

WORLD TRADE ORGANIZATION

G/SG/N/1/AUS/2
2 July 1998

(98-2630)

Committee on Safeguards

NOTIFICATION OF LAWS AND ADMINISTRATIVE PROCEDURES RELATING TO SAFEGUARD MEASURES

AUSTRALIA

The following communication has been received on 25 June 1998 from the Permanent Mission of Australia.

Pursuant to Article 12.6 of the Agreement on Safeguards and the related decision by the Committee on Safeguards (G/SG/N/1), Australia notifies the Committee of its laws and procedures relating to safeguard measures.

This notification includes:

- (i) a copy of the procedures for safeguard investigations as published in the Gazette No. S 297 of 25 June 1998; and
- (ii) a copy of the Productivity Commission Act 1998

Investigations are initiated by the Treasurer through a reference to the Productivity Commission, which is the investigating authority.

The Productivity Commission was established in April 1998, taking over the functions of the Industry Commission, the Bureau of Industry Economics, and the Economic Planning Advisory Commission. It is an independent statutory body and the Government's principal advisory body on all aspects of microeconomic reform. A major part of its existing work is the conduct of public inquiries into industry, industry development, and productivity. Inquiries by the Productivity Commission are initiated by the Treasurer and its reports are required to be tabled in Parliament.

There is no specific legislation for the imposition of safeguard measures. If required, quotas would be imposed through regulations under the Customs Act 1901 and increases in tariff through a Tariff Bill or Notice thereof.

**ESTABLISHMENT OF GENERAL PROCEDURES FOR INQUIRIES BY
THE PRODUCTIVITY COMMISSION INTO WHETHER SAFEGUARD
ACTION IS WARRANTED UNDER THE AGREEMENT ESTABLISHING
THE WORLD TRADE ORGANIZATION**

1. In order to comply with the requirements of the Agreement Establishing the World Trade Organization (WTO Agreement), and in particular the Agreement on Safeguards (Safeguards Agreement) and Article XIX of the General Agreements on Tariffs and Trade 1994 (GATT 1994), this notice establishes the general procedures for inquiries into safeguard action by the Productivity Commission (Commission) in respect of a reference under Parts 2 and 3 of the *Productivity Commission Act* 1998.

2. A reference under Parts 2 and 3 of the *Productivity Commission Act* 1998 in respect of safeguard action will designate the product being imported and request an inquiry and report by the Commission on:

- (a) whether the conditions are such that safeguard measures would be justified under the WTO Agreement;
- (b) if so, what measures would be necessary to prevent or remedy serious injury and to facilitate adjustment; and
- (c) whether, having regard to the Government's requirements for assessing the impact of regulation which affects business those measures should be implemented.

3. A "**safeguard measure**" means a measure provided for in Article XIX of GATT 1994, the rules for which are established by the Safeguards Agreement. A safeguards measure would be in the form of a quota, a tariff quota, or an increased level of tariff.

Conditions

4. The Commission is to report on whether the product under reference is being imported into Australia in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

5. Safeguard measures have to be applied to a product being imported irrespective of its source, except:

- (a) product determined to be of New Zealand origin pursuant to the Australia New Zealand Closer Economic Relations Trade Agreement, which shall be excluded from the inquiry; and
- (b) product originating in a developing country Member of the WTO shall be exempted from such measures as long as its share of imports of the product concerned does not exceed 3%, provided that developing country Members of the WTO with less than 3% import share collectively account for not more than 9% of total imports of the product.

Inquiry

6. Reasonable public notice must be given to all interested parties in accordance with section 14 of the *Productivity Commission Act 1998*. The inquiry must involve public hearings or other appropriate means in which importers, exporters and other interested parties can present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest.

7. In accordance with section 12 of the *Productivity Commission Act 1998* a report shall be published promptly setting forth the Commission's findings and reasoned conclusions reached on all pertinent issues of fact and law. The report will include a detailed analysis of the case under inquiry as well as a demonstration of the relevance of the factors examined. All factors specified in these procedures must be considered.

8. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the Commission. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the Commission find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, it may disregard such information unless it can be demonstrated to its satisfaction from appropriate sources that the information is correct.

Determination of Serious Injury or Threat Thereof

9. **"Serious injury"** means a significant overall impairment in the position of a domestic industry.

