EXPOSURE DRAFT – COMPETITION AND CONSUMER AMENDMENT (COMPETITION POLICY REVIEW) BILL 2016

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
Act	*Competition and Consumer Act 2010*
Commission	Australian Competition and Consumer Commission
Council	National Competition Council
Final Report	Final Report of the Competition Policy Review (March 2015)
Harper Review	Competition Policy Review
Regime	National Access Regime
Review Panel	The Competition Policy Review Panel chaired by Professor Ian Harper
RPM	Resale Price Maintenance
Tribunal	Australian Competition Tribunal

General outline

Overview

The Competition Policy Review and public consultation

The Australian economy has changed markedly since the last major review of competition policy in 1993 (the Hilmer Review). Recognising this, in 2014, the Government commissioned a 'root and branch' review of Australia's competition laws and policy to ensure Australia continues to experience long-term productivity growth.

The Competition Policy Review (Harper Review) was led by the Review Panel, chaired by Ian Harper, and supported by a secretariat. The terms of reference, issued on 27 March 2014, set out that the Review Panel was to ensure thorough engagement with all interested stakeholders. They further set out that the key areas of focus would be to identify impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest.

The Review Panel released an Issues Paper on 14 April 2014 and a Draft Report on 22 September 2014. The Review Panel received almost 350 submissions in response to the Issues Paper and around 600 submissions to the Draft Report.

On 31 March 2015, the Review Panel presented the Final Report of the Competition Policy Review (Final Report). The Review Panel found that although reforms introduced following the Hilmer Review led to significant improvements in economic growth and wellbeing, renewed policy effort is required to support growth and wellbeing.

The Harper Review concluded that while the concepts, prohibitions and structure of the *Competition and Consumer Act 2010* (the Act) are sound, some provisions are unnecessarily complex, imposing costs on the economy and burdens on business, as well as inhibiting the adaptability of the laws to changing circumstances.

The Government received 140 submissions in response to the Final Report.

The Government response to the Harper Review was released on 24 November 2015, and supported in full or in principle 39 of the Harper Review's 56 recommendations, and a further 5 recommendations in part.

The Government also noted or remained open to the remaining 12 recommendations, following further review and consultation.

In the Government Response, the Government committed to consult further on options to strengthen the misuse of market power provision. On 11 December 2015 the Government released a discussion paper setting out possible options for reforming the provision. In response to the paper, 86 submissions were received. The further consultation in relation to the misuse of market power provision is detailed in Chapter 7 of this explanatory memorandum. .

The Department of Communications and the Arts has released a discussion paper considering the operation of the anti-competitive provisions of Part XIB light of the proposed amendments to section 46 outlined in Chapter 7. The discussion paper is available at https://communications.gov.au/have-your-say/consultation-telecommunications-anti-competitive-conduct-laws

Chapter 1
Definition of competition

Outline of chapter

1.1 Schedule 1 to this Bill amends the definition of 'competition' in section 4 of the Act, to ensure that competition includes competition from goods and services that are imported or which are capable of importation.

1.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

1.3 The provisions of the Act are focused on conduct that damages competition in markets in Australia. When applying the provisions of the Act, it is therefore necessary to analyse the relevant market, and the forms of competition which may affect that market.

1.4 'Market' and 'competition' are both defined terms within the Act, and the Harper Review considered the appropriateness of the respective definitions.

1.5 ***Competition*** is defined in section 4 to include competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.

1.6 ***Market*** is defined in section 4E to mean a market in Australia, and includes the area of close competition between firms for goods and services (that is, the area within which particular goods and services are substitutable for, or otherwise competitive with, each other).

1.7 The Harper Review noted that while it is appropriate that the term 'market' is defined as a market in Australia, the Act should not ignore forces of competition which arise overseas and affect markets in Australia.

1.8 A market may exist where there is the potential for transactions between buyers and suppliers, even though no transactions eventuate.

Where a credible threat of importation exists, the potential for transactions can exert competitive pressure within the relevant market.

1.9 Australia operates within a global economy, and assessment of competition within Australian markets must take into account the competitive pressure exerted by both actual and potential imports of goods and services.

1.10 The Harper Review found that although the current definition of market appropriately focuses on Australian markets, the definition of competition causes a narrow focus and does not give proper consideration to global sources of competition. This narrow definition may in turn distort the assessment of the effect of a particular action, such as a merger, within a given market and exaggerate the theoretical effect on competition beyond what is likely to occur in reality.

Summary of new law

1.11 The new law amends the current definition of 'competition' to clarify that it includes potential imports of goods and services, not just actual imports.

Comparison of key features of new law and current law

New law	*Current law*
Competition expressly includes goods and services that are capable of being imported, in addition to goods and services that are imported.	***Competition*** includes goods and services that are imported.

Detailed explanation of new law

1.12 The definition of competition is amended so that the term specifically includes:

- competition from goods that are, or are capable of being, imported into Australia; and
- competition from services that are rendered, or are capable of being rendered, by persons not resident or not carrying on business in Australia. ***[Schedule 1, item 1, subsection 4(1)]***

1.13 The express inclusion of goods and services that are 'capable of' being imported does not require consideration of every product and service that could conceivably be imported into Australia. Rather, this change clarifies that the credible threat of import competition is a relevant component of competition analysis.

1.14 Where there is only a remote possibility of importation, for example because importation would not be commercially viable, this possibility would not constitute a credible threat of import competition and should not form part of a competition analysis.

1.15 This change reflects the recommendation of the Harper Review, and ensures that competition analysis consistently takes into account any goods or services that affect markets in Australia, regardless of their source.

Commencement and application provisions

1.16 Schedule 1 commences on a day or days to be fixed by Proclamation.

1.17 The amendments made by Schedule 1 apply in relation to conduct engaged in, on, or after the commencement of the Schedule. ***[Schedule 1, item 2, Division 3 of Part XIII]***

Chapter 2
Cartel conduct

Outline of chapter

2.1 Schedule 2 to this Bill makes a number of amendments to the Act to simplify the provisions on cartel conduct and better target the prohibitions toward anti-competitive conduct, including:

- confining the application of the provisions to cartel conduct affecting competition in Australian markets;
- confining the application of the provisions to actual or likely competitors; and
- broadening the exceptions for joint ventures and vertical trading restrictions.

2.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

2.3 The Act prohibits certain types of provisions within contracts, arrangements or understandings between competitors that amount to cartel conduct.

2.4 A provision of a contract, arrangement or understanding between competitors is a 'cartel provision' if it has the purpose of output restriction, market sharing or division, or bid-rigging or the purpose or effect or likely effect of price-fixing.

2.5 The Act contains both criminal and civil sanctions for contravention of the prohibition on cartel provisions. There are a number of exceptions to the general prohibition, some of which are available for both the criminal and civil sanctions, and some of which are available for only one type of sanction.

2.6 The Harper Review noted that cartel conduct between competitors is anti-competitive in most circumstances, as they usually increase prices or reduce choice, and should be prohibited without a need to establish an actual or likely effect on competition.

2.7 A number of specific changes were recommended by the Harper Review, intended to simplify the cartel conduct provisions and better target them toward anti-competitive conduct. These included broadening the exceptions for joint ventures and vertical trading restrictions which the Harper Review considered to be so narrow as to potentially capture pro-competitive conduct.

Summary of new law

2.8 Schedule 2 to this Bill makes a number of amendments to Division 1 of Part IV, to simplify the cartel conduct provisions and better target them toward anti-competitive conduct.

2.9 The defined term 'trade or commerce' is incorporated in various provisions within Division 1 of Part IV, to expressly confine the application of the provisions to cartel conduct affecting competition in Australian markets.

2.10 The definition of 'likely' in section 44ZZRB is repealed.

2.11 The joint venture exception is broadened to apply to:

- arrangements or understandings (in addition to contracts);
- joint ventures for the production, supply or acquisition of goods and services; and
- cartel provisions that are reasonably necessary for undertaking a joint venture.

2.12 The exception for vertical trading restrictions is broadened to apply to various types of vertical trading restrictions, as now defined in section 44ZZRS, rather than only to exclusive dealing.

2.13 The 'output restriction' purpose condition in paragraph 44ZZRD(3)(a) is broadened to address any gap resulting from the repeal of the separate prohibition on exclusionary provisions.

Comparison of key features of new law and current law

New law	*Current law*
The cartel conduct provisions apply to cartel conduct occurring in trade or commerce within Australia, or between Australia and places outside Australia.	The cartel conduct provisions are not expressly confined to cartel conduct affecting competition in Australian markets.
'Likely' is not a defined term.	'Likely' is a defined term.
The joint venture exception applies to contracts, arrangements or understandings.	The joint venture exception applies only to contracts.
The joint venture exception applies to cartel provisions that are for the purposes of a joint venture or reasonably necessary for undertaking a joint venture.	The joint venture exception applies to cartel provisions that are for the purposes of a joint venture.
The joint venture exception applies to joint ventures for the production, supply or acquisition of goods or services.	The joint venture exception applies to joint ventures for the production and/or supply of goods or services.
The exception for vertical trading restrictions applies to a broad range of vertical trading restrictions.	The exception for vertical trading restrictions applies only to exclusive dealing.
The 'output restriction' purpose condition refers to production, capacity, supply and acquisition.	The 'output restriction' purpose condition refers to production, capacity and supply.

Detailed explanation of new law

Cartel conduct affecting 'trade or commerce'

2.14 The Harper Review was of the view that, for cartel conduct to be an offence within Australia, it should have an effect on trade or commerce within, to or from Australia, consistent with the treatment of cartel conduct in comparable overseas jurisdictions.

2.15 Schedule 2 amends a number of provisions in Division 1 of Part IV to include a specific requirement that cartel conduct must be 'in trade or commerce'. ***Trade or commerce*** is defined in section 4 to mean trade or commerce within Australia, or between Australia and places outside Australia. ***[Schedule 2, items 4 to9, subsection 44ZZRD(4)]***

2.16 The intention of this amendment is to expressly confine the application of the provisions to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident or carrying on business in Australia.

2.17 This amendment aligns the cartel conduct provisions with the Act's objective of enhancing the welfare of Australians.

Actual or likely competitors

2.18 The Harper Review found that the definition of 'likely' in the cartel conduct provisions –'a possibility that is not remote' – was a low threshold for its application, and inadvertently captures corporations that are not in competition with each other in their immediate markets and undertake collaborative activities that produce consumer benefits.

2.19 The amendments repeal the definition of ***likely***, meaning a possibility that is not remote, in section 44ZZRB. When used in the cartel conduct provisions, 'likely' now takes its meaning from the common law. ***[Schedule 2, item 2, section 44ZZRB]***

2.20 By removing the specific definition in the cartel conduct provisions, the intention is that 'likely' will have a consistent meaning where it is used throughout Part IV, and the existing jurisprudence will inform the meaning of 'likely' in the cartel conduct provisions.

Exception for joint ventures

2.21 The Harper Review's view was that the narrow framing of the joint ventures exemption from the cartel provisions may have the effect of limiting legitimate commercial transactions, or else increasing business compliance costs.

2.22 Schedule 2 makes a number of amendments to broaden the exceptions for joint ventures from both the criminal cartel provisions (section 44ZZRO) and the civil cartel provisions (section 44ZZRP).

2.23 The broadened exceptions apply to arrangements and understandings containing cartel provisions, in addition to contracts. This reflects the reality that not all provisions of a joint venture will be contained within a contract. ***[Schedule 2, items 12, 14, 16 and 21, subsections 44ZZRO(1) and 44ZZRP(1)]***

2.24 The broadened exceptions apply to joint ventures for the acquisition of goods or services, in addition to the production of goods or the supply of goods and services. Joint ventures for the acquisition of

goods are common, and may encourage pro-competitive economic activity. ***[Schedule 2, items 13 and 20, subsections 44ZZRO(1) and 44ZZRP(1)]***

2.25 The broadened exceptions apply to cartel provisions that are reasonably necessary for undertaking a joint venture, in addition to cartel provisions that are for the purposes of a joint venture. ***[Schedule 2, items 13 and 20, subsections 44ZZRO(1) and 44ZZRP(1)]***

2.26 The Harper Review also noted that broadening the joint venture exception for cartel conduct will not put joint ventures beyond the reach of the competition law, as section 45 prohibits joint venture arrangements that have the purpose, effect or likely effect of substantially lessening competition.

Exception for vertical trading restrictions

2.27 The Harper Review's view was that vertical trading restrictions are relatively common and may be either pro-competitive or anti-competitive depending on the circumstances.

2.28 One form of vertical trading restriction is exclusive dealing. Presently, vertical trading restrictions that constitute exclusive dealing for the purposes of section 47 are exempted from both the civil and criminal cartel provisions.

2.29 The amendments in Schedule 2 simplify the law by rewriting the exception for vertical trading restrictions exception in section 44ZZRS to better target the prohibition on cartel provisions toward anti-competitive conduct.

2.30 The amendments broaden the exception by removing the specific reference to section 47 and providing for the types of vertical trading restriction arrangements that fall under the exception. The amendments also rename the exception to 'Restriction on supplies and acquisitions', to reflect the broader scope of the exception. ***[Schedule 2, item 24, section 44ZZRS]***

2.31 The type of arrangements that fall under the broadened scope of the vertical trading restrictions exception will be subject to other provisions of the Act, including sections 45 and 47, and will be unlawful where they substantially lessen competition.

Exclusionary provisions

2.32 The 'output restriction' purpose condition is amended to prohibit cartel provisions with the purpose of directly or indirectly preventing,

restricting or limiting production, capacity, supply or acquisition. The inclusion of acquisition is achieved by adding a fourth subparagraph to paragraph 44ZZRD(3)(a). ***[Schedule 2, item 3, paragraph 44ZZRD(3)(a)]***

2.33 This change is made as a result of the repeal of the separate prohibition on exclusionary provisions, as detailed in Chapters 3 and 4, and addresses a possible gap in the law following the repeal.

