactions internal to local government from Part IV of the Principal Act.

Clause 82 - Interpretation

352. This clause inserts the concept of 'fully-participating jurisdiction' into the Principal Act. A fully-participating jurisdiction is defined in this clause to mean a State or Territory that is a participating jurisdiction as defined in section 150A and is not named in a notice by the Minister in operation under section 150K.

Clauses 83, 84 and 85 - Constitution of Commission, Associate members, and Deputy Chairperson

353. These clauses require the support of a majority of fully-participating jurisdictions for appointments to the Commission. They commence twelve months after the Bill receives the Royal Assent and replace the transitional provisions inserted by clauses 40, 42 and 43.

Clause 86 - Exceptions

354. This clause amends new section 51 to replace the reference in new paragraph 51(1C)(e) to a State or Territory that is a Party to the Conduct Code Agreement with a reference to a State or Territory that is a fully-participating jurisdiction.

355. This means that, from twelve months after the Bill receives the Royal Assent, laws of the States, the Australian Capital Territory and the Northern Territory will not be effective in granting immunity from the Principal Act to particular conduct unless at the time of the alleged contravention, the jurisdiction was a fully-participating jurisdiction and a Party to the inter-governmental Competition Principles Agreement.

356. There is one exception to this limitation, providing for a transitional period following a jurisdiction ceasing to be a fully-participating jurisdiction or a Party to the Competition Principles Agreement. The making of a contract, and an action under a contract, which was protected under law in force immediately before the jurisdiction ceased to be a fully-participating jurisdiction or a Party to that Agreement, will continue to be protected for twelve months from when the jurisdiction ceased to be a fully-participating jurisdiction or a Party to that Agreement.

Clause 87 - Insertion of new section (Concurrent operation of State and Territory laws)

357. In extending the application of Part IV to the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, some jurisdictions are concerned that, in terms of section 109 of the *Commonwealth Constitution*, Part IV may be regarded as covering the field of anti-competitive behaviour. If this view were correct then State laws that require or permit anti-competitive behaviour which is not prohibited by the explicit terms of Part IV provisions would be invalid.

358. New section 51AAA makes it clear that Part IV is not intended to make State or Territory laws inoperative where those laws are not directly inconsistent with Part IV.

359. Where any jurisdiction wishes to require or permit conduct which is explicitly prohibited by a provision of Part IV, it will need to make a law that complies with new subsection 51(1C) and that specifically authorises the conduct in terms of new subsection 51(1) of the Principal Act.

360. This provision is in slightly different terms to current subsection 75(1) of the Principal Act. Despite the difference of wording, it is intended to have the same operation as that subsection which was considered by the High Court in *R.v. Credit Tribunal; ex parte General Motors Acceptance Corporation* (1975-1977) 137 CLR 545. In that case, Mason J (as he then was) stated that subsection 75(1) indicates:

"a very clear expression of intention that the *Trade Practices Act* is not an exhaustive enactment on the topics with which it deals and that it is not intended to operate to the exclusion of State laws on those topics. As such it does not avoid any instance of direct inconsistency ... but ... it eliminates any suggestion of inconsistency otherwise arising."

361. Other instances in which similar words have been used to ensure that State legislation is only invalid to the extent of direct inconsistency with Commonwealth legislation include section 76F of the *Crimes Act 1914*, section 116ZC of the *Defence Act 1903*, section 201 of the *Radiocommunications Act 1992* and section 350 of the *Superannuation Industry (Supervision) Act 1993*.

Division 2 - Transitional rules

Clause 88 - Temporary exemption from pecuniary penalties

362. By way of transition, State and Territory authorities which are currently outside the coverage of the Principal Act by reason of shield of the Crown immunity will only become liable for pecuniary penalties for conduct which takes place two years after the Bill receives the Royal Assent.

Clause 89 - Existing contracts not affected by amendments

363. This clause will operate in respect of contracts entered into by the Crown in right of the States and Territories (or by State or Territory authorities with shield of the Crown protection) in similar terms as clause 34, which is explained above.

Clause 90 - Advance authorisations

364. This clause permits State and Territory Crown businesses and authorities to apply to the Commission for authorisation of conduct and to notify conduct to the Commission before the provisions of Part IV apply to that conduct.

PART 6 - AMENDMENTS COMMENCING AT THE FIFTH COMMENCEMENT TIME

Clause 91 - Amendment of the Trade Practices Act: insertion of feminine pronouns

365. This clause up-dates the Principal Act by inserting gender-neutral language.

PART 7 - MISCELLANEOUS

Clause 92 - Regulations

366. This permits the Governor-General to make regulations. In particular, the transitional and savings matters will be dealt with by way of regulations.

SCHEDULE 1

367. This Schedule sets out the Schedule version of Part IV which will appear as a Schedule to the Principal Act. The Schedule version of Part IV is designed to facilitate application of the Part IV rules by participating jurisdictions.