10. **"Threat of serious injury"** means serious injury that is clearly imminent, in accordance with the provisions of paragraphs 13 and 14. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

11. In determining injury or threat thereof, a **"domestic industry"** means the producers as a whole of the like or directly competitive products operating in Australia, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

12. **"Like product"** means a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

13. In the inquiry to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Commission shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

14. The determination referred to in paragraph 13 shall not be made unless this inquiry demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than

increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

Application of Safeguard Measures

15. A safeguard measure can only be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

Provisional Safeguard Measures

16. A reference can also be made to the Commission for an accelerated report to determine whether critical circumstances exist where delay in applying measures would cause damage which it would be difficult to repair. The Commission will report to the Minister on whether there is clear evidence that increased imports have caused or are threatening to cause serious injury. If the Commission finds that such circumstances exist, then it will also recommend what provisional measures would be appropriate for up to 200 days. Such measures should take the form of tariff increases unless that would not be sufficient to prevent serious injury. The provisional measures would be revoked when the Government reached a decision on the imposition of safeguard measures following the receipt of the report by the Commission.

Duration and Review of Safeguard Measures

17. The Commission shall also make recommendations about the duration of the measures up to a four year period. The period is to include any period where provisional measures have been in place.

18. Where safeguard measures are imposed, the Minister may refer to the Commission for inquiry and report the question of the extension of the period for safeguard measures beyond four years and up to eight years.

19. The inquiry by the Commission to advise whether the safeguard measure continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is adjusting shall be in conformity with the procedures set out above. A measure so extended is not to be more restrictive than it was at the end of the initial period, and should continue to be liberalized.



Productivity Commission Act 1998

No. 14, 1998



Productivity Commission Act 1998

No. 14, 1998

An Act to establish the Productivity Commission, and for related purposes

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Productivity Commission Act 1998

No. 14, 1998

An Act to establish the Productivity Commission, and for related purposes

[Assented to 16 April 1998]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Productivity Commission Act 1998*.

2 Commencement

This Act commences immediately after the commencement of the *Productivity Commission (Repeals, Transitional and Consequential Amendments) Act 1998*.

3 Definitions

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

Associate Commissioner means an Associate Commissioner appointed under section 25.

Chair means the Chair of the Commission.

Commission means the Productivity Commission established by this Act, and includes a Division of the Commission performing functions of the Commission.

Commissioner means:

- (a) the Chair; or
- (b) a Commissioner appointed under section 24.

Commonwealth authority means:

- (a) a body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth or of a Territory; or
- (b) a company or other body corporate in which the Commonwealth, a Territory or a body referred to in paragraph (a) has a controlling interest.

Division means a Division of the Commission established under section 40.

government body includes:

- (a) a body consisting of representatives of 2 or more government bodies; and
- (b) an international government body.

hearing means a hearing held for the purposes of an inquiry.

industry means industry of any kind (including any business or activity relating to goods or services), and a reference to industry is a reference to industry in general, a particular industry, a part of an industry, or a group or groups of particular industries.

inquiry means an inquiry held under this Act.

member means:

- (a) a Commissioner (including the Chair); or
- (b) an Associate Commissioner.

subject of Commonwealth power means any matter with respect to which the Parliament has power to make laws.

(2) For the purposes of this Act:

- (a) the Chair may be referred to as the Chair, Chairperson, Chairman or Chairwoman or by any other such term as the person occupying the office so chooses; and
- (b) the Deputy Chair may be referred to as the Deputy Chair, Deputy Chairperson, Deputy Chairman or Deputy Chairwoman or by any other such term as the person occupying the office so chooses.

(3) If a person occupying either of the offices mentioned in subsection (2) does not make known his or her choice of term, the person may be referred to by whichever of the following terms that a person addressing that person considers appropriate, as the case requires:

- (a) Chair or Deputy Chair;
- (b) Chairperson or Deputy Chairperson;
- (c) Chairman or Deputy Chairman;
- (d) Chairwoman or Deputy Chairwoman.

4 Act binds Crown

- (1) Subject to this section, this Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.
- (2) Nothing in this Act makes the Crown liable to prosecution for an offence against this Act.
- (3) The protection in subsection (2) does not apply to a Commonwealth authority.

Part 2—Establishment and functions of Productivity Commission

5 Establishment of Commission

The Productivity Commission is established.

6 Functions of Commission

- (1) The functions of the Commission are:
 - (a) to hold inquiries and report to the Minister about matters relating to industry, industry development and productivity that are referred to it by the Minister; and
 - (b) to provide secretariat services and research services to government bodies as directed by the Minister; and
 - (c) on and after 1 July 1997, to receive and investigate complaints about the implementation of competitive neutrality arrangements in relation to Commonwealth government businesses and business activities and to report to the Minister on its investigations; and
 - (d) to provide advice to the Minister about matters relating to industry, industry development and productivity, as requested by the Minister; and
 - (e) to undertake, on its own initiative, research about matters relating to industry, industry development and productivity; and
 - (f) to promote public understanding of matters relating to industry, industry development and productivity; and
 - (g) to perform any other function conferred on it by this Act; and
 - (h) to do anything incidental to any of the preceding functions.
- (2) In this section:

matters relating to industry, industry development and productivity includes legislative or administrative action taken, or to be taken, by the Commonwealth, a State or a Territory that affects or might affect the productivity performance of industry, industry development, or the productivity performance of the economy as a whole.