Renumbering

2.34 Part 2 of Schedule 2 renumbers Division 1 of Part IV to the Act, in order to make the cartel conduct provisions easier to navigate. ***[Schedule 2, item 49, Division 1 of Part IV]***

2.35 Amendments are also made to Schedule 1 to the Act, to mirror the renumbering of the Act itself. ***[Schedule 2, item 50, Division 1 of Part 1 of Schedule 1 to the Act]***

2.36 Schedule 2 also provides for references in other Acts, instruments or documents to be construed as a reference to the renumbered provision where appropriate. ***[Schedule 2, item 51]***

Consequential amendments

2.37 Following the changes to the exception for joint ventures, complex additional subsections relating to arrangements and understandings have been removed from sections 44ZZRO and 44ZZRP. ***[Schedule 2, items 15 and 22, subsections 44ZZRO(1A), 44ZZRO(1B), 44ZZRP(1A) and 44ZZRP(1B)]***

2.38 As a result of the changes described in this Chapter, amendments have been made to various provisions in Division 1 of Part IV. These amendments ensure that other provisions correctly refer to the amended provisions and no longer refer to repealed concepts. ***[Schedule 2, items 1, 10, 11, 16 to 18 and 23, subsections 6(2C), 44ZZRD(5), 44ZZRD(7), 44ZZRO(2) and 44ZZRP(2)]***

2.39 Amendments are also made to Schedule 1 to the Act, to mirror the amendments made to the Act itself by Schedule 2 to this Bill. ***[Schedule 2, items 25 to 48, sections 44ZZRB, 44ZZRD, 44ZZRO, 44ZZRP and 44ZZRS of Schedule 1 to the Act]***

Commencement and application provisions

2.40 Schedule 2 commences on a day or days to be fixed by Proclamation.

Chapter 3
Price signalling and concerted practices

Outline of chapter

3.1 Schedule 3 to this Bill repeals the price signalling provisions, and extends section 45 to prohibit a person from engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

3.2 Schedule 3 to this Bill also repeals subparagraphs 45(2)(a)(i) and 45(2)(b)(i) to remove the separate prohibition on exclusionary provisions from the Act.

3.3 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

Price signalling

3.4 Division 1A of Part IV of the Act contains provisions prohibiting the anti-competitive disclosure of information (price signalling).

3.5 In 2007, the report of the ACCC inquiry into the price of unleaded petrol identified evidence of price-fixing in the petrol industry which the Commission considered to be anti-competitive (specifically, the private disclosure of pricing information). However, the conduct did not amount to a contract, arrangement or understanding within the judicial interpretation of those terms in section 45, and this concern led to the introduction of separate provisions on price signalling to address the conduct.

3.6 These provisions prohibit the private disclosure of pricing information to a competitor on a *per se* basis, that is, the conduct is prohibited without reference to its effect or likely effect on competition. The provisions also prohibit the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market.

3.7 These provisions are confined in their application to a single industry (banking) and since the introduction of the provisions in June 2012, no cases have been brought for contravention of the prohibitions.

3.8 The public disclosure of pricing information can help consumers to make informed choices and is unlikely to be harmful to competition. Where such disclosures occur in private, this may facilitate anti-competitive collusion between competitors, such as the coordination of pricing decisions resulting in higher price outcomes. However, the private disclosure of pricing information may in some circumstances be pro-competitive or a necessary part of business, for example in the case of a joint venture or similar type of collaborative business activity.

3.9 On this basis, the Harper Review concluded that the price signalling provisions, in particular the *per se* prohibition, are not fit for their purpose as they have the potential to overreach and capture pro-competitive conduct. The recommendation of the Harper Review was to repeal the separate price signalling provisions and make modifications to other parts of the competition law to address the conduct dealt with by Division 1A of Part IV.

3.10 In order to address price signalling following the repeal of the separate prohibitions, the Harper Review recommended expanding section 45 to include a prohibition on 'concerted practices' in addition to contracts, arrangements or understandings with the purpose, effect or likely effect of substantially lessening competition.

Exclusionary provisions

3.11 See Chapter 4 for detail on the context of the repeal of the separate prohibition on exclusionary provisions.

Summary of new law

3.12 Division 1A of the Act is repealed, and section 45 of the Act is expanded to include the concept of a 'concerted practice'.

3.13 Subparagraphs 45(2)(a)(i) and 45(2)(b)(i) are repealed, to remove the separate prohibition on exclusionary provisions from the Act.

Comparison of key features of new law and current law

New law	*Current law*
The anti-competitive disclosure of pricing and other information is dealt with under the more general prohibitions in the competition law.	The anti-competitive disclosure of pricing and other information is separately and specifically prohibited.
A corporation is prohibited from engaging in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition.	No equivalent.
There is no separate prohibition on exclusionary provisions within contracts, arrangements or understandings.	There is a separate prohibition on exclusionary provisions within contracts, arrangements or understandings.

Detailed explanation of new law

3.14 Division 1A of Part IV of the Act, relating to the anti-competitive disclosure of pricing and other information, is repealed. ***[Schedule 3, item 1, Division 1A of Part IV]***

3.15 Section 45, dealing with contracts, arrangements or understandings that restrict dealings or affect competition, is broadened to apply to conduct previously falling within the separate prohibitions within Division 1A.

Contract, arrangement, understanding or concerted practice

3.16 Schedule 3 amends section 45 to prohibit corporations from engaging in a 'concerted practice' that has the purpose, effect or likely effect of substantially lessening competition. Section 45 will continue to also prohibit making, arriving at or giving effect to a contract, arrangement or understanding with the purpose, effect or likely effect of substantially lessening competition. The Schedule also amends subsections 45(1), 45(2) and 45(3) to incorporate concerted practices and simplify the provision. ***[Schedule 3, item 2, section 45]***

3.17 The concept of a concerted practice is well established in competition law internationally. The amendment to introduce the concept of a 'concerted practice' is made to recognise that lesser forms of coordination than what has been judicially interpreted as required for a contract, arrangement or understanding, should be captured by section 45,

provided the practice has the purpose, effect or likely effect of substantially lessening competition.

3.18 As is the case for other forms of coordination dealt with by section 45, concerted practices are not defined in the Act. The interpretation of a 'concerted practice' should be informed by international approaches to the same concept, where appropriate. Broadly, international jurisprudence suggests that coordination between competitors, where cooperation between firms is substituted for the uncertainties and risks of independent competition, is potentially a concerted practice.

3.19 It is not necessary that a concerted practice have an anti-competitive 'provision', as it is the practice itself which has the anti-competitive purpose, effect or likely effect.

Operation of section 45

3.20 In addition to the changes described elsewhere in this Chapter, the following is intended to clarify the operation of section 45 as amended. Schedule 3 is not intended to change the operation of section 45 except as described.

3.21 Paragraphs 45(1)(a) and 45(1)(b) set out that a corporation must not enter into or give effect to a contract, arrangement or understanding, if the contract, arrangement or understanding (or a provision thereof) has the purpose, or would have or be likely to have the effect, of substantially lessening competition. ***[Schedule 3, item 2, paragraphs 45(1)(a) and 45(1)(b)]***

3.22 Paragraph 45(1)(c) sets out that a corporation must not engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition. ***[Schedule 3, item 2, paragraph 45(1)(c)]***

3.23 Subsection 45(2) makes it clear that a corporation must not give effect to a prohibited provision of a contract, arrangement or understanding that was made or arrived at before the commencement of the new section 45. ***[Schedule 3, item 2, paragraph 45(2)]***

3.24 Subsection 45(3) contains a specific definition of 'competition' for the purposes of section 45, which expands the definition to competition in any market in which a corporation (or related body corporate) that is party to the contract, arrangement or understanding containing the prohibited provision, supplies or acquires goods or services (or would supply or acquire goods or services, but for the anti-competitive provision). With the introduction of the concept of a concerted practice, competition is also defined, for the purposes of section 45, in relation to a

concerted practice. This ensures that the effects of anti-competitive provisions and practices are assessed in the same way. ***[Schedule 3, item 2, paragraph 45(3)(b)]***

3.25 Section 45 contains a number of exceptions, which are amended to incorporate concerted practices: an anti-overlap provision which prevents section 45 capturing conduct which would contravene other sections (subsection 45(6)); an exception for the acquisition of shares in the capital of a body corporate or any assets of a person (subsection 45(7)); and an exception where the only parties to the contract, arrangement, understanding or concerted practice are related bodies corporate (subsection 45(8)). ***[Schedule 3, items 9-11, subsections 45(6) to 45(8)]***

Exclusionary provisions

3.26 Schedule 4 to this Bill also repeals subparagraphs 45(2)(a)(i) and 45(2)(b)(i) to remove the separate prohibition on exclusionary provisions from the Act. This is achieved by repealing subsections 45(1) to 45(3) and rewriting the provisions without the separate prohibition on exclusionary provisions. ***[Schedule 3, item 2, subsections 45(1) to 45(3)]***

3.27 As detailed in Chapter 4, section 4D, which contains the definition of ***exclusionary provision***, is repealed as a consequence of the repeal of the separate prohibition on exclusionary provisions. ***[Schedule 4, item 1, section 4D]***

3.28 As detailed in Chapter 2, a consequential amendment is made to the cartel conduct provisions to address any resulting gap in the law following the repeal of the separate prohibition on exclusionary provisions. ***[Schedule 2, item 2, paragraph 44ZZRD(3)(a)]***

Consequential amendments

3.29 A number of amendments are made to section 45 to simplify the provisions and make them easier to read and understand. For example, the subsection 45(7), which was expressed in one long and complex sentence, is now split into dot points. This simplification also involves some renumbering of provisions. ***[Schedule 3, items 3-5, subsections 45(5A), 45(6), 45(7) and 45(8)]***

3.30 Amendments are made throughout the Act to reflect the renumbering of provisions in section 45 and the amendments detailed in this Chapter. ***[Schedule 3, items 11-24, Subdivision A of Division 2 of Part VII, section 93, subsections 45(8A), 49(9) and 51(4), paragraphs 4(2)(a), 4(2)(b), 6(2)(d),, 84(3)(b), 93AB(1)(a), 93AB(1)(b) and 93AC(2), and subparagraph 6(2)(b)(i)]***

3.31 Amendments are also made to Schedule 1 to the Act, to mirror the amendments made to the Act itself by Schedule 3 to this Bill. The Schedule version of section 45 applies to persons generally, rather than to corporations. ***[Schedule 3, items 6-10, Division 1A of Part IV to Schedule 1]***

Commencement and application provisions

3.32 Schedule 3 commences on a day or days to be fixed by Proclamation.

Chapter 4
Exclusionary provisions

Outline of chapter

4.1 Schedule 4 to this Bill repeals the definition of 'exclusionary provision' and a defence to the prohibition on exclusionary provisions, following the repeal of the separate prohibition on exclusionary provisions by Schedule 3.

4.2 As detailed in Chapter 2, a related amendment is made by Schedule 2, to the provisions on cartel conduct, to ensure there is no gap following the repeal of the prohibition on exclusionary provisions.

4.3 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

4.4 Sub-paragraphs 45(2)(a)(i) and 45(2)(b)(i) of the Act respectively prohibit making, arriving at or giving effect to a contract, arrangement or understanding containing an exclusionary provision.

4.5 ***Exclusionary provision*** is defined in section 4D, and broadly means a provision of an actual or proposed contract, arrangement or understanding between competitors, where the provision has the purpose of preventing, restricting or limiting certain supplies or acquisitions of goods or services.

4.6 Section 76C contains a defence to proceedings relating to an exclusionary provision, where the provision is for the purposes of a joint venture and does not have the purpose, effect or likely effect of substantially lessening competition.

4.7 The prohibition on exclusionary provisions substantially overlaps with the prohibition on cartel provisions. Division 1 of Part IV of the Act relates to cartel conduct, and generally prohibits cartel provisions within contracts, arrangements or understandings between competitors.

4.8 A provision is a cartel provision if it has the purpose of output restriction (paragraph 44ZZRD(3)(a)), market sharing or division (paragraph s44ZZRD(3)(b)) or bid-rigging (paragraph 44ZZRD(3)(c)) or

the purpose, effect or likely effect of price-fixing (subsection 44ZZRD(2)).

4.9 Output restriction refers to the restriction of the production of goods, supply of goods or capacity to supply goods. Market sharing or division refers to the allocation of customers or geographical areas of supply or acquisition between the parties to the contract, arrangement or understanding. Following output restriction, or market sharing or division, there is a resulting reduction in competition in those markets. Where a cartel provision has the purpose of output restriction or market sharing or division, the same provision is also likely to fall within the definition of 'exclusionary provision'.

4.10 Section 45 contains a number of anti-overlap provisions which prevent the application of section 45 to conduct which contravenes one of several other provisions. However, there is no anti-overlap provision preventing the application of section 45 to conduct which contravenes the prohibition on cartel provisions.

4.11 The Harper Review considered that this overlap creates unnecessary uncertainty and complexity in the law, and recommended that the separate prohibition on exclusionary provisions be repealed, with an amendment to the provisions on cartel conduct to address any resulting gap in the law.

Summary of new law

4.12 Schedule 4 to this Bill repeals the definition of 'exclusionary provision' in section 4D and makes consequential amendments to remove reference to section 4D throughout the Act.

4.13 The defence to the exclusionary provision prohibition is repealed as it is no longer needed.

Comparison of key features of new law and current law

New law	*Current law*
'Exclusionary provision' is not defined in the Act.	'Exclusionary provision' is defined in the Act.
There is no provision containing a defence as there is no longer a separate prohibition on exclusionary provisions.	There is a defence to the prohibition against exclusionary provisions.