368. Essentially the Schedule version is a repeat of the text of Part IV of the Principal Act with references to 'corporation' generally replaced with 'person' by using the terms 'person', 'first person' or 'second person' as appropriate. Additionally, the text in the Schedule version differs from Part IV in the following areas:

- (a) In subsection 45(1), the reference to 'the *Trade Practices Amendment Act 1977*' is replaced with 'this section'. The application legislation should stipulate the date of commencement of section 45 (and section 45B) of the Schedule version of Part IV.
- (b) Subsection 45D(1) has been compacted because neither the third person nor the fourth person needs to be a corporation.
- (c) The words 'corporation or other' have been omitted from section 48.

Section 48 operates by reference to section 96. However, section 96 is not included in the Schedule version of Part IV and accordingly, for the purposes of the Competition Code, section 96 is modified to fit in with the Schedule version (see new subsection 150F(2)). In the Competition Code the references to 'corporation' in subsections 96(1) and (2) will read 'person'. This means there will be a choice as to whether to apply subsection 96(1) or (2).

- (d) Subsections 50(1) and (2) have been compacted into a single subsection.
- (e) Paragraph 51(1)(a) provides that exceptions under section 51 of the Principal Act have the same effect under the Competition Code.
 - (i) Exceptions under the Principal Act will authorise conduct that might involve a contravention of the Principal Act. However, because the Competition Code covers persons who are outside the coverage of the Principal Act, the exemption may not protect all persons engaging in that conduct from contravening the Competition Code.
 - (ii) For example, the exception may be limited to persons who are covered by the Principal Act and accordingly, persons outside that coverage may contravene the Competition Code when engaging in the conduct referred to in the exception.

- (iii) If a State or Territory wants to extend the protection to those other persons, it can do so under paragraphs 51(1)(b) to (e) (whichever is appropriate) by way of a specific authorisation which complies with the requirements of subsection 51(1C).

- (f) Subsection 51(1C) does not contain new paragraphs 51(1C)(e) and (f) which will appear in Part IV of the Principal Act.

SCHEDULE 2

369. This Schedule makes an amendment to the Australian Postal Corporation Act to make it clear that certain conduct is authorised for the purposes of subsection 51(1) of the Principal Act.

370. This Schedule also amends the *Jurisdiction of Courts (Cross-vesting) Act 1987* so that jurisdiction conferred on the Federal Court by State and Territory application laws will be treated in the same manner as jurisdiction conferred on the Federal Court by the Principal Act.

SCHEDULE 3

371. Schedule 3 makes consequential amendments to other Commonwealth Acts.

372. Of particular importance are the amendments to the Australian Postal Corporation Act, the Prices Surveillance Act, and the Telecommunications Act which are explained below.

Australian Postal Corporation Act

373. Schedule 3 inserts new section 32D into the Australian Postal Corporation Act which provides that the national access regime does not apply to the supply of a service (including a bulk interconnection service and an incoming overseas mail service) by Australia Post.

Prices Surveillance Act

Definitions

374. The definitions of '**associate member**' and '**inquiry**' are amended by replacing 'Authority' with 'Commission'.

375. The definition of '**Commonwealth authority**' is amended to reflect the repeal of Schedule 3 of the *Australian Capital Territory (Self-Government) Act 1988* by the *Arts, Environment and Territories Legislation Amendment Act 1993*.

376. The definition of '**person**' is amended to make it clear that 'person' also includes State and Territory authorities.

377. The definition of '**member**' is replaced by a new definition which up-dates the reference to the Chairman and to the Authority with 'Chairperson' and 'Commission' respectively.

378. New definitions of 'service' and 'supply' are inserted to accord with the definition of these terms in the Principal Act.

379. The definitions of 'appoint', 'full-time member' and 'meeting' are omitted.

380. The definition of 'Authority' is replaced with a definition of 'Commission'.

381. The definition of 'Chairman' is replaced with a definition of 'Chairperson'.

382. The definition of 'prescribed authority' is omitted. This definition was relevant for the purposes of subsection 4(2): the Prices Surveillance Act did not apply to the supply of goods or services by a prescribed authority. Subsection 4(2) is amended by this Bill to extend the coverage of the Prices Surveillance Act to the supply of goods or services by the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, and authorities of the Crown in those capacities. New subsection 4(2) will preserve the protection which the Norfolk Island currently enjoys by virtue of current subsection 4(2).

383. The definition of 'National Competition Council' is inserted.

384. The definition of 'member of the staff of the Commission' replaces current subsection 3(4).

385. The definition of 'State or Territory authority' is inserted to facilitate application of provisions of the Prices Surveillance Act to the supply of goods or services by the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory.

Application to State and Territory authorities - Sections 4 and 5

386. Application of the Prices Surveillance Act to the supply of goods and services by the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory is achieved by amending subsections 4(2) and 5(1).

387. New subsection 5(1) provides that the Prices Surveillance Act binds the Crown in right of the Commonwealth (as is currently the case), of each of the States, of the Northern Territory and of the Australian Capital Territory. This removes the 'shield of the Crown' immunity currently enjoyed by the Crown in right of the States, the Northern Territory and the Australian Capital Territory, and agents and instrumentalities of the Crown in those capacities.

388. The amendments to subsection 5(2) provide that the Crown in those capacities will not be liable to be prosecuted for an offence. This protection does not extend to Crown authorities that are incorporated.