7 General power of Commission

The Commission has power to do everything necessary or convenient to be done for, or in connection with, the performance of its functions.

8 General policy guidelines for Commission

- (1) In the performance of its functions, the Commission must have regard to the need:
 - (a) to improve the overall economic performance of the economy through higher productivity in the public and private sectors in order to achieve higher living standards for all members of the Australian community; and
 - (b) to reduce regulation of industry (including regulation by the States, Territories and local government) where this is consistent with the social and economic goals of the Commonwealth Government; and
 - (c) to encourage the development and growth of Australian industries that are efficient in their use of resources, enterprising, innovative and internationally competitive; and

- (d) to facilitate adjustment to structural changes in the economy and the avoidance of social and economic hardships arising from those changes; and
 - (e) to recognise the interests of industries, employees, consumers and the community, likely to be affected by measures proposed by the Commission; and
 - (f) to increase employment, including in regional areas; and
 - (g) to promote regional development; and
 - (h) to recognise the progress made by Australia's trading partners in reducing both tariff and non-tariff barriers; and
 - (i) to ensure that industry develops in a way that is ecologically sustainable; and
 - (j) for Australia to meet its international obligations and commitments.
- (2) In the performance of its functions, the Commission must also have regard to any other matters notified to it in writing by the Minister.
- (3) The Commission, in all reports on matters referred to it, must provide a variety of viewpoints and options representing alternative means of addressing the issues in the report. If the report relies on formal mathematical economic modelling, the Commission must either:
- (a) if practicable—utilise at least 2 different economic models, with the assumptions and results of those models made explicit in the report; or
 - (b) if it is not practicable to utilise at least 2 different economic models, appoint, and report on the views of, an independent reference panel on the modelling.

9 Flexibility and range of working methods in performance of Commission's functions

In the performance of its functions, the Commission:

- (a) is not required to act in a formal manner; and
- (b) may inform itself on any matter in any way it thinks fit; and
- (c) may consult with anyone it thinks fit; and
- (d) may receive written or oral information or submissions; and
- (e) may hold public seminars, conduct workshops and establish working groups and task forces.

10 Annual report

- (1) The Commission must, as soon as practicable after the end of each financial year, prepare and give to the Minister a report of the Commission's operations during that financial year.
- (2) In the report, the Commission must report on matters relating to industry, industry development and productivity that have been referred to it, and the Commission may also report on industry and productivity performance generally.
- (3) The Commission must, as far as practicable, report on assistance and regulations affecting industry and the effect of such assistance and regulations on industry and on the economy as a whole.
- (4) In the report, the Commission must also report on the number of complaints received by the Commission about the competitive neutrality of government businesses and business activities, and the outcomes of the Commission's investigations into those complaints.

- (5) Subsection (4) does not apply to a report in respect of a financial year beginning before 1 July 1997.
- (6) In this section:
 - assistance* includes any act that, directly or indirectly:
 - (a) assists a person to carry on a business or activity; or
 - (b) confers a pecuniary benefit on, or results in a pecuniary benefit accruing to, a person in respect of carrying on a business or activity.
- (7) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report.

Part 3—Inquiries

Division 1—Reference to Commission for inquiry and report

11 Reference of matters to Commission for inquiry

- (1) In referring a matter to the Commission for inquiry, the Minister may, for the purpose of ensuring that the inquiry is conducted in the manner appropriate to that inquiry, do any or all of the following:
 - (a) require the Commission to hold hearings for the purposes of the inquiry;
 - (b) specify a period within which the Commission must submit its report on the inquiry to the Minister;
 - (c) require the Commission to make a draft report available to the public during an inquiry;
 - (d) require the Commission to make recommendations in relation to the matter;and the Commission must act accordingly.
- (2) The Commission must make a written report to the Minister on the inquiry unless the Minister withdraws the reference to the Commission.
- (3) The Minister may withdraw or amend the reference at any time before the Minister has received the report on the inquiry from the Commission.
- (4) If the Minister refers a matter to the Commission for inquiry, the Commission may also make recommendations in the report on any matters relevant to the matter referred.

12 Report of inquiry to be tabled

The Minister must cause a copy of the Commission's report on an inquiry to be tabled in each House of the Parliament:

- (a) within 25 sitting days of that House after the day on which the Minister receives it; or
- (b) if the Commission recommends that the tabling of the report, or part of the report, be delayed for a specified period—within 25 sitting days of that House after the end of that period.