Detailed explanation of new law

4.14 Schedule 4 repeals the definition of 'exclusionary provision', in section 4D. ***[Schedule 4, item 1, section 4D]***

4.15 Following the repeal of the separate prohibition on exclusionary provisions, as detailed in Chapter 4, the definition of exclusionary provision is no longer necessary.

4.16 Schedule 4 to this Bill also repeals section 76C, the defence to the prohibition on exclusionary provisions, as it is made redundant by the repeal of the separate prohibition. ***[Schedule 4, item 2, section 76C]***

Consequential amendments

4.17 Consequential amendments are made to provisions of the Act which reference section 4D or exclusionary provisions, to remove such references. ***[Schedule 4, items 3-5, subsections 93AC(1) and 10.08(1)]***

Commencement and application provisions

4.18 Schedule 4 commences on a day or days to be fixed by Proclamation.

Chapter 5
Covenants affecting competition

Outline of chapter

5.1 Schedule 5 to this Bill simplifies the provisions in the Act in respect of covenants by inserting definitions of 'contract' and 'party, to an arrangement that is a covenant', and repeals unnecessary duplicate or redundant provisions.

5.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

5.3 Section 45 concerns contracts, arrangements or understandings that restrict dealings or affect competition. The operation of section 45 is detailed in earlier chapters.

5.4 Sections 45B and 45C relate to covenants and largely duplicate the concepts of section 45. The distinction between contracts and covenants appears throughout the Act, for example in section 87 which contains separate references to contracts and covenants.

5.5 Some submissions to the Harper Review identified areas of complexity where the Act could be simplified to increase understanding and better achieve its policy intent.

5.6 The Harper Review acknowledged this view and noted that businesses and consumers would benefit from simplified competition laws that improve clarity and better adhere to the economic principles underpinning the Act.

5.7 The Harper Review recommended that provisions which are redundant or unnecessarily duplicate other provisions could be removed, and identified the provisions relating to covenants of one example of unnecessary duplication.

Summary of new law

5.8 Schedule 5 to this Bill simplifies the provisions in the Act in respect of covenants by inserting definitions of 'contract' and 'party, to an arrangement that is a covenant' into the Act, and repeals unnecessary duplicate or redundant provisions.

Comparison of key features of new law and current law

New law	*Current law*
Contract is defined.	Contract is not defined.
The definition of ***contract*** includes a covenant.	Contract is not defined and the Act separately refers to contracts and covenants throughout.
Party, to an arrangement that is a covenant, is defined, to include a person bound by or entitled to the benefit of a covenant.	Party, to an arrangement that is a covenant, is not defined.
Covenants are specifically included within the meaning of 'contract'.	Covenants affecting competition are provided for under separate provisions in the law.

Detailed explanation of new law

5.9 Covenants are a form of agreement in which one or more parties promise to do, or not do, some action. In a legal sense, there are technical differences between contracts and covenants. However, the Harper Review found that these technical differences have little to no impact on the agreement's effect on competition. In light of this, a distinction between contracts and covenants in the Act is unnecessary, particularly given that the provisions on contracts and covenants largely duplicate each other.

5.10 Schedule 5 to this Bill inserts a definition of 'contract' into the Act. The meaning of ***contract*** includes a covenant. The definition does not define contract more generally, as the definition is well established in the common law. ***[Schedule 5, item 1, subsection 4(1)]***

5.11 Schedule 5 also inserts a definition of 'party, to an arrangement that is a covenant' to the Act, to clarify that a party to an arrangement that is a covenant includes a person who is bound by, or entitled to the benefit of, the covenant. ***[Schedule 5, item 1, subsection 4(1)]***

5.12 The incorporation of the new definitions removes unnecessary duplication and greatly simplifies the Act by eliminating the need to determine whether a particular agreement is a contract or a covenant, and locates and applies the relevant provisions accordingly.

5.13 As a result of the new definitions, the separate provisions concerning covenants are repealed, and other provisions are amended as required to remove the references to covenants. ***[Schedule 5, items 2-20, sections 45B, 45C, and 44ZZRQ, subsections 4(1), 4(3), 45(5), 46A(6), 87(3), 87(5) and 151AJ(4) to 151AJ(7), paragraphs 4F(1)(a), 6(2)(b)(i), 6(2)(e), 87(3)(a), 87(3)(c), 87(3)(d), 151AJ(3)(a) and 151AJ(7)(d), and subparagraph 4F(1)(a)(i)]***

Consequential amendments

5.14 Schedule 5 also amends Schedule 1 to the Act, to ensure that the amendments to the Act made by this Schedule are mirrored in the Competition Code and apply to persons. ***[Schedule 5, items 21-23, section44ZZRQ, subsection 45(5), section 45B and 45C of Schedule 1]***

Transitional provisions

5.15 Schedule 5 provides that amendments to section 87 of the Act (about orders made by a court) do not affect the validity of an existing order made in relation to a contravention of the specific provisions regarding covenants affecting competition (section 45B), provided the order was in force immediately before the commencement of the amendments in Schedule 5.***[Schedule 5, item 24]***

Commencement and application provisions

5.16 Schedule 5 commences on a day or days to be fixed by Proclamation.

Chapter 6
Secondary boycotts

Outline of chapter

6.1 Schedule 6 amends the Act to increase the maximum penalty applying to breaches of the secondary boycott provisions. This aligns the penalty with penalties for other breaches of the competition law.

6.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

6.3 The Harper Review noted that a corporation that contravenes the secondary boycott provisions is liable to a civil penalty not exceeding $750,000, and recommended that the maximum penalty for secondary boycotts should be the same as that applying to other breaches of the competition law.

6.4 Secondary boycotts are harmful to trading freedom and therefore harmful to competition. There is no good reason why the maximum penalty for breaches of the secondary boycott provisions should be lower than the maximum penalty for breaches of other provisions of the competition law.

Summary of new law

6.5 Schedule 6 to this Bill increases the maximum pecuniary penalty that applies for secondary boycotts, in line with the maximum penalty for other breaches of the competition law.

Comparison of key features of new law and current law

New law	*Current law*
The maximum penalty for a breach of the secondary boycott provisions is the greatest of: • $10,000,000; • three times the total value of the benefit obtained from the secondary boycott; or • 10% of the annual turnover of the corporation for the twelve months leading up to when the secondary boycott occurred.	The maximum penalty for a breach of the secondary boycott provisions is $750,000.

Detailed explanation of new law

6.6 Section 76 sets out the civil pecuniary (monetary) penalties for contravention of various sections of the Act.

6.7 Sections 45D and 45DB prohibit secondary boycotts. Paragraph 76(1A)(a) currently provides that the maximum penalty payable by a corporation for a breach of the secondary boycott provisions is $750,000. The maximum penalties for a contravention of other sections of the competition law are $10 million or higher, depending on the value of the benefit obtained as a result of the contravention or the annual turnover of the corporation.

6.8 Schedule 6 removes sections 45D and 45DB from paragraph 76(1A)(a), which provides for a separate maximum pecuniary penalty of $750,000 for a breach of certain listed provisions. ***[Schedule 6, item 1, subsection 76(1A)(a)]***

6.9 The effect of this amendment is that the maximum pecuniary penalty for a breach of the secondary boycott provisions is determined by paragraph 76(1A)(b). The maximum penalty for a contravention of the secondary boycott provisions is the greatest of:

- $10,000,000;
- three times the total value of the benefit obtained from the secondary boycott; or

- 10% of the annual turnover of the corporation for the twelve months leading up to when the secondary boycott occurred.

6.10 These amounts are a maximum penalty, and the court has discretion to set a penalty lower than the maximum.

Commencement and application provisions

6.11 Schedule 6 commences on a day or days to be fixed by Proclamation.

Chapter 7
Misuse of market power

Outline of chapter

7.1 Schedule 7 to this Bill amends the Act to strengthen the prohibition of misuse of market power by corporations and better target anti-competitive conduct by corporations with a substantial degree of market power.

7.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

7.3 Section 46 prohibits a corporation with a substantial degree of power in a market from taking advantage of that power in any market for one of three specific purposes. These purposes focus on damaging an actual or potential competitor. Subsection 46(6A) sets out considerations that may be taken into account in determining whether a corporation has 'taken advantage' of its substantial market power.

7.4 Section 46 also expressly prohibits certain conduct, such as predatory pricing (subsection 46(4A)).

7.5 A number of submissions to the Issues Paper, Draft Report and Final Report of the Harper Review outlined concerns with the operation of section 46. Submissions focussed on whether the section sufficiently deterred anti-competitive conduct by firms with substantial market power, and whether it created commercially predictable outcomes.

7.6 The Harper Review recommended re-framing section 46 to prohibit a firm with a substantial degree of power in a market from engaging in conduct with the purpose, effect or likely effect of substantially lessening competition in any market.

7.7 In light of the importance of the issue for business and consumers and the level of contention surrounding the recommendation, the Government decided to consult further on options to strengthen the misuse of market power provision. A Discussion Paper on section was released on 11 December 2015. The Treasurer noted that the Government

was seeking to 'ensure section 46 offers a commercially and legally robust, yet practical, approach to preventing the misuse of market power'.

7.8 The Government received a further 86 submissions in response to the discussion paper. On 16 March 2016, the Prime Minister, Treasurer and Assistant Treasurer announced that the Government would adopt in full the Harper Review recommendation relating to the misuse of market power. In their joint announcement, they noted that the change 'uses existing legal concepts from within the competition law – such as "substantially lessening competition" – and ensures the focus of the provision remains only on those firms that have substantial market power.'

Summary of new law

7.9 Schedule 7 amends section 46 to prohibit a corporation with a substantial degree of market power engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

7.10 Schedule 7 also rewrites section 46 to simplify the provision and make it easier to navigate.

Comparison of key features of new law and current law

New law	*Current law*
The conduct must have the purpose, effect or likely effect of substantially lessening competition in that or any other market.	The conduct must 'take advantage' of market power.
The conduct must have the purpose, effect or likely effect of substantially lessening competition in that or any other market.	Conduct must be for a specific anti-competitive purpose, relating to damaging an actual or potential competitor.
There is a general provision only, and no specific prohibition on predatory pricing or other forms of conduct (however described).	Predatory pricing and other forms of conduct are expressly prohibited.
A person may seek exemption from section 46 via the Commission authorisation process.	Authorisation is not available for section 46.
Certain pro-competitive and anti-competitive factors must be	'Substantial lessening of competition'

taken into account when considering a substantial lessening of competition.	is not an element of section 46.

Detailed explanation of new law

Objective of the misuse of market power provision

7.11 The objective of section 46 is to prevent firms from engaging in unilateral conduct that harms the competitive process. This requires distinguishing between vigorous competitive activity which is desirable, and economically inefficient, monopolistic practices that may exclude rivals and harm the competitive process.

7.12 Despite the objective described above, the focus of the current provision is on prohibiting damage to *a competitor*. The Harper Review noted that this was inconsistent with the overriding objective of the Act, which is to protect competition rather than individual competitors.

7.13 The amendments reframe section 46 to focus the provisions and tests on the competitive process rather than individual competitors.

7.14 To better target anti-competitive conduct, and make it clear that the rewritten section 46 is not intended to prevent pro-competitive conduct, section 46 lists mandatory factors that must be considered when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition.

Prohibition on the misuse of market power

7.15 A corporation with a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market. ***[Schedule 7, item 1, subsection 46(1)]***

Substantial degree of power in a market

7.16 Section 46 only applies to corporations with a substantial degree of power in a market. This test applies under the current section 46 and the retention of this test was supported by the Harper Review.

7.17 Subsections 46(3) to 46(8) set out the circumstances and provide guidance about when a corporation has substantial degree of market power for the purposes of section 46. Subsections 46(3) to 46(8) remake and simplify the former parallel subsections 46(3) to 46(4). This

simplification is not intended to change their meaning or operation. ***[Schedule 7, item 1, subsections 46(3) to 46(8)]***

Purpose, effect or likely effect of substantially lessening competition

7.18 The rewritten section 46 prohibits a corporation that has a substantial degree of power in a market from engaging in conduct with the *purpose, effect or likely effect of substantially lessening competition* in a market. ***[Schedule 7, item 1, subsection 46(1)]***

7.19 The concept of the purpose, effect or likely effect of substantially lessening competition is new to section 46. This concept already exists in a number of provisions in Part IV of the Act, and it is intended that the existing jurisprudence will inform the meaning of this concept as it applies to section 46.

Mandatory factors to which regard must be had when considering whether there has been a substantial lessening of competition

7.20 Subsection 46(2) sets out a list of factors that must be taken into account when assessing whether conduct has the purpose, effect or likely effect of substantially lessening competition.

7.21 Subsection 46(2) lists factors that indicate pro-competitive conduct, as well as factors that indicate anti-competitive conduct.

Pro-competitive factors

7.22 Factors indicating a purpose, effect or likely effect of increasing competition in a market include increasing competition by enhancing efficiency, innovation, product quality or price competitiveness. This ensures that pro-competitive aspects of conduct are taken into account when assessing the overall purpose, effect or likely effect of the conduct. ***[Schedule 7, item 1, paragraph 46(2)(a)]***

Anti-competitive factors

7.23 Factors indicating a purpose, effect or likely effect of lessening competition in the market include preventing, restricting or deterring the potential for competitive conduct or new entry into the market. This ensures that section 46 better targets anti-competitive conduct by requiring consideration of the competitive process. ***[Schedule 7, item 1, paragraph 46(2)(b)]***

Consideration of the factors

7.24 The factors in subsection 46(2) are not exhaustive, but must be considered in determining whether the conduct has the purpose, effect or likely effect of substantially lessening competition. The factors are intended to provide guidance about the typical effects of pro-competitive or anti-competitive conduct on competition in a market.