389. The amendments do not disturb the protection which the Norfolk Island currently enjoys.

390. The amendments set out in this Bill will enable the Commonwealth Minister to declare a State or Territory authority under section 21 of the Prices Surveillance Act and to direct the Commission to monitor the prices, costs and profits of a State or Territory authority (new section 27A). The inquiry provisions will not, however, apply to the supply of goods or services by a State or Territory authority (subsection 17(1) as amended by this Bill and new subsections 18(1A) and 18(3A)).

Part II

391. Part II is omitted. The matters which were dealt with under this Part are covered by the Principal Act. Section 17 in Part III is amended to transfer the functions of the Prices Surveillance Authority to the Australian Competition and Consumer Commission. New subsections 17(4) and (5) carry over relevant provisions of the Principal Act to the Prices Surveillance Act.

Prices Surveillance

(A) Extension of coverage - Section 21

392. The Commonwealth Minister will only be able to declare a State or Territory authority under section 21 where:

- (a) the appropriate Minister of the State or Territory concerned has agreed to the declaration; or
- (b) the Council has, on the request of an Australian government, recommended declaration of the authority and the Commonwealth Minister has consulted the appropriate Minister of the State or Territory concerned.

393. The reference to the State or Territory concerned refers to the State or Territory that is responsible for the authority.

394. The Council may only recommend declaration where it is satisfied of the matters set out in new subsection 21(1B). In particular, it must be satisfied that there is no effective supervision of the prices charged by the authority for the supply of goods or services in respect of which the declaration is sought.

395. Where the State or Territory concerned is a Party to the Competition Principles Agreement, the Council must determine the issue of effective supervision by applying the relevant principles set out in that Agreement (new subsection 21(1D)). Those principles are set out in subclause 2(4) of that Agreement as desirable characteristics for an independent source of price oversight.

396. Where the State or Territory concerned is not a Party to that Agreement, the Council can take into account any relevant factor in its assessment of effective supervision.

397. If the Council has previously been satisfied that there is effective supervision, that decision will stand for 5 years where the Council is satisfied that there has not been a substantial change in the mechanism for supervision.

(B) Time limited declarations - Section 21

398. New subsection 21(1E) requires declarations to specify a time limit after which the declaration will expire.

(C) Price increases - Section 22

399. Schedule 3 amends section 22 to deal with situations of large price fluctuations. For the purposes of notification, the previous highest price will now be the highest price at which the declared person has previously supplied the notified goods or services in the preceding 12 months.

(D) Publication of reasons - Section 23

400. A new provision is being included to enable the Commission to give reasons for its decisions on the price notifications. In order to protect confidential information, the Commission can exclude from the public register information that the provider claims is confidential where the Commission is satisfied that the claim is justified and is not of the opinion that disclosure is necessary in the public interest.

Monitoring*(A) Formalising the power - Sections 17, 27A and 27B*

401. Subsection 17(1) is amended to make it clear that the functions of the Commission include the monitoring of prices, costs and profits in any industry or business as directed by the Commonwealth Minister.

402. New section 27A confers power on the Commonwealth Minister to give the Commission a monitoring direction. The direction can be in respect of the supply of goods or services by persons in a specified industry (new paragraph 27A(1)(a)) or by a specified person (new paragraph 27A(1)(b)). When monitoring pursuant to a direction under new section 27A, the Commission can use its compulsory information gathering powers in section 32.

403. New section 27B requires the Commission to send a copy of its monitoring report to person referred to in a direction under paragraph 27A(1)(b) and to make the report publicly available.

(B) Extension of coverage - Section 27A

404. The Commonwealth Minister will be able to direct monitoring of the prices, costs and profits of a State or Territory authority with the agreement of the State or Territory concerned.

Inquiries: prohibition on price increases - Section 24

405. Like section 22, section 24 will be amended to deal with situations of large price fluctuations. For the purposes of the prohibitions on price increases during an inquiry, the previous highest price will now be the highest price at which the person has supplied the goods or services in the preceding 12 months.

Delegation of Commission powers and functions - Section 29

406. New section 29 is a simplification of the current provision in the Prices Surveillance Act.

Information Gathering Powers - Sections 32 and 36

407. A person can refuse to comply with a notice issued under section 32, to answer questions or produce documents when appearing as a witness at an inquiry, if the person has a 'reasonable excuse'.

408. New subsection 32(2A) provides that an individual can refuse to give information or produce a document on the ground that the information or production of the document may tend to incriminate him or her, or expose him or her to a pecuniary penalty. In light of the recent High Court decision in *Environment Protection Authority v. Caltex Refining Co Pty Limited* supra, and the Full Federal Court decision in *Trade Practices Commission v. Abbco Ice Works Pty Limited* supra, this protection is limited to individuals.

409. New subsections 36(2) and (3) will provide a similar protection, referring to persons, rather than individuals, because section 36 does not apply to bodies corporate.

Telecommunications Act

410. This Schedule inserts new section 235A into the Telecommunications Act which provides that the national access regime does not apply in relation to the supply of a telecommunications service by a carrier under a class licence.