Division 2—Conduct of inquiries

13 Notice of inquiry

As soon as practicable after the Commission receives a reference to hold an inquiry, it must give reasonable notice in each State and internal Territory, by advertisement published in a newspaper circulating in the State or Territory, of its intention to hold the inquiry.

14 Notice of hearings

Before the Commission begins to hold hearings for the purposes of an inquiry, it must give reasonable notice in each State and internal Territory, by advertisement published in a newspaper circulating in the State or Territory, of its intention to hold the hearings, the subject of the hearings and the time and place at which the first of the hearings is to be begun.

15 Procedure at hearings

- (1) A hearing must be held in public except in the circumstances set out in subsection (2).
- (2) If the Commission is satisfied that it is in the public interest not to hold the hearing, or a part of it, in public because of the confidential nature of any evidence or matter, or for any other reason, it may:
 - (a) direct that the hearing, or that part of it, take place in private; and
 - (b) give directions as to who may be present.
- (3) Sections 39 and 40 apply to a hearing, so far as those sections are capable of so applying, as if the hearing were a meeting of the Commission.

16 Written statements etc. to be made public

If:

- (a) the Commission is required to hold hearings for the purposes of an inquiry; and
- (b) a person gives written evidence to the inquiry or gives or produces a document to the Commission in connection with the inquiry;

the Commission must make available to the public in any way it thinks fit the contents of the statement or document, other than any matter:

- (c) that the person objects to being made public; and
- (d) the evidence of which the Commission is satisfied would have been taken in private if it had been given orally at a hearing and the person giving it had objected to giving it in public.

Part 4—Other functions of the Commission

Division 1—Advice, research and secretariat functions

17 Requests for advice

- (1) If the Minister requests the Commission's advice on a matter, the Minister may specify any or all of the following:
 - (a) that the advice is to be in writing;
 - (b) a period within which the advice is to be given;
 - (c) any matter to which the Commission is to have regard in giving the advice;and the Commission must act accordingly.
- (2) The Minister may withdraw or amend the request at any time before the Commission gives the advice.
- (3) If the Minister requests the Commission's advice on a matter, the Commission may also advise the Minister on any matters it considers relevant to the matter.

18 Minister may publish Commission's advice

- (1) The Minister may publish advice given by the Commission under section 17 in any way he or she thinks fit.
- (2) If:
 - (a) the Minister decides to publish the advice; and
 - (b) the advice contains information whose publication would, in the Minister's opinion, be contrary to the public interest;the Minister may publish the advice with deletions.
- (3) If the advice is published with deletions, the Minister must also publish the fact that the advice is published with deletions.

19 Secretariat services and research services to government bodies

- (1) If the Minister directs the Commission to provide secretariat services or research services to a government body, the direction must be in writing.
- (2) The Minister may, in writing, specify conditions on which the Commission is to provide the services.

20 Research services on request of other bodies

- (1) If:
 - (a) a person or body (other than a government body) requests the Commission to undertake a specified research project for the person or body; and
 - (b) the project relates to a matter or matters relating to industry, industry development and productivity, as defined in section 6; and
 - (c) the Minister consents, in writing, to the Commission undertaking the project;the Commission may undertake the project.

- (2) The Minister may, in writing, specify conditions on which the Commission is to undertake the project.

Division 2—Competitive neutrality complaints

21 Complaints to the Commission

- (1) A person may complain to the Commission that:
 - (a) a particular Commonwealth Government business or business activity, or a business or business activity competing with a Commonwealth Government business or business activity, is not conducted in accordance with competitive neutrality arrangements that apply to it; or
 - (b) a particular Commonwealth government or business activity, or a business or business activity competing with a Commonwealth government business or business activity, should be required to be conducted in accordance with competitive neutrality arrangements.
- (2) The complaint must be in writing.
- (3) The Commission is to give particular regard to ensuring the interests of users of the service are considered in relation to the complaint and may invite submissions from interested parties.
- (4) In addition to the obligations imposed on the functions of the Commission in section 8, the Commission must give particular consideration to the public interest requirements in clause 1 of the Competition Principles Agreement signed by the Commonwealth Government on 11 April 1995.
- (5) Competitive neutrality arrangements are the arrangements referred to by that name in the *Commonwealth Government Competitive Neutrality Statement* of June 1996 (the aim of which is to ensure that significant business activities do not enjoy net competitive advantages or disadvantages in comparison with their competitors by virtue of their public sector ownership).