7.25 It is not necessary that any one individual factor is present and points toward a purpose, effect or likely effect of substantially lessening competition in a market. The assessment of several pro-competitive or anti-competitive factors together, including those listed in subsection 46(2), may lead to a conclusion that the overall purpose, effect or likely effect of the conduct is to substantially lessen competition. In particular circumstances, some factors may be attributed more weight than others, and factors not listed in section 46 may nevertheless be of significant weight.

Simplification of elements of section 46

7.26 The amendments remove the specific prohibition against predatory pricing from section 46. The reframed section 46 focuses on damage to the competitive process and specific prohibitions are not required. ***[Schedule 7, item 1, section 46]***

7.27 The amendments also remove the additional provisions providing guidance on the meaning of 'take advantage' from section 46. This is because the rewritten section 46 replaces the former 'take advantage' test with a test of the purpose, effect or likely effect of conduct. ***[Schedule 7, item 1, section 46]***

Schedule version of Part IV

7.28 Schedule 7 also amends Schedule 1 to the Act, to ensure that the amendments to the Act made by Schedule 7 are mirrored in the Competition Code and apply to persons. ***[Schedule 7, item 5, section 46 of Schedule 1 to the Act]***

Consequential amendments

7.29 As a result of the amendments and simplification to section 46, Schedule 7 makes certain consequential amendments to the provisions of the Act. ***[Schedule 7, items 2, 3, 4, subsection 151BC(4) and paragraphs 151AJ(5)(c) and 151AJ(5)(d)]***

7.30 As a result of the change to a competition-based test for third line forcing, Schedule 8 makes a consequential amendment to the wording in subsection 47(10). ***[Schedule 8, item 2, subsection 47(10)]***

Commencement and application provisions

7.31 Schedule 7 commences on a day to or days to be fixed by Proclamation.

Chapter 8
Third line forcing

Outline of chapter

8.1 Schedule 8 to this Bill amends the Act to only prohibit third line forcing where it has the purpose, effect or likely effect of substantially lessening competition.

8.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

8.3 Third line forcing is a form of exclusive dealing (also known as a vertical trading restriction) and involves the supply of goods or services on the condition that the purchaser also acquire goods or services from another person, or a refusal to supply because the purchases will not agree to that condition.

8.4 Third line forcing is prohibited *per se* under subsections 47(6) and 47(7) and paragraphs 47(8)(c) and 47(9)(d), that is, it is prohibited irrespective of its purpose, effect or likely effect.

8.5 Third line forcing may be exempted by filing a notification with the Commission. The Commission may withdraw the notification if it considers that the anti-competitive detriment outweighs any public benefit from the conduct.

8.6 Australia is the only comparable jurisdiction that prohibits third line forcing on a *per se* basis. Other jurisdictions, including the United States, Canada, the European Union and New Zealand, assess similar conduct under a test that looks at the effect of the conduct on competition.

8.7 The Harper Review noted that third line forcing is similar to second line forcing, in which a corporation supplies a product on the condition that the purchaser acquires another product from the same corporation (or a related corporation). Second line forcing is also known as ‘bundling’ or ‘tying’, and is not prohibited on a *per se* basis. Rather, it is prohibited where the purpose, effect or likely effect of the conduct is a substantial lessening of competition.

8.8 The Harper Review found there was no need for third line forcing to be prohibited *per se* and singled out from other forms of vertical trading restriction which are competition tested. The Harper Review acknowledged the availability of an exemption through the notification process, but found that the regulatory cost of lodging a notification is unnecessary, because in most cases the notification will be allowed.

8.9 The recommendation of the Harper Review was to prohibit third line forcing only where the purpose, effect or likely effect is substantially lessening competition.

Summary of new law

8.10 Third line forcing is only prohibited where it has the purpose, effect or likely effect of substantially lessening competition.

Comparison of key features of new law and current law

New law	*Current law*
Third line forcing is prohibited only where it has the purpose, effect or likely effect of substantially lessening competition.	Third line forcing is prohibited on a *per se* basis.

Detailed explanation of new law

8.11 Subsection 47(1) of the Act prohibits a corporation engaging in exclusive dealing in trade or commerce. Subsections 47(2) to 47(9) set out various forms of conduct which constitute exclusive dealing, including third line forcing in subsections 47(6) and 47(7) and paragraphs 47(8)(c) and 47(9)(d).

8.12 Schedule 8 amends subsection 47(10) of the Act to provide that all forms of exclusive dealing, including third line forcing, are only prohibited where they have the purpose, effect or likely effect of substantially lessening competition. This ensures that all forms of conduct constituting exclusive dealing are assessed under the same test, and brings Australia's competition law in line with other comparable jurisdictions in respect of third line forcing.

8.13 The amendments to subsection 47(10) of the Act apply the purpose, effect or likely effect of substantially lessening competition test to all forms of exclusive dealing conduct, by removing the specific references to the types of exclusive dealing conduct to which the test currently applies. ***[Schedule 8, item 1, subsection 47(10)]***

8.14 As all third line forcing conduct is now subject to a substantial lessening of competition test, Chapter 10 outlines certain amendments to the notification provisions. This includes broadening the grounds on which the Commission may consider whether to not approve a notification of exclusive dealing to include a substantial lessening of competition test. This makes the grounds that the Commission will consider consistent for all forms of exclusive dealing that may be notified. ***[Schedule 10, item 6, subsection 93(3)]***

8.15 The amendments in Schedule 8 provide that the third line forcing provisions are now subject to this standardised procedure. Consequently, subsection 47(10A), which specifically deals with notifications for third line forcing, is repealed. ***[Schedule 8, item 3, subsection 47(10A)]***

Consequential amendments

8.16 As a result of the change to a competition-based test for third line forcing, Schedule 8 makes a consequential amendment to the wording in subsection 47(10). ***[Schedule 8, item 2, subsection 47(10)]***

8.17 Schedule 8 also amends Schedule 1 to the Act, to ensure that the amendments to the Act made by Schedule 8 are mirrored in the Competition Code and apply to persons. ***[Schedule 8, items 4-6, subsection 47(10) of Schedule 1 to the Act]***

Commencement and application provisions

8.18 Schedule 8 commences on a day or days to be fixed by Proclamation.

Chapter 9
Resale price maintenance

Outline of chapter

9.1 Schedule 9 to this Bill simplifies regulation by amending the resale price maintenance (RPM) and notification provisions to allow a corporation or person to notify the Commission of RPM conduct, in addition to seeking authorisation from the Commission for RPM conduct.

9.2 Schedule 9 also provides an exemption from the RPM prohibition for conduct between related bodies corporate.

9.3 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

9.4 RPM is a form of vertical restraint concerning resale prices. RPM involves a supplier supplying a product to a person on condition that the product not be advertised for sale or sold below a price specified by the supplier. The Act prohibits RPM on a *per se* basis.

9.5 In recent years, more support has been expressed for the view that RPM is not always anti-competitive. Like other forms of vertical trading restriction, RPM will not have a substantial effect on competition in a market if the product or service is subject to strong rivalry from competing products or services. In those circumstances, a manufacturer or wholesaler would be unable commercially to specify a minimum price that is above the level determined by competition. In a competitive market, RPM may be beneficial to competition and consumers.

9.6 In particular, a number of online business models now use distribution arrangements that may constitute RPM conduct. These businesses are an increasingly significant part of the economy, and provide benefits in many ways, including expanding the range of products sold in Australia as many online companies operate across national borders. While it is important to ensure that anti-competitive conduct is deterred by the RPM provisions, it is also important to ensure pro-competitive conduct is not unnecessarily targeted.

9.7 A person may seek authorisation for RPM conduct from the Commission where it would result in a public benefit. Since authorisation for RPM conducted was introduced in 1995, there have been relatively few applications, relative to other provisions of the Act.

9.8 A concern noted in the Harper Review was that the cost and delay of the authorisation process is a real deterrent to businesses seeking exemption for a retailing strategy involving RPM. This is particularly so for manufacturers launching a new product that would have to place the product on hold while the Commission conducted a public benefit analysis.

9.9 While the Harper Review considered that RPM should remain prohibited on a *per se* basis, it recommended that the quicker and less expensive notification procedure should be available for RPM conduct.

9.10 Notification, which involves a corporation giving notice to the Commission setting out the conduct or proposed conduct, is generally a quicker and less costly process than authorisation. However, notification of RPM is not permitted under the Act, in contrast with other forms of vertical restraint, including third line forcing, where a corporation is able to notify the Commission of the conduct.

9.11 A notice for RPM comes into effect 60 days after lodgement and remains in force until either:

- the notice is withdrawn by the corporation;
- the Commission advises that the notice is not valid;
- the Commission advises that the conduct specified in the notice is not approved.

Summary of new law

9.12 Schedule 9 amends the Act to simplify regulation by allowing a corporation or person to notify the Commission of RPM conduct, in addition to seeking authorisation from the Commission for RPM conduct.

9.13 Schedule 9 also amends the Act to provide that actions between related bodies corporate are not acts that constitute engaging in RPM.

Comparison of key features of new law and current law

New law	*Current law*
A corporation or other person may notify the Commission of RPM.	Notification is not available for RPM.
Actions between related bodies corporate do not constitute engaging in RPM.	Acts between related bodies corporate may constitute engaging in RPM.

Detailed explanation of new law

Notification

9.14 Schedule 9 amends section 48 to provide that the prohibition against RPM does not apply to a corporation or other person engaging in conduct that constitutes RPM if the corporation or other person has given the Commission a notice under section 93(1), and that notice is in force. ***[Schedule 9, item 2, subsection 48(2)]***

9.15 Subsection 93(1) sets out the types of conduct or proposed conduct that a corporation may give a notice to the Commission. Schedule 9 amends the law to include conduct of the kind referred to in section 48 (RPM). The subsection is split into two paragraphs to simplify the provision and make it easier to read. ***[Schedule 9, items 3 and 5, Subdivision A of Division 2 of Part VII, subsection 93(1)]***

9.16 Subsection 48 is also added to other subsections within section 93 which detail the requirements, procedure and other matters for notifications. ***[Schedule 9, items 4, 9, 13, 14 and 16, section 93, subsections 93(7A), 93(7B), and 93(7C) and paragraph 93(3A)(a)]***

9.17 The effect of these amendments is to allow a corporation or other person engaging or proposing to engage in RPM to notify the Commission of the conduct. This is a quicker and less costly mechanism of seeking an exemption from the RPM prohibition than seeking an authorisation.

9.18 Section 48 applies to a 'corporation or other person', and so provisions of section 93 relating to section 48 are amended to refer to a 'corporation or other persons'. Provisions within section 93 relating to other sections of the Act remain applicable to corporations only. ***[Schedule 9, items 6, 7, 8, 10, 11, 15, 17, 19 subsections 93(2), 93(3A), 93(3B), 93(5), 93(6), 93(7A) and 93(10) and paragraphs 93(3A)(a), 93(7B)(b), 93(7C)(b), 93(8)(a) and 93(8)(b)]***

9.19 Section 93 contains a differential procedure for when certain types of notifications comes into force, does not come into force or cease, at subsections 93(7A), 93(7B) and 93(7C) respectively. Each of these subsections is amended to apply this differential procedure to notifications for conduct notified under section 48. ***[Schedule 9, items 13, 14 and 16, subsections 93(7A), 93(7B) and 93(7C)]***

9.20 Subsection 93(7A) is also amended so that when conduct is notified under section 48, the notice comes into force:

- at the end of the period of 60 days, or such other period as is prescribed by the regulations, starting on the day when the corporation or other person gave the Commission notice; or

- if the Commission gives notice to the corporation or other person under subsection 93(2) during that period – when the Commission decides not to give the corporation or other person a notice under subsection 93(3A). ***[Schedule 9, item 13, subsection 93(7A)]***

9.21 As a result of this amendment, paragraph 93(7A)(a) now sets a default period of 60 days if no period is prescribed by the regulations.

9.22 Where a corporation or other person has given the Commission a notification for RPM conduct, the Commission may give that corporation or other person a written notice imposing conditions on the notification. If the Commission reasonably believes that it would have grounds to give the person a notice under subsection 93(3A) (that the conduct is not approved), but that those grounds would not exist if particular conditions relating to the proposed conduct were complied with, then the Commission may impose those conditions. This is also discussed at paragraph 10.68.

Related bodies corporate

9.23 A new subsection is added to section 96, so that the actions listed in subsection 96(3) do not constitute engaging in RPM if the supplier and second person are related bodies corporate. ***[Schedule 9, item 20, subsection 96(8)]***

9.24 This change reflects the general tenet of competition law that companies within a corporate group are treated as a single economic entity and are not considered to be competitors. This also brings section 48 in line with the prohibitions in sections 45 and 47, which do not apply to trading arrangements entered into between related companies.