22 Discretion not to investigate complaints

- (1) The Commission may decide not to investigate a complaint, if in the opinion of the Commission:
 - (a) the complaint is frivolous or vexatious or was not made in good faith; or
 - (b) the complainant does not have sufficient interest in the subject matter of the complaint; or
 - (c) an investigation is not warranted having regard to all the relevant circumstances.
- (2) If the Commission decides not to investigate a complaint it must inform the complainant of the decision.

Part 5—Constitution and operation of Commission

Division 1—Structure of Commission

23 Constitution of Commission

- (1) The Commission consists of:
 - (a) a Chair; and
 - (b) not fewer than 4 nor more than 11 other Commissioners.
- (2) The performance of the Commission's functions, and the exercise of its powers, are not affected merely because of:
 - (a) a vacancy in the office of Chair; or
 - (b) the number of Commissioners falling below 5 for a period of not more than 3 months; or
 - (c) the lack of a member who meets the requirements of subsection 26(3), (4) or (5) for a period of not more than 4 months.

24 Appointment of Commissioners

- (1) The Commissioners are to be appointed by the Governor-General.
- (2) A person must not be appointed as a Commissioner unless he or she has, in the opinion of the Governor-General, qualifications and experience relevant to the Commission's functions.
- (3) At least one Commissioner must have extensive skills and experience in applying the principles of ecologically sustainable development and environmental conservation.
- (4) At least one Commissioner must have extensive skills and experience in dealing with the social effects of economic adjustment and social welfare service delivery.
- (5) At least one Commissioner must have extensive skills and experience acquired in working in Australian industry.

25 Appointment of Associate Commissioners

The Minister may, after consulting with the Chair, appoint Associate Commissioners to the Commission.

26 Terms and conditions of appointment of members

- (1) The Chair must be appointed on a full-time basis.
- (2) The other members of the Commission may be appointed either on a full-time or part-time basis.
- (3) At least one member must have extensive skills and experience in matters relating to the principles of ecologically sustainable development and environmental conservation.
- (4) At least one member must have extensive skills and experience in matters relating to the social effects of economic adjustment and social welfare service delivery.

- (5) At least one member must have extensive skills and experience acquired in working in Australian industry.
- (6) A member is appointed for the term, not longer than 5 years, that is specified in the instrument of appointment, and is eligible for re-appointment.
- (7) A member's appointment is subject to any terms and conditions set out in the instrument of appointment.

27 Outside employment

- (1) A full-time member must not engage in paid employment outside the duties of his or her office, except with the Minister's consent.
- (2) A part-time member must not engage in paid employment that, in the Minister's opinion, conflicts with the proper performance of the member's duties.

28 Remuneration and allowances

- (1) A member is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed.
- (2) A member is to be paid the prescribed allowances.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

29 Leave of absence for full-time members

- (1) Subject to section 87E of the *Public Service Act 1922*, a full-time member has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant a full-time member leave of absence (other than recreation leave) on the terms and conditions as to remuneration or otherwise that the Minister determines.
- (3) The Minister may, by written instrument, delegate to the Chair the Minister's powers under subsection (2) (other than powers in relation to the Chair).

30 Leave of absence for part-time members

The Chair may grant leave to a part-time member to be absent from a meeting or meetings of the Commission.

31 Deputy Chair

- (1) The Minister may, in writing, appoint one of the full-time Commissioners to be the Deputy Chair for such period as is specified in the instrument of appointment.
- (2) The Deputy Chair must assist the Chair in the exercise of the powers and the performance of the duties of the Chair.
- (3) The Deputy Chair holds office until:

- (a) his or her term of office as Deputy Chair expires; or
 - (b) he or she ceases to be a Commissioner; or
 - (c) the Chair ends the appointment;whichever first happens.
- (4) A Commissioner may resign an appointment as Deputy Chair by giving the Chair a signed notice of resignation, but the resignation is not effective until it is accepted by the Chair.

32 Acting appointments

- (1) The Deputy Chair is to act as Chair:
 - (a) during a vacancy in the office of Chair, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Chair is absent from duty or from Australia or is, for any other reason, unable to perform the duties of office.
- (2) The Minister may appoint another Commissioner to act as Chair if:
 - (a) there is a vacancy in the office of Chair and the office of Deputy Chair (whether or not an appointment has been made to either or both of those offices); or
 - (b) the Chair and Deputy Chair are absent from duty or from Australia or are, for any other reason, unable to perform the duties of office.
- (3) The Minister may appoint a person (including an Associate Commissioner) to act as a Commissioner (other than the Chair):
 - (a) during a vacancy in the office of the Commissioner; or
 - (b) during any period, or during all periods, when the Commissioner is absent from duty or from Australia or is, for any other reason, unable to perform the duties of office.
- (4) Anything done by a person purporting to act under an appointment under this section is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in or in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

Note: Sections 20, 33 and 33A of the *Acts Interpretation Act 1901* set out additional rules governing acting appointments.

33 Resignation of member

- (1) A Commissioner may resign by giving the Governor-General a signed notice of resignation.
- (2) An Associate Commissioner may resign by giving the Minister a signed notice of resignation.

34 Retirement of member

- (1) The Governor-General may retire a Commissioner on the ground of invalidity if the Commissioner consents.
- (2) The Minister may retire an Associate Commissioner on the ground of invalidity if the Associate Commissioner consents.

35 Termination of member

- (1) The Governor-General may terminate a Commissioner's appointment for misbehaviour or physical or mental incapacity.
- (2) The Governor-General must terminate a Commissioner's appointment:
 - (a) if the Commissioner:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors or makes an assignment of remuneration to them; or
 - (b) if the Commissioner is a full-time Commissioner and is absent from duty, without reasonable excuse, for 14 consecutive days or for 28 days in any 12 month period; or
 - (c) if the Commissioner is absent, without reasonable excuse, from 3 consecutive meetings of the Commission; or
 - (d) if the Commissioner fails, without reasonable excuse, to comply with his or her disclosure obligations under section 43; or
 - (e) if the Commissioner is a full-time Commissioner who engages in paid employment outside the duties of his or her office without the Minister's consent; or
 - (f) if the Commissioner is a part-time Commissioner who engages in paid employment that, in the Minister's opinion, conflicts with the proper performance of the Commissioner's duties.
- (3) The Minister may terminate an Associate Commissioner's appointment for misbehaviour or physical or mental incapacity.
- (4) The Minister must terminate an Associate Commissioner's appointment:
 - (a) if the Associate Commissioner:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors or makes an assignment of remuneration to them; or
 - (b) if the Associate Commissioner is a full-time Associate Commissioner and is absent from duty, without reasonable excuse, for 14 consecutive days or for 28 days in any 12 month period; or
 - (c) if the Associate Commissioner is absent, without reasonable excuse, from 3 consecutive meetings of the Commission; or
 - (d) if the Associate Commissioner fails, without reasonable excuse, to comply with his or her disclosure obligations under section 43; or

- (e) if the Associate Commissioner is a full-time Associate Commissioner who engages in paid employment outside the duties of his or her office without the Minister's consent; or
 - (f) if the Associate Commissioner is a part-time Associate Commissioner who engages in paid employment that, in the Minister's opinion, conflicts with the proper performance of the Associate Commissioner's duties.
- (5) A member is not to be removed from office except as provided in this section.

36 Removal taken to be retirement on ground of invalidity

- (1) If a member:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) is removed from office under section 35 on the ground of physical or mental incapacity;
- for the purposes of that Act, he or she is taken to have been retired on the ground of invalidity within the meaning of Part IVA of that Act on the day on which he or she was removed from office.
- (2) In spite of subsection (1), section 54C of the *Superannuation Act 1976* applies in relation to the member.
- (3) If a member:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is removed from office under section 35 on the ground of physical or mental incapacity;
- for the purposes of that Act, he or she is taken to have been retired on the ground of invalidity within the meaning of that Act on the day on which he or she was removed from office.
- (4) In spite of subsection (3), section 13 of the *Superannuation Act 1990* applies in relation to the member.

37 Retirement on ground of invalidity under the Superannuation Acts

- (1) In spite of anything contained in sections 34 and 35, a member who:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- is not capable of being retired from office on the ground of invalidity within the meaning of Part IVA of that Act unless the CSS Board has given a certificate under section 54C of that Act.
- (2) In spite of anything contained in sections 34 and 35, a member who:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- is not capable of being retired from office on the ground of invalidity within the meaning of that Act unless the PSS Board has given a certificate under section 13 of that Act.

Division 2—Operation of Commission

38 Role of Chair

The Chair is to manage the Commission and to ensure the efficient performance of the Commission's functions.

39 Meetings of Commission

- (1) The Chair is to convene such meetings of the Commission he or she thinks necessary for the efficient performance of the functions of the Commission.
- (2) Meetings are to be held at such places as the Chair determines.
- (3) The Chair must preside at all meetings.
- (4) The Chair may give directions regarding the procedure to be followed at or in connection with a meeting.
- (5) At a meeting:
 - (a) the Chair and 3 other Commissioners form a quorum; and
 - (b) questions must be decided by a majority of votes of the Commissioners present and voting; and
 - (c) the Chair has a deliberative vote and, if necessary, also has a casting vote.
- (6) The Chair may permit a person to participate in, or a Commissioner to form a part of a quorum at, a meeting by means of telephone, closed circuit television or any other method of communication.
- (7) A power of the Chair under subsection (1), (2), (4) or (6) must be exercised, so far as practicable, only after consultation with the Commissioners.
- (8) This section has effect subject to sections 40 and 41.