Consequential amendments

9.25 Schedule 9 makes a number of consequential amendments as a result of providing for notification in respect of RPM. Some of these amendments preserve that certain elements of section 93 should only apply to notification for exclusive dealing, and not also RPM. ***[Schedule 9, item 1, 12 section 48, subsection 93(7)]***

9.26 As a result of the repeal of the price-signalling provisions, as detailed in Chapter 3, notification is no longer required for price-signalling and section 93 is amended to remove any reference to those provisions. ***[Schedule 9, items 5, 9, 13, 14 and 16, subsections 93(7A), 93(7B), and 93(7C) and paragraph 93(3A)(a)]***

9.27 As a result of the removal of the *per se* prohibition on third line forcing, and the change to a competition-based test as detailed in Chapter 8, third line forcing is removed from subsections of section 93 with additional or different requirements for conduct notified under specified sections only. ***[Schedule 9, items 9, 13, 14 and 16, subsections 93(7A), 93(7B), 93(7C)and paragraph 93(3A)(a)]***

9.28 Amendments are made to the Schedule version of the Act, to mirror the changes made by Schedule 9 and apply them to persons. ***[Schedule 9, items 21 and 22, section 48 of Schedule 1 to the Act]***

Commencement and transitional provisions

9.29 Schedule 9 commences on a day or days to be fixed by Proclamation.

9.30 Where a notice was in force under section 93 immediately before commencement of Schedule 9, that notice continues in force after commencement as if it has been given under section 93, as amended by Schedule 9. ***[Schedule 9, item 23]***

Chapter 10
Authorisations, notifications and class exemptions

Outline of chapter

10.1 Schedule 10 to this Bill amends and simplifies Part VII of the Act, to:

- consolidate the various authorisation provisions, including those relating to mergers, into a single authorisation process;
- grant the Commission a 'class exemption' power;
- allow the Commission to impose conditions on notifications for collective bargaining;
- grant the Commission a power to issue a 'stop notice' requiring collective boycott conduct to cease.

10.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

10.3 Part VII contains general notifications and authorisation divisions, as well as a specific merger division. In substance, all of these divisions are designed to grant an exemption from the application of Part IV of the Act.

Simplification

10.4 A number of submissions to the Harper Review considered Part VII overly complex, and that it could benefit from simplification.

10.5 The Harper Review considered this complexity undesirable, as it generates excessive regulatory and administrative costs and creates a focus on form over substance. The recommendation of the Harper Review was that the underlying purpose of Part VII—to permit conduct that lessens competition but results in a greater public benefit— could be better achieved through simplification.

Mergers

10.6 Submissions to the Harper Review raised concerns about the Commission's formal merger clearance and merger authorisation processes. The formal merger clearance process has not been used since its introduction in 2007. A number of factors may have led to this, including that it is unduly complicated by strict technical formal requirements.

10.7 Unlike authorisations for other conduct prohibited under Part IV, the Commission is not currently the decision-maker at first instance for merger authorisations. Instead, the Tribunal makes the decision at first instance, and there is no avenue for review of these decisions. Generally, it was considered that the Tribunal is not well suited to fulfil the role of decision-maker at first instance, since the Commission is better able to make investigations into matters.

10.8 The Harper Review recommended that the process could be simplified by removing the formal clearance process and combining the merger authorisation process with the general authorisation process under the Act. This would allow the merger parties to make a single application for approval to the Commission, and maintain the role of the Tribunal in conducting merits review of the Commission's decisions.

Class exemptions

10.9 Under the current law, common business practices may be captured under Part IV of the Act despite there being no competition or public interest concerns. Businesses may seek an individual exemption from the Commission either by authorisation or notification for these common practices where there are no competition concerns or there is a net public benefit. However, this process is costly for the business community who must submit individual applications and for the Commission which must process the applications.

10.10 The Harper Review considered that granting the Commission the power to issue 'class exemption' for common business practices that do not generate competition concerns, or are likely to generate a net public benefit, will reduce compliance and administration costs, increase certainty and create 'safe harbours' for business.

Collective Bargaining

10.11 Collective bargaining is generally detrimental to competition and consumer welfare. Such behaviour may allow firms to exploit consumers, force out competition, and reduce the general economic welfare. The same is true of collective boycott where suppliers may refuse to supply firms downstream. However, in certain circumstances,

collective bargaining conduct can be beneficial for competition. Similarly, in some circumstances, a collective boycott can be an appropriate and useful tool to support collective bargaining.

10.12 For example, small businesses will typically have less bargaining power than one large supplier, so they are at a disadvantage in negotiations. By negotiating as a collective, small business may be able to negotiate with bargaining power equal to a larger firm, and achieve a more efficient and pro-competitive outcome.

10.13 Submissions to the Harper Review were concerned that small businesses failed to effectively utilise the notification provisions for collective bargaining, because they are overly complex, and there are a number of restrictions and inhibitions created by the current legal framework.

10.14 There are also relatively few bargaining proposals that include collective boycott activity. The Commission submitted that this may be because small businesses believe that a collective bargaining arrangement that includes the prospect of a collective boycott would not be approved.

10.15 The Harper Review considered that there was a strong case for reforming the notification provisions in line with the Commission's submitted proposal, as higher use of the provisions would drive greater efficiencies for the Commission and for users of the notification process.

Summary of new law

10.16 Schedule 10 simplifies the various authorisation provisions into a single authorisation provision that allows the Commission to authorise conduct that would otherwise be prohibited under Part IV.

10.17 Schedule 10 also repeals the formal merger clearance and authorisation processes contained in Division III of Part VII. Mergers will be subject to the general authorisation process in section 88, changing the decision-maker at first instance from the Tribunal to the Commission.

10.18 A class exemption power allows the Commission to exempt conduct or categories of conduct if it is unlikely to raise competition concerns or is likely to generate net public benefits.

10.19 Amendments to the notification process for collective bargaining will allow the Commission to impose conditions on notifications including collective boycott activity, and require collective boycott conduct to cease through a 'stop notice' power.

Comparison of key features of new law and current law

New law	*Current law*
There is a single authorisation provision for all types of authorisations.	There are separate authorisation provisions applying to mergers and other types of authorisations.
The decision-maker at first instance for merger authorisations is the Commission.	The decision-maker at first instance for merger authorisations is the Tribunal.
The Commission's determination on a merger authorisation can be reviewed by the Tribunal on appeal.	The Tribunal's determination on a merger authorisation cannot be appealed.
The Commission may impose conditions on collective boycott and RPM notifications.	The Commission can only approve or reject notifications.
A collective boycott must cease when the Commission gives a 'stop notice', until the earliest of: • The end of 90 days (the Commission may extend this once by a further 90 days, to a maximum of 180 days); or • The date the Commission issues a final objections notice under subsections 93AC(1) or 93AC(2); or • The date the Commission issues a final conditions notice under section 93AAA; or • If and when the Commission withdraws the stop notice.	There is no provision for a 'stop notice'.

Detailed explanation of new law

Repeal of the formal merger clearance and authorisation processes

10.20 Schedule 10 repeals Division 3 of Part VII. This includes the formal merger clearance process, and the merger authorisation process. Mergers are now brought within the general authorisation process in Division 1 of Part VII. ***[Schedule 10, item 21, Division 3 of Part VII]***

10.21 A ***merger authorisation*** is defined to mean an authorisation granted under the general authorisation power in section 88 that allows a person to engage in conduct to which one or more of sections 50 and 50A would or might apply. A merger authorisation is not authorisation for a person to engage in conduct to which any other provision of Part IV would or might apply. The Act also defines an ***overseas merger authorisation***. It is defined to mean a merger authorisation to engage in conduct to which section 50A would apply. ***[Schedule 10, item 29, subsection 4(1)]***

10.22 The Commission may grant a single authorisation for all conduct specified in an application for authorisation, or may grant separate authorisations for any conduct specified. While the Commission may grant an authorisation for other conduct under Part IV in a single authorisation, the entire authorisation is not considered to be a merger authorisation. Where there are different procedures for merger authorisations or overseas merger authorisations, with other conduct under Part IV, the procedures that are relevant to each type of authorisation apply. ***[Schedule 10, item 1, subsection 88(4)]***

10.23 Before granting a merger authorisation, the Commission must consider various factors listed under subsections 90(6) and 90(9A). The operation of the new paragraph 90(6) is discussed below under simplification, and it operates in the same way for merger authorisations as it does for other conduct under Part IV that may be authorised. The considerations that are relevant to a merger authorisation may, however, be different to the considerations for other conduct. ***[Schedule 10, item 2 and 3, subsections 90(6) and 90(9A)]***

10.24 When considering what amounts to a public benefit in relation to an overseas merger authorisation, the Commission must have regard to section 90(9A). That section sets out certain factors that must be considered benefits to the public. ***[Schedule 10, item 3, subsection 90(9A)]***

10.25 Because of the repeal of subsections 90(8A), (8B) and (9), the reference in subsection 90(9A) to those subsections is repealed and replaced with a reference to dual listing arrangements under section 49, and overseas merger authorisations. This makes it clear that the subsection continues to apply authorisations for dual listing arrangements and overseas acquisitions. ***[Schedule 10, item 3, subsection 90(9A)]***

10.26 Many of the other machinery provisions that apply to authorisations will now also apply to merger authorisations. This includes the procedures for application, and the requirement to keep a register under section 89.

10.27 Because merger considerations are commercially sensitive and require quick consideration, the Act sets up different periods for consideration of merger authorisations and overseas merger authorisations to other forms of authorisation. Instead of the usual six month period that applies to authorisations, subsection 90(10B) provides that the Commission has 90 days from the day the Commission receives an application to determine the merger authorisation. If at the end of the period, the Commission has not determined the application, then the Commission is taken to have refused the merger authorisation. This preserves the existing period for consideration and default position in the event the Commission has not made a decision. ***[Schedule 10, item 74, subsection 90(10A)]***

10.28 No changes are made to the timing for or default decision on overseas merger authorisations. The Commission continues to have 30 days from the day on which the application is received to determine the authorisation. If the Commission has not determined the authorisation by the end of that period, they will be taken to have granted the authorisation. ***[Schedule 10, item 75, subsections 90(11)]***

10.29 For a merger authorisation that is not an overseas merger authorisation, if the applicant informs the Commission in writing before the expiration of the 90 days that they agree to the Commission taking a specified longer period, then the Commission must make a determination by the end of that longer period, or be deemed to have not granted the authorisation. ***[Schedule 10, item 76, subsection 90(12)]***

10.30 The Tribunal may review determinations of the Commission in relation to:

- an application for a merger authorisation;
- an application for a minor variation of a merger authorisation;
- an application for, or the Commission's proposal for, the revocation of a merger authorisation; and
- an application for, or the Commission's proposal for, the revocation of a merger authorisation and the substitution of another merger authorisation. ***[Schedule 10, items 100 and 108, subsections 101(2) and 102(8)]***

10.31 Schedule 10 amends the Act so that Tribunal reviews of merger authorisations are not a full re-hearing of the matter. This ensures that parties have the incentive to put all relevant matters to the Commission in the first instance. Accordingly, the Tribunal may only have regard to matters that were referred to in the Commission's reasons for making the relevant determination, as well as any information given to the Tribunal as

a result of the Tribunal seeking such relevant information, and consulting with such persons as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence given to it by the Commission. In this regard, the Tribunal is not bound by the rules of evidence, and the proceedings are to be conducted with as much expedition as possible. ***[Schedule 10, item 109, subsection 102(8)]***

10.32 For the Tribunal's review of a matter that relates to a merger authorisation that is not an overseas merger authorisation, the Tribunal must make its determination on the review within 90 days after receiving the application for review. ***[Schedule 10, item 101, subsection 102(1AA)]***

Simplification of the Authorisation Process

10.33 The former section 88 set out separate authorisation provisions for various types of conduct under Part IV, including provisions in contracts, arrangements or understandings that may have had an anti-competitive purpose. It also covered authorisations in relation to covenants (which are now no longer separately prohibited: see Chapter 5) and some forms of exclusive dealing.

10.34 Schedule 10 amends and simplifies section 88, removing the separate provisions and replacing them with a single provision under which authorisation may be granted in relation to conduct to which Part IV would apply. This includes authorisation for conduct that would otherwise be prohibited under section 46. ***[Schedule 10, item 1, section 88]***

10.35 The Commission has the discretion to grant an application for authorisation. An application for authorisation must specify both: the relevant conduct that is to be engaged in; and the provisions of Part IV that would or might apply to the conduct for which authorisation is being sought. ***[Schedule 10, item 1, subsection 88(1)]***

10.36 The power of the Commission to authorise conduct is limited to conduct that has been specified in the application. An authorisation does not automatically extend to any conduct that may be engaged in under Part IV, or from all provisions that were specified in an application. ***[Schedule 10, item 1, subsections 88(1) and 88(4)]***

10.37 The Commission may grant a single authorisation for all the conduct that is specified in the application for authorisation. The Commission may also grant separate authorisations for the various forms of conduct specified in the application. ***[Schedule 10, item 1, subsections 88(4)]***

10.38 The new paragraph 89(1)(a) removes the requirement that the application must be in the form prescribed in the regulations, and amends

it to require that that the application is in the 'form approved' by the Commission.

10.39 The content of the form will be determined administratively by the Commission. Information or documents to be accompanied with the authorisation and any fees payable will continue to be prescribed by the regulations, rather than administratively determined. ***[Schedule 10, item 1, subsection 88(1)]***

10.40 The effect of an authorisation is that it exempts the conduct that is specified from the operation of the provisions of Part IV covered by the authorisation. To ensure that authorisations are sufficiently flexible to cover changing situations, the exemption from conduct applies to the applicant, any other person named or referred to in the application as a person who is engaged in the conduct, or particular persons or a class of persons that are mentioned in the application. This also includes people who are proposed to engage in the conduct, or a class of persons who may become engaged in the conduct, provided that it is specified in the application. ***[Schedule 10, item 1, subsection 88(2)]***

10.41 The exemption granted by authorisation can only apply in relation to conduct engaged in from the time of the Commission's decision. The Commission does not have power to grant authorisation for conduct engaged in before the Commission decides the application for the authorisation. The rationale for the Commission's decision being the point from which an exemption applies, is that it is open to the Commission not to grant authorisation. ***[Schedule 10, item 1, subsection 88(5)]***

10.42 The Commission may grant an authorisation subject to conditions specified in the authorisation. The discretion to set conditions is broad to ensure that the Commission has flexibility to deal with various forms of conduct through an authorisation. ***[Schedule 10, item 1, subsection 88(3)]***

10.43 Where a condition imposed by the Commission in the authorisation is contravened, the exemption for the specified conduct from the provisions of Part IV set out in the authorisation does not apply. ***[Schedule 10, item 1, subsection 88(3)]***

10.44 The applicant is able to withdraw an application for authorisation at any time by writing to the Commission. ***[Schedule 10, item 1, subsection 88(6)]***

Authorisation should not substantially lessen competition or must be in the public benefit

10.45 Because of the simplification of section 88, the matters that the Commission must be satisfied with before making a determination to

grant an authorisation are also simplified to two matters. If the Commission determines that either:

- the conduct, would not have the effect, or be likely to have the effect of substantially lessening competition; or

- the conduct would result, or be likely to result, in a benefit to the public that would outweigh the detriment that would result or be likely to result from the conduct,

then they may grant an authorisation. Where the Commission is unable to determine either of these matters, then no authorisation will be granted. ***[Schedule 10, item 2, subsection 90(6)]***

10.46 Certain matters under Part IV are prohibited on a *per se* basis. Because those offences are not subject to a substantial lessening of competition test, they are carved-out of the first limb under which an authorisation may be granted. If the first limb were allowed to apply, the effect would be that conduct that is prohibited *per se* would be able to be engaged in if it did not substantially lessen competition. Instead, authorisation for conduct that would infringe those provisions may only be granted under the second limb, which assesses whether the public benefit outweighs the detriment caused by the conduct. The provisions to which the first limb does not apply are:

- one or more of the provisions of Division 1 of Part IV (cartel conduct);

- one or more of sections 45D to 45DB (secondary boycotts); and

- section 48 (RPM). ***[Schedule 10, item 2, subsection 90(7)]***

10.47 For the purposes of determining whether a merger authorisation or a dual listing arrangement satisfies the second limb, subsection 90(9A) sets out certain factors that the Commission must regard as having a public benefit. ***[Schedule 10, item 3, subsection 90(9A)]***

Class exemption power

10.48 Schedule 10 also inserts a new Division 3 of Part VII that allows the Commission to create class exemptions for particular kinds of conduct.

10.49 The class exemption power allows the Commission to make a determination that one or more provisions of Part IV do not apply to kinds of conduct specified in the determination. A determination made by the Commission is a legislative instrument within the meaning of section 8 of

the *Legislation Act 2003* and must be registered on the Federal Register of Legislation.

10.50 Before the Commission may determine a class exemption authorising that one or more provisions of Part IV do not apply to the conduct, they must be satisfied in all the circumstances that either:

- the conduct would not have the effect or be likely to have the effect of substantially lessening competition; or
- the conduct would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from conduct of that kind. ***[Schedule 10, item 21, subsection 95AA(1)]***

10.51 Because the provision looks at conduct of a kind, rather than particular conduct, the Commission does not need to be satisfied of a particular set of facts or circumstances before making a determination. They must only be satisfied that conduct of the kind specified would satisfy one of the criteria listed in paragraph 10.50. ***[Schedule 10, item 21, subsection 95AA(1)]***

10.52 To ensure that the conduct is only allowed in particular circumstances, the Commission may determine a number of limitations on when the class exemption will or will not apply. These limitations may be to:

- persons of a specified kind;
- circumstances of a specified kind; or
- conduct that complies with specified conditions. ***[Schedule 10, item 21, subsection 95AA(2)]***

10.53 To ensure that class exemptions remain relevant and appropriate, a determination by the Commission must specify when the determination will cease to be in force, and that date cannot be more than 10 years after it is made. The Commission may, at its discretion, specify a period of less than 10 years. The maximum period that an instrument may be in force is generally consistent with Part 4 of Chapter 3 of the *Legislation Act 2003* (sunsetting of legislative instruments). ***[Schedule 10, item 21, subsection 95AA(3)]***

10.54 A determination made by the Commission enters into force on the day it is made. Unless set aside by the Tribunal, it ceases to be in effect when the period that it is specified to be in force for expires. ***[Schedule 10, item 21, subsection 95AA(4)]***

10.55 The Harper Review recommended that class exemptions should be reviewable by the Tribunal. Accordingly, amendments are made so that class exemptions made by the Commission may be set aside by the Tribunal if the person satisfies the Tribunal of particular matters. The matters that the Tribunal must be satisfied with replicate the matters considered under section 95AA when issuing a class exemption. If the Tribunal is not satisfied of these matters, they must affirm the decision to issue the class exemption. ***[Schedule 10, item 25 subsection 102(5F)]***

10.56 A person that is dissatisfied with the making of a class exemption may apply to the Tribunal for a review of the determination. The Tribunal must review the making of the determination if they are satisfied that the person has a sufficient interest. ***[Schedule 10, item 22, section 101B]***

10.57 A class exemption made by the Commission ceases to be in force if it is set aside by the Tribunal. ***[Schedule 10, item 21, subsection 95AA(4)]***

Collective Bargaining and Collective Boycott Conduct

10.58 Collective boycott activity generally refers to where two or more individuals do not deal with a business customer because a price or specific terms were not agreed to in a collective bargain. In the context of the Act, this term is used in relation to collective bargaining activity, and is defined to mean where there is a contract, arrangement or understanding has a purpose condition of the type listed in subsection 44ZZRD(3). Because collective boycott conduct is a term that will be used in parts of the Act other than Part IV, the definition is included in section 4(1), so that it applies to the whole of the Act. ***[Schedule 10, item 27, subsection 4(1)]***

10.59 Under the Act a corporation may notify the Commission that they intend to engage in collective bargaining conduct. Collective boycott conduct may be notified under the collective bargaining provisions. ***[Schedule 10, item 16, paragraph 93AD(1)(a)]***

10.60 To allow greater flexibility in the bargaining process—in particular for small businesses—the people that a collective bargaining notice may cover is extended to include people who may join the bargaining group at a later time. Collective bargaining notices are also extended so that the bargaining group may deal with unnamed counterparties in the future, in addition to the counterparty specifically named in the notice. ***[Schedule 10, items 7 to 13, subsection 93AB(2), 93AB(3), 93AB(4), 93AB(7), paragraphs 93AB(4)(a) and (b)]***

10.61 Unless otherwise provided, a collective bargaining notice will come into effect 14 days after it is given to the Commission. Regulations may prescribe a longer or shorter period than this for different types of

collective bargaining conduct. Where a collective bargaining notice substantially relates to collective boycott conduct, it instead comes into effect 60 days after it is given to the Commission. ***[Schedule 10, item 16, paragraph 93AD(1)(a)]***

10.62 The Commission is empowered to impose conditions on collective bargaining notifications. The Commission may only impose conditions where it reasonably believes that it would have grounds to give the person an objection notice relating to the collective bargaining notification, but that those grounds would not exist if particular conditions relating to the proposed conduct were complied with. The Commission may only impose those conditions that would remove the grounds for issuing the objection notice. ***[Schedule 10, item 15, section 93ACA]***

10.63 Where a person has notified the Commission of collective boycott activity, they must cease that activity when the Commission gives them a stop notice. The Commission may only give a stop notice where the collective boycott conduct has resulted in a serious detriment to the public, or serious detriment to the public is imminent as a result of the collective boycott conduct. ***[Schedule 10, item 20, section 93AG]***

10.64 The Commission must, at the time it gives the corporation the stop notice, give the corporation a written statement of its reasons for giving the stop notice. ***[Schedule 10, item 20,subsection 93AG(2)]***

10.65 While the stop notice is in force, the collective bargaining notice is taken, for the purposes of this Act, not to be in force under section 93AD to the extent that the collective bargaining notice relates to collective boycott conduct. This means that collective bargaining may continue whilst the notice is in force, but collective boycott activity is no longer protected under the notice and is required to cease. ***[Schedule 10, item 20,subsection 93AG(3)]***

10.66 The stop notice comes into force at the time the Commission gives the corporation the stop notice. ***[Schedule 10, item 20,subsection 93AG(4)]***

10.67 The stop notice ceases to be in force at the earliest of the following times:

- the end of 90 days (the Commission may extend this once by a further 90 days, to a maximum of 180 days); or
- the date the Commission issues a final objections notice under subsections 93AC(1) or 93AC(2); or
- the date the Commission issues a final conditions notice under section 93AAA; or

- if and when the Commission withdraws the stop notice. ***[Schedule 10, item 20,subsection 93AG(5)]***

Consequential amendments

Notification amendments

10.68 Schedule 10 amends Part VII to reflect consequential amendments made in Schedules 8 and 9.. These include allowing notification for RPM conduct (in Chapter 9, paragraphs 9.13 to 9.20) and simplifying the assessment of all forms of exclusive dealing conduct under a single test (in Chapter 8, paragraph 8.14). ***[Schedule 10, item 4, subsection 93(3)]***

10.69 The ability for the Commission to impose conditions relating to RPM conduct are also made as part of the broader amendments to Part VII. ***[Schedule 10, item 6, subsection 93AAA]***

Other consequential amendments

10.70 Schedule 10 makes a number of consequential amendments to update references in the Act to new or remade provisions of Part VII. ***[Schedule 10, Part 2, items 26 to 141, section 45EA, 76A, 76B, 80AC, 81A, 93AA, 101A, 102A, 150J, 157AA, 174, 45EA of Schedule 1, subsections 4(1), 8A(6), 25(1), 29P, 45(6A), 45(9), 45D(1), 45DA(1), 45DB(1), 45E(8), 46A(6) 49(1), 50(1), 50(2), 50(5), 75B(1), 76B(2), 76B(3), 76B(4), 80AC(1), 80AC(2), 81A(3), 81A(6), 86C(4), 87B(1A), 90(10), 90(10B), 90(11), 90(12), 90(13), 90(15), 90A(1), 91(2A), 91A(4), 91A(5), 91B(5), 91C(7), 93(3A), 93(4), 93(5), 93(6), 93(7C), 93(9), 93AB(1), 93A(1), 93A(3), 93A(4), 93A(10A), 101(1A), 101(1C), 101(2), 102(1AA), 102(5AC), 102(8), 109(1A), 163(5), 165(3A), 172(2B), 174(2), 45(6A) of Schedule 1, 45(9) of Schedule 1, 45D(1) of Schedule 1, 45DA(1) of Schedule 1, 45E(8) of Schedule 1, 49(1) of Schedule 1, 50(1) of Schedule 1, 50(5) of Schedule 1, paragraphs 44ZZRR(1)(b), 44ZZRRT(1)(b), 44ZZRRT(2)(b), 45(6)(a), 50(4)(b), 50(4)(c), 50(4)(d),76(1A)(c), 76(1B)(a), 76B(5)(a), 80AC(1)(b), 80AC(1)(d), 80AC(1)(e), 81A(1)(b), 81A(1)(d), 81A(1)(e), 81A(1)(f), 89(1)(a), 91C(6)(a), 93(7A)(b), 93(10)(a), 101(1B)(a), 102(1A)(a), 102(1A)(b), 102(1A)(c), 151AY(2)(c), 157(1)(a), 157(1)(ba), 162(1)(b), 165(1)(a), 170(3)(a), 44ZZRR(1)(b) of Schedule 1, 44ZZRT(1)(b) of Schedule 1, 44ZZRT(2)(b) of Schedule 1, 45(6)(a) of Schedule 1, 50(4)(b) of Schedule 1, 50(4)(c) of Schedule 1, 50(4)(d) of Schedule 1, subparagraphs 45(6)(b)(i),76(1)(a)(iii), 93(7B)(b)(ii), 155(2)(b)(iv), 170(3)(b)(ii), 45(6)(b)(i) of Schedule 1]***

Commencement and application provisions

10.71 Schedule 10 commences on a day or days to be fixed by Proclamation.

Chapter 11
Admissions of fact

Outline of chapter

11.1 Schedule 11 to this Bill extends section 83 of the Act so that a party bringing certain proceedings may rely on both admissions of fact and findings of fact made in certain other proceedings.

11.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

11.3 Consumers or business harmed by a contravention of the competition law can seek relief by commencing a private action before the Federal Court.

11.4 Section 82 allows a person suffering loss or damage as a result of a contravention of certain sections of the Act to seek to recover damages from any person involved in the contravention. Section 51ADB and subsection 87(1A) allow a court to make orders listed in those provisions, on an action brought for contravention of certain sections of the Act.

11.5 Section 83 of the Act is intended to facilitate private actions by enabling findings of fact made in certain proceedings against a corporation to be used as prima facie evidence against the corporation in certain other proceedings. For example, if the Commission brings a proceeding against a corporation for contravention of the Act, and during that proceeding the court makes a finding of fact, that finding may be relied upon by a person later bringing a private action. This mechanism helps to reduce the cost of private actions.

11.6 Many proceedings brought by the Commission are resolved by a corporation making admissions of fact that establish the contravention. However, it is uncertain whether section 83 also applies to admissions of fact, and the extent to which private litigants may later rely on admissions of fact as well as findings of fact.

11.7 The Harper Review noted this was an impediment to the important right to private enforcement of the competition law, and

recommended amendment to section 83 to clarify that it applies to admissions of fact as well as findings of fact. This would ensure section 83 more effectively facilitates access to justice and reduces the cost of private actions.

Summary of new law

11.8 Section 83 is amended so that a party bringing certain proceedings may rely on both admission of fact and findings of fact made in certain other proceedings.

Comparison of key features of new law and current law

New law	*Current law*
Admissions of fact made by a person, or findings of fact made by a court, in certain proceedings may be used in certain other proceedings against that person under the Act.	Findings of fact made by a court against a person may be used in other proceedings against that person under the Act.