40 Commission may sit in Divisions

- (1) For the purposes of performing a function of the Commission, the Chair may, by written instrument, establish a Division of the Commission.
- (2) The Division is to be constituted by the Chair and any other member or members specified in the instrument.
- (3) A Division is taken to be the Commission for the purposes of performing the function specified in the instrument and exercising the powers of the Commission in relation to that function.
- (4) Despite subsection 39(3), the Chair is not required to attend a meeting of a Division. If the Chair does not attend, he or she must nominate another member to preside.
- (5) The Chair may at any time before the Commission has completed performing the function specified in the instrument, amend the instrument in any respect, and if the constitution of the Division is changed, the Division as constituted after the change may complete the function specified in the instrument.

- (6) At a meeting of a Division constituted by 3 or more members, 2 members form a quorum.
- (7) A Division of the Commission may exercise powers of the Commission under this Act even if another Division of the Commission is exercising powers of the Commission at the same time.

41 Constitution of Division by one member in exceptional circumstances

- (1) Despite section 40, a Division may be constituted by one member if:
 - (a) only one member of a Division is available to attend a hearing; and
 - (b) the other members of the Division are unavailable to attend the hearing because of accident, illness, injury or other reason beyond their control.
- (2) If subsection (1) applies:
 - (a) the Division is taken, for the purposes of the hearing, to be constituted by the sole available member until one of the other members becomes available to attend the hearing; and
 - (b) while the sole available member is taken to constitute the Division, he or she is taken to have been nominated to preside at the meeting of the Division at which the hearing takes place.
- (3) In this section:
hearing includes part of a hearing.

42 Delegation by Chair

The Chair may, in writing, delegate all or any of the Chair's powers and functions under this Act to a member.

Note: Sections 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* set out general rules governing delegation of powers and functions.

43 Disclosure of interests

- (1) The Chair must give written notice to the Minister of all direct and indirect pecuniary interests that he or she has or acquires in a business or in a body corporate carrying on a business.
- (2) If the Chair has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of a function of the Chair, he or she must ensure that the interest is disclosed in one of the following ways:
 - (a) if a report or similar document results from the performance of the function—in the report or document;
 - (b) in any other case—to the person or body for whom the function is being performed.
- (3) If a member has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions as a member, he or she must disclose the interest to the Chair.

- (4) If the Chair becomes aware that a member has, in relation to the performance of a function, an interest, pecuniary or otherwise, that could conflict with the proper performance of the function by the member, the Chair must do one of the following:
 - (a) if the Chair considers that the member should not perform or continue to perform the function, the Chair must give a direction to the member accordingly;
 - (b) if paragraph (a) does not apply, the Chair must ensure that the interest is disclosed in one of the following ways:
 - (i) if a report or similar document results from the performance of the function—in the report or document;
 - (ii) in any other case—to the person or body for whom the function is being performed.

Part 6—Staff and consultants

44 Staff

- (1) Subject to section 45, the staff of the Commission are to be appointed or employed under the *Public Service Act 1922*.
- (2) The Chair has all the powers of a Secretary under the *Public Service Act 1922* as they relate to the branch of the Australian Public Service comprising the staff of the Commission.

45 Consultants

- (1) The Chair may, on behalf of the Commonwealth, engage as consultants to the Commission persons who have suitable qualifications and experience.
- (2) In selecting consultants and in its annual reporting on the engagement of consultants, the Commission must follow the Commonwealth's best practice standards.
- (3) The Chair must ensure that the Commonwealth's best practice standards are used in selecting consultants and in public reporting on their engagement.
- (4) If the estimated value of a consultancy exceeds the amount prescribed by the regulations, the Chair must ensure that an open, competitive tendering process is used in selecting the consultant or consultants.
- (5) A consultant may be engaged either under a contract for services or a contract of service.
- (6) Subject to any commitments under any award or employment agreement, the Chair may determine the terms and conditions on which a consultant is engaged.

Part 7—Offences etc.

46 Hindering or disrupting Commission

A person must not:

- (a) obstruct or hinder a member of the Commission in the performance of the Commission's functions; or
- (b) disrupt a hearing before the Commission.