Detailed explanation of new law

11.9 The scope of section 83 is broadened so that where there has been an admission of fact made by a person in certain proceedings, that admission can be used as prima facie evidence of that fact in other proceedings against that person. ***[Schedule 11, item 1, subsection 83(1)]***

11.10 Admissions of fact may be proved by either a document under the seal of a court from which the admission appears, or from a document in which the admission was made. The method of proving findings of fact remains the same. ***[Schedule 11, item 1, subsection 83(2)]***

11.11 Section 83 is rewritten for simplification. ***[Schedule 11, item 1, section 83]***

Commencement and application provisions

11.12 Schedule 11 commences on a day or days to be fixed by Proclamation.

11.13 The amendments made by Schedule 11 only apply to findings of fact and admissions of fact made on or after the commencement of this item. Admissions of fact made prior to the commencement of this provision may not be relied on in subsequent proceedings, irrespective of whether the proceedings commenced prior to or following the commencement of Schedule 11. This preserves the context in which those admissions of fact were made. ***[Schedule 11, item 2]***

Chapter 12
Power to obtain information, documents and evidence

Outline of chapter

12.1 Schedule 12 to this Bill extends the Commission's power to obtain information, documents and evidence in section 155, to cover investigations of alleged contraventions of court enforceable undertakings.

12.2 The Schedule also introduces a 'reasonable search' defence to the offence of refusing or failing to comply with section 155, and increases the fine for non-compliance with section 155.

12.3 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

Operation of section 155

12.4 The Commission's primary investigative power is contained in section 155. Given that the competition law is concerned with regulating conduct which often occurs secretively, such as cartel conduct, the Commission requires strong coercive powers to investigate and uncover such contraventions.

12.5 A section 155 notice may be issued by the Commission in relation to the matters specified in subsection 155(1), and may require a person to furnish information to the Commission, to produce documents to the Commission or to appear before the Commission to give evidence and produce documents.

12.6 Under subsection 155(5), a person shall not refuse or fail to comply with a notice, or provide false or misleading evidence or information. Subsection 155(6A) makes it an offence to contravene subsection 155(5), and sets out the applicable maximum fine or term of imprisonment upon conviction.

Search for documents

12.7 As noted by the Harper Review, section 155 notices have been a longstanding element of Australia's competition law. The power to compel the production of evidence, information and documents is crucial to the Commission's administration of the Act.

12.8 However, the Harper Review also noted that in the digital age businesses retain many more documents, such as emails, than in the past. Strict compliance with a section 155 notice may require an electronic search of tens of thousands of documents, which can constitute a significant compliance cost.

12.9 In recognition of the cost of documentary searches, courts have modified the rights of discovery in recent years. For example, the Federal Court Rules 2011 require a party to undertake a 'reasonable search' for documents. Consideration may be given to factors such as the number of documents to be searched and the ease and cost of retrieving the documents.

12.10 In light of these developments, the recommendation of the Harper Review was to introduce a 'reasonable search' defence to the offence of a 'refusal or failure to comply' with a section 155 notice.

Scope of section 155

12.11 The Commission may accept a court-enforceable undertaking under section 87B of the Act, or section 218 of the Australian Consumer Law (Schedule 2 to the Act).

12.12 A section 155 notice may be issued by the Commission in relation to the matters specified in subsection 155(1). However, the investigation of an alleged contravention of a court-enforceable undertaking is not currently a matter in relation to which a section 155 notice may be issued.

12.13 The recommendation of the Harper Review was to extend the section 155 power to cover investigation of alleged contraventions of court-enforceable undertakings.

12.14 The Harper Review considered that the ability to gather information about a possible contravention of an undertaking accepted by the Commission would assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

Penalty for non-compliance with section 155

12.15 Subsection 155(6A) currently sets out that the maximum fine upon conviction for an offence under section 155 is 20 penalty units for an individual.

12.16 Under section 4B of the *Crimes Act 1914*, the penalties for corporations are five times that of individuals, making the maximum penalty under section 155 100 penalty units. When applied to a corporation, this equates to a maximum fine of $18,000 (at current penalty rates).

12.17 By comparison, the maximum penalties for a corporation failing or refusing to comply with similar notice-based investigative powers are significantly higher. For example, section 63 of the Australian Securities and Investments Commission Act 2001 applies a maximum penalty of 100 penalty units for individuals, or $90,000 for corporations (at current penalty rates).

12.18 The Harper Review noted that compliance with compulsory powers facilitates the Commission's ability to investigate competition concerns, and considered that the current maximum penalty is inadequate. The recommendation of the Harper Review was to increase the maximum penalty for an offence under section 155, in line with similar notice-based evidence-gathering powers of other regulators.

Summary of new law

12.19 A defence is introduced to section 155, so that a person who is unable to produce required documents after undertaking a reasonable search is not taken to have contravened subsection 155(5).

12.20 Section 155 is broadened, so that a notice may be issued in relation to an alleged contravention of a court-enforceable undertaking made to the Commission under section 87B and section 218 of the Australian Consumer Law.

12.21 The maximum penalty for non-compliance with a section 155 notice is increased.

Comparison of key features of new law and current law

New law	*Current law*
If a person has refused or failed to comply with a notice to produce documents it is a defence if the person has undertaken a reasonable search for those documents.	If a person has refused or failed to comply with a notice to produce documents it is not a defence if the person has undertaken a reasonable search for those documents.
A section 155 notice may be issued in relation to alleged contraventions of court-enforceable undertakings.	A section 155 notice may not be issued in relation to alleged contraventions of court-enforceable undertakings.
The maximum penalty for non-compliance with a section 155 notice is 100 penalty units or 2 years imprisonment (for an individual).	The maximum penalty for non-compliance with a section 155 notice is 20 penalty units or 12 months imprisonment (for an individual).

Detailed explanation of new law

'Reasonable search' defence

12.22 Schedule 12 inserts a defence into section 155 in relation to the failure or refusal to comply with a notice requiring the production of documents.

12.23 Where a notice has been given to a person relating to producing documents, and after a reasonable search the person is not aware of the documents, the person will not have contravened paragraph 155(5)(a) and will not be guilty of an offence under subsection 155(6A). The defendant bears the evidential burden of establishing that they have undertaken a reasonable search. ***[Schedule 12, item 3, subsection 155(5B)]***

12.24 Whether a person has made a reasonable search is an objective test. In determining whether they have made a reasonable search, a person may take into account the matters listed in subsection 155(6), including:

- the nature and complexity of the matter to which the notice relates;
- the number of documents involved;
- the ease and cost of retrieving a document;

- the significance of any document likely to be found; and
- any other relevant matter. ***[Schedule 12, items 3, subsection 155(6)]***

Scope of section 155

12.25 Schedule 12 simplifies and expands the scope of subsection 155(1) so that the Commission may give a notice in relation to matters that constitute, or may constitute, a contravention of the terms of an undertaking accepted under section 87B of the Act or section 218 of the Australian Consumer Law. Subsection 155(1) is also expanded so that the Commission may give a notice in relation to a matter that is relevant to the making of a decision by the Commission under subsection 90(1) in relation to an application for a merger authorisation. ***[Schedule 12, items 1 and 2, subsections 155(1) and 155(2)]***

12.26 These amendments assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework of the Act.

Penalty for non-compliance with section 155

12.27 The maximum penalty for a contravention of section 155(5) is increased to 100 penalty units (for individuals) or imprisonment for two years. ***[Schedule 12, items 3, subsection 155(6A)]***

12.28 This aligns the penalty under section 155 with the penalty for non-compliance with similar notice-based evidence-gathering powers of other regulators.

Application and transitional provisions

12.29 Schedule 12 commences on a day or days to be fixed by Proclamation.

12.30 Following the commencement of Schedule 12, notices that were in force immediately before commencement continue in force, and the amended section 155 applies in relation to the notice as if it has been issues under section 155 as amended. ***[Schedule 12, sub item 5(1)]***

12.31 The effect of this is to allow the 'reasonable search' defence to be used for notices that were in force immediately before the commencement of Schedule 12.

12.32 However, the increased penalty under subsection 155(6A) does not apply to notices that were issued prior to the commencement of Schedule 12. ***[Schedule 12, sub item 5(2)]***

Chapter 13
Access to services

Outline of chapter

13.1 Schedule 13 amends Part IIIA of the Act, which contains the National Access Regime (Regime), to ensure that it better addresses the economic problem of an enduring lack of effective competition in markets for nationally significant infrastructure services.

13.2 All references in this Chapter are to the Act unless otherwise stated.

Context of amendments

The economic problem addressed by the Regime

13.3 The Regime provides a regulatory framework for third parties to seek access to nationally significant infrastructure services owned and operated by others.

13.4 The Regime is geared towards addressing the economic problem of an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services. Large, usually sunk, fixed costs and economies of scale typically associated with natural monopoly can serve as impediments to prospective competitors entering infrastructure service markets.

13.5 Where there is a lack of effective competition in markets for infrastructure services, a provider might deny access to, or restrict output and charge monopoly prices for, its infrastructure service. This can reduce economic efficiency where access to the service is required for third parties to compete effectively in dependent (upstream or downstream) markets. As a consequence, transactions that would enhance community wellbeing may not proceed.

13.6 The Regime provides a means of promoting competition in markets where the ability to compete effectively is dependent on being able to use a service provided by a piece of nationally significant infrastructure. As part of this, the Regime seeks to ensure that facility

owners achieve a commercial investment return so as not to impair investment incentives.

The operation of the access Regime

13.7 The Regime sets out a regulatory framework through which third parties may seek access to nationally significant infrastructure services. It includes Part IIIA of the Act, and clause 6 of the Competition Principles Agreement, that sets out general principles to assess the effectiveness of State and Territory access regimes.

13.8 A declaration under the Regime gives an access seeker the right to negotiate access to a service provided by means of a facility. Declarations are therefore limited to matters that are defined as a service under s 44B. This includes the use of an infrastructure facility, handling or transporting things, or a communications service.

13.9 The designated Minister is only able to make a declaration once they have received a recommendation from the National Competition Council (Council). When making a recommendation, the Council must take into account five criteria. When considering the recommendation of the Council, the Minister must consider those same five criteria before they decide to declare a service. The effect of these criteria is that they determine when access regulation will and will not apply, as they constrain the considerations of the Council and Minister.

Developments in the last few years

13.10 The declaration criteria have been examined in a number of cases heard by both the Federal and High Court, the most recent of which was heard by the High Court in 2012. In these cases, the declaration criteria have been subject to several different interpretations, with particular implications for how competition in dependent markets should be assessed. For investment to continue to be made in nationally significant infrastructure, it is important that the Regime is easily understood, creates outcomes that are predictable and addresses the economic problem of an enduring lack of effective competition in markets for infrastructure services.

13.11 Subsequent to these cases, the Regime has been reviewed twice, first by the Productivity Commission in 2013, and then by the Harper Review in 2015. Both review processes examined the application of the declaration criteria, and whether it was effectively promoting the objectives of the Regime by promoting effective competition in dependent markets. The two reviews involved extensive consultation with the public and States and Territories.

13.12 The Government decided in 2014 that it would respond to both reviews following the conclusion of the Harper Review.

13.13 As part of the Government response to the Harper Review, the Government decided to implement all of the recommendations of the Productivity Commission. These amendments seek to refocus and clarify the intent of the Regime, in particular the declaration criteria that the Council and Minister must be satisfied of in order to recommend that a service be declared, as this determines when arbitration by the Commission will and will not be available to access seekers or access providers.

Summary of new law

13.14 Schedule 13 amends the Regime to ensure that it remains an accessible and effective regulatory option which can boost competition in the economy, and create predictable outcomes. The three primary changes included in this Schedule:

- amend and clarify the declaration criteria that must be used by the Council and designated Minister;
- amend the default position, whereby if a Minister does not respond to a declaration recommendation by the Council within 60 days, they will be deemed to have made a decision in accordance with the recommendation; and
- amend and clarify the scope of a determination made by the Commission to 'extend' a facility in an access dispute.

Comparison of key features of new law and current law

New law	*Current law*
Declaration criteria	
The declaration criteria that must be considered by the Council and Minister are contained in a single section.	The declaration criteria that must be considered by the Council and Minister are replicated across multiple sections.

New law	*Current law*
Declaration criteria	
The decision maker must consider whether access (or increased access) on reasonable terms and conditions following declaration would promote a material increase in competition.	Declaration criterion (a) requires the decision maker to consider whether access (or increased access) would promote a material increase in competition.
The decision maker must consider whether total foreseeable market demand could be met by the facility at least cost.	The decision maker must consider whether it is uneconomical for anyone to develop another facility to provide the service.
No change.	The decision maker must consider whether the facility is of national significance, having regard to its size, importance to constitutional trade or commerce and to the national economy.
The decision maker must consider whether access (or increased access) would promote the public interest.	The decision maker must consider whether access (or increased access) would be contrary to the public interest.
The decision maker does not need to consider an application by an access seeker or access recommendation respectively if the regime is subject to an effective access regime.	The decision maker must consider whether the service is subject to an effective access regime as part of the declaration criteria.
Powers of the Minister and the Commission	
The Minister may revoke the certification on recommendation by the Council, if the regime ceases to be effective. The Council may make a recommendation on its own initiative or on application.	No equivalent.
The Commission's power to make a determination requiring a facility operator to extend or expand the facility, and the safeguards on that power, are amended to include capacity and geographical expansions.	The Commission's power to make a determination requiring a facility operator to extend or expand the facility, and the safeguards on that power, relate to 'expansions', 'extensions' and 'extending' the facility.
Default declaration decision	
If the Minister does not publish a decision on a declaration within the 60 day time limit, they are taken to have accepted the Council's recommendation.	If the Minister does not publish a decision on a declaration within the 60 day time limit, they are taken to have not made a declaration.

Detailed explanation of new law

13.15 The declaration criteria are matters about which the Council and Minister must be satisfied prior to recommending a declaration be made, or making a declaration, respectively. Additional considerations of a commercial, economic or other character may be relevant, provided that they are not irrelevant to those decisions.

Simplification of declaration criteria

13.16 Schedule 13 simplifies the law by specifying, in a separate section, the four declaration criteria that must be considered by both the Council and the Minister. This makes it clearer that the Minister and the Council must consider the same matters, and avoids duplication within the legislation. ***[Schedule 13, items2 to 3, sections 44B and 44CA]***

13.17 Because the declaration criteria that the Minister and the Council must consider are now in a single provision, certain other elements of the Act are amended to reflect this change. Accordingly, Councillors are now required to include in the Annual Report prepared under section 29O details of any judicial interpretation of the declaration criteria. ***[Schedule 13, item 1, subparagraph 29O(2)(b)(ii)]***

(1) The competition test (criterion (a))

13.18 Paragraph 44CA(1)(a) requires an assessment of the effect of access (or increased access) following a declaration on competition in at least one market, other than the market for the service. The amendments to paragraph 44CA(1)(a) are intended to restore the pre-2006 interpretation of how the criterion was applied. ***[Schedule 13, item 3, paragraph 44CA(1)(a)]***

13.19 The amendments require the decision maker to consider whether access (or increased access) on reasonable terms and conditions following declaration would promote a material increase in competition in a market other than the market for the service. That is, the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.

13.20 This requires a comparison of two future scenarios: one in which access (or increased access) is available, and one in which no additional access is granted. In comparing these two scenarios, the granting of access (or increased access) must promote the material increase in competition.

13.21 What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to

a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the disruption in dependent markets that may otherwise be caused by the exploitation of monopoly power.

(2) Total foreseeable market demand test (criterion (b))

13.22 Paragraph 44CA(1)(b) asks whether the facility that provides the service could meet the total foreseeable market demand for the service or a substitute service at least cost. The amendment to this paragraph is intended to refocus the test to a 'natural monopoly' test instead of a 'private profitability' test. ***[Schedule 13, item 3, paragraph 44CA(1)(b)]***

13.23 The approach under the new paragraph is market-based, requiring the market in which the infrastructure service under application is supplied to be defined. This includes any substitute services that serve or will serve the market.

13.24 In estimating total foreseeable market demand, this should be over the declaration period, since the decision-maker is considering declaration of the service. In assessing whether a facility could meet total foreseeable market demand at least cost, this calls for a consideration of whether what could be expected to be peak demand could be supported by the facility.

13.25 Because the test uses the concept of foreseeability, it is not limited to looking at peak demand based on current uses of the service. Other future uses may be relevant to the consideration, if they are foreseeable.

13.26 Whether total foreseeable market demand can be provided at least cost over the declaration period is a question of fact and requires a comparison of the costs from the facility in question meeting total foreseeable market demand with the costs that would be incurred in the least costly alternative scenario.

13.27 Broadly, the alternative scenarios to be considered will depend on whether there is a substitute service provided by another facility. Different alternative scenarios will need to be considered based on whether there are existing substitutable services or not, for example:

- if there is a substitute service provided by another facility there are, broadly, two potential alternative scenarios: the two substitute facilities share total foreseeable market demand; or a third facility is built to provide part of total foreseeable market demand; or

- if there is not a substitute service provided by another facility there may only be one potential alternative scenario, that is the duplication (or partial duplication) of the facility.

Determining costs of meeting total foreseeable market demand

13.28 The costs relevant to determining whether a facility can meet total foreseeable market demand at least cost are not defined, but specifically includes the cost to the provider of the service of co-ordinating multiple users of the facility.

13.29 The costs of application for declaration should generally not be considered, because those are the costs of access regulation, rather than the costs of operating the facility, so they are not relevant to whether the facility is operating as a natural monopoly. ***[Schedule 13, item 3, subsection 44CA(2)]***

13.30 The administrative and compliance costs that may be imposed once a service is declared would be considered in criterion (d), as these are the costs of access regulation and are social costs. ***[Schedule 13, item 3, subsection 44CA(3)]***

13.31 To reflect the changes that have been made to criterion (b), subsection 44F(4) and 44H(2) have been repealed. This also makes it clear that this test will be considered once, as part of the declaration criteria, rather than at various stages. ***[Schedule 13, item 4, item 7, subsections 44F(4) and 44H(2)]***

(3) The national significance test (criterion (c))

13.32 Paragraph 44CA(1)(c) requires the decision maker to be satisfied that the facility is of national significance, having regard to:

- the size of the facility;
- the importance of the facility to constitutional trade or commerce; or

  the importance of the facility to the national economy. ***[Schedule 13, item 3, paragraph 44CA(1)(c)]***

13.33 This test replicates, in the new subsection 44CA(1), the existing national significance test.

(4) The public interest test (criterion (d))

13.34 Paragraph 44CA(1)(d) asks if that declaration of the service, on reasonable terms and conditions, would promote the public interest. This

means that a decision maker must be satisfied that declaration is likely to generate overall gains to the community. ***[Schedule 13, item 3, paragraph 44CA(1)(d)]***

13.35 Paragraphs 44CA(3)(a) and (3)(b) set out non-exhaustive factors that decision makers are required to consider to determine the effect of the declaration on the public interest. These include the effect of declaration on investment in infrastructure services and dependent markets, as well as the administrative and compliance costs incurred once a service is declared. ***[Schedule 13, item 3, paragraph 44CA(3)]***

Minister is taken to have declared a service after 60 days

13.36 If a Minister has not published their decision within 60 days after receiving a declaration recommendation, then the Minister will be taken to have made a decision under section 44HA, in accordance with the declaration recommendation.

13.37 This means that if a decision on the declaration recommendation has not been published within 60 days, the decision to either declare the service, or not to declare the service will be made by default after the 60 day period. The default decision will also be taken to be published in accordance with section 44HA. ***[Schedule 13, item 10, subsection 44H(9)]***

The Council and Minister cannot declare a service that is subject to an effective access regime

13.38 Where a regime is already the subject of a decision that the regime is an effective access regime, the Council and the Minister are not required to consider the remainder of the declaration criteria. The amendments provide that the Council and Minister cannot recommend or make a declaration that the service be declared in these circumstances. ***[Schedule 13, item 5, subsection 44G(1A), item 8, subsection 44H(3A)]***

13.39 This saves on the administrative costs of considering the other mandatory factors, and expedites the decision maker's process.

Revoking the certification that an access regime is 'effective'

13.40 Part IIIA provides that a service cannot be declared by the designated Minister if the service is already subject to a regime that has been certified as an effective access regime. The amendments insert new subdivision CA of Division 2A to Part IIIA that deals with the revocation of access regimes that have previously been certified as effective by the Commonwealth Minister. ***[Schedule 13, item 16, Subdivision CA]***

13.41 Subsections 44NBA(1), (5) and (6) set out that if a ministerial decision on whether an access regime is effective under section 44N is in effect, then the Council may on its own initiative, or on application, assess whether to recommend that the Commonwealth Minister revoke or not revoke their decision. ***[Schedule 13, item 16, subsections 44NBA(1), 44NBA(5), 44NBA(6)]***

13.42 Before considering on its own initiative whether to recommend that the Commonwealth Minister should revoke the decision, the Council must publish, by electronic or other means, a notice to that effect. This makes the timeframes for considerations by the Council on its own volition under section 44NC consistent with applications that are received from a party listed under subsection 44NBA(3). It also signals to the facility operator that the Council is considering revocation of the access regime. ***[Schedule 13, item 16, subsections 44NBA(2) and 44NBA(3)]***

13.43 Subsection 44NBA(3) sets out that an application may be made by a person seeking access to the service, the responsible Minister for the State or Territory, or the provider of the service. ***[Schedule 13, item 16, subsection 44NBA(3)]***

13.44 The purpose for reconsideration is whether the access regime continues to be an effective access regime. Accordingly, subsection 44NBA(4) sets out that the Council must consider whether the access regime continues to meet the principles of what is an effective access regime. An access regime may cease to meet the definition because there has either been a substantial change to the regime, or substantial changes to the principles on what constitutes an effective regime. ***[Schedule 13, item 16, subsection 44NBA(4)]***

13.45 The recommendations made by the Council to the Commonwealth Minister under subsections 44NBA(5) and (6) must be in writing. ***[Schedule 13, item 16, subsections 44NBA(5) and 44NBA(6)]***

13.46 On receiving a recommendation, the Commonwealth Minister must assess whether he or she should revoke the decision. In making this decision, the Commonwealth Minister must do this in accordance with the factors that would be relevant to whether they should make a decision to declare an access regime effective, as set out in section 44N(2). ***[Schedule 13, item 16, subsection 44NBC(1)]***

13.47 The Commonwealth Minister must be satisfied with the Council's assessment of whether the access regime is effective. This requires them to consider the same factors and matters as the Council, rather than assess the process that led the Council to the decision. ***[Schedule 13, item 16, subsection 44NBC(2)]***

13.48 Once the Commonwealth Minister has decided if they are satisfied or not so satisfied, then they must issue a notice in writing, either revoking or not revoking the decision. A notice that sets out that the Commonwealth Minister is so satisfied must specify the day on which the decision is to cease to be in force. ***[Schedule 13, item 16, subsections 44NBC(3) and 44NBC(4)]***

13.49 If the Commonwealth Minister does not publish their decision in accordance with section 44NG, within 60 days of receiving the recommendation of the Council, they are taken to have made the decision in accordance with the recommendation, and to have published that decision under 44NG. ***[Schedule 13, item 16, subsection 44NBC(5)]***

13.50 If the Commonwealth Minister has made a decision under section 44NBC, the person who applied to the Council for the Commonwealth Minister to make that decision or anyone else who would have had standing to request that the Council recommend to the Commonwealth Minister that the decision be revoked may apply to the Tribunal for review of the Commonwealth Minister's decision. ***[Schedule 13, item 31, subsection 44O(1A)]***

13.51 For the purposes of the Council's assessment of whether to make a recommendation, the Council may give a person a written notice requesting information that they consider to be relevant. The information requested must be specified in the notice. The notice may specify kinds of information that may be requested, and not just specific, precise or itemised bits of information, provided that the Council consider it may be relevant to deciding what recommendation to make. The notice may also request the information be provided within a specified period. ***[Schedule 13, item 16, subsections 44NBB(1)]***

13.52 If the Council has given a notice to a person, they must give a copy of this notice to the applicant, and the provider of the service. If the applicant or the service provider is issued a notice, then the Council does not have to also send them a copy in addition to the notice. The Council must also cause a notice to be published by electronic or other means. ***[Schedule 13, item 16, subsections 44NBB(2)]***

13.53 In deciding what recommendation to make on the application, the Council must have regard to any information that was given within the specified time period, but at their discretion may disregard information given after the expiration of that period. ***[Schedule 13, item 16, subsections 44NBB(3)]***

Extensions of facilities

13.54 The Commission can make a determination in an access dispute that requires an infrastructure service provider to extend the facility or permit interconnection to the facility by a third party. This is separate to the declaration process. There are also a number of safeguards that restrict how the Commission may use these powers.

13.55 To clarify that the Commission's power, and the restrictions on that power, applies to both geographical extensions and capacity expansions, various references in sections 44V, 44W and 44X are amended. ***[Schedule 13, items 33 to 36, subsection 44V(2), paragraphs 44W(1)(d), 44W(1)(e) and 44X(1)(e)]***

Consequential amendments

13.56 Schedule 13 makes a number of consequential amendments to provisions of the Act as a result of moving the 'declaration criteria' to section 44CA. ***[Schedule 13, items 6, 9 and 11 to 13, subsections 44G(2), 44H(4), paragraphs 44LB(3)(b), 44LG(5)(b), 44LI(2)(a)]***

13.57 Schedule 13 also makes a number of consequential amendments to the provisions of the Act as a result of the insertion of the new Subdivision CA of Division 2A of Part IIIA. ***[Schedule 13, items 15 and 17 to 32, subsections, 44NC(1), 44NC(2), 44NC(3), 44NC(5), 44NE(1), 44NE(3), 44NF(1), 44NG(1), 44O(1), paragraphs 29O(2)(a), 44NC(8)(a), 44NC(9)(a), 44NF(2)(a), 44NF(4)(a), 44NG (2)(a), 44NG(3)(a), 44ZZOAAA(3)(a), subparagraph, 44NE(6)(c)(iii)]***

Commencement provisions

13.58 Schedule 13 commences on a day or days to be fixed by Proclamation.

Application provisions

Declared services (Part 1 of Schedule 13)

13.59 If, after the commencement of Schedule 13, a Court or Tribunal makes a decision interpreting the declaration criteria in subsection 44H(4), details of that decision must be included in the annual report required to be produced by the Councillors under section 29O. ***[Schedule 13, sub item 14(1)]***

13.60 The amendments to the declaration criteria to be considered by the Council do not apply in relation to applications under s 44F(1) (about a person requesting a recommendation) before the commencement of Schedule 13. ***[Schedule 13, sub item 14 (2)]***

13.61 The amendments to the declaration criteria to be considered by the Minister do not apply in relation to declaration recommendations that relate to applications that were made under s 44F(1) before the commencement of this item. ***[Schedule 13,sub item 14(3)]***

Effective access regimes (Part 2 of Schedule 13)

13.62 The amendments to effective access regimes in Part 2 of Schedule 13 apply to all decisions under section 44N that were in force immediately before, and decisions made on or after, commencement of that Schedule. ***[Schedule 13, item 33, paragraphs (a) and (b)]***