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

47 Intimidation etc.

A person must not:

- (a) threaten, intimidate or coerce another person; or
- (b) cause or procure damage, loss or disadvantage to another person;

because that other person:

- (c) proposes to give, or has given, information or documents to the Commission; or
- (d) proposes to give evidence, or has given evidence, at a hearing held for the purposes of an inquiry; or
- (e) proposes to assist, or has assisted, the Commission in the performance of its functions in any other way.

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

48 Notice to person to provide information and documents

(1) If the Commission:

- (a) is:
 - (i) required to hold hearings for the purposes of an inquiry; or
 - (ii) holding an inquiry under section 11 in relation to a competitive neutrality complaint made under Division 2 of Part 4; and
- (b) has reason to believe that a person is capable of giving information or producing documents relevant to the inquiry;

the Chair may, by written notice served on the person, require the person to send to the Commission:

- (c) a statement signed by the person, setting out the specified information; and
- (d) specified documents.

(2) The notice must specify the period within which the statement and documents referred to in subsection (1) must be sent to the Commission. The period must be a period of at least 14 days commencing on the day the notice is served.

- (3) A person must not intentionally fail to send to the Commission the statement or documents that the person is required to send under subsection (1).

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

49 Summons to person to attend hearing

- (1) The Chair may summon a person, in writing, to appear at a hearing to give evidence and to produce documents specified in the summons.
- (2) A person served with a summons to appear at a hearing must not intentionally:
- (a) fail to attend as required by the summons; or
 - (b) fail to attend from day to day unless excused, or released from further attendance, by the Chair.

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

50 Refusal to answer questions or produce documents

A person appearing as a witness at a hearing must not refuse or fail:

- (a) to answer a question as required by the Chair; or
- (b) to produce a document as required by a summons served on the person under section 49.

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

51 Preservation of the privilege against self-incrimination

- (1) Subject to subsection (2), a person who would, apart from this subsection, be required to:
- (a) send a statement or document to the Commission under section 48; or
 - (b) answer a question or produce a document under section 50;
- need not comply with that requirement if so complying would:
- (c) tend to incriminate the person; or
 - (d) result in further attempts to obtain evidence that would tend to incriminate the person.
- (2) Subsection (1) does not apply, and the person must comply with the requirement, if the person has waived his or her rights under that subsection.

52 False or misleading evidence or information

If the Commission is:

- (a) required to hold hearings for the purposes of an inquiry; or
- (b) holding an inquiry under section 11 in relation to a competitive neutrality complaint made under Division 2 of Part 4;

a person must not, in relation to the inquiry:

- (c) give information to the Commission, whether orally or in writing, that the person knows to be false or misleading in a material particular; or
- (d) give evidence at a hearing before the Commission that the person knows to be false or misleading in a material particular; or
- (e) send to the Commission, under section 48, a statement or document containing material that the person knows to be false or misleading in a material particular.

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

53 Restrictions on publication of evidence

- (1) If the Commission directs that a hearing, or part of it, take place in private, the Commission may give directions prohibiting or restricting the publication of:

- (a) evidence given before the hearing (including evidence given prior to a direction that part of the hearing take place in private); or
- (b) matters contained in documents given to the Commission in connection with the hearing.

Note: Section 15 sets out the circumstances in which the Commission may direct that a hearing, or part of it, be held in private.

- (2) A person must not contravene a direction given under this section.

Penalty: Imprisonment for 6 months.

Note: This penalty is a maximum penalty (section 4D, *Crimes Act 1914*). A court may impose an appropriate fine instead of or as well as imprisonment (subsection 4B(2), *Crimes Act 1914*). If a body corporate is convicted of the offence, a court may impose a fine not more than 5 times the maximum fine that the court could impose on an individual for the same offence (subsection 4B(3), *Crimes Act 1914*). Penalty units are defined in section 4AA of the *Crimes Act 1914*.

54 Documents produced in relation to inquiry

If documents are produced or given to the Commission under this Part, the Commission:

- (a) may take possession of, and make copies of, or take extracts from, the documents; and
- (b) may keep possession of the documents for so long as is necessary for the purposes of the inquiry to which they relate; and
- (c) while it has possession of the documents, must permit them to be inspected at all reasonable times by people who would be entitled to inspect them if they were not in the possession of the Commission.

55 Allowances to witnesses

A person who attends a hearing of the Commission under a summons served under section 49 is entitled to be paid by the Commonwealth such allowances and expenses as are prescribed.

56 Limitation of powers under this Part

- (1) The powers under sections 48 and 49, paragraph 50(a) and sections 53 and 54 may be exercised only as provided in this section.
- (2) The powers may be exercised in relation to:
 - (a) a person holding, or performing the duties of, an office or appointment under a law of the Commonwealth or of a Territory; or
 - (b) a Commonwealth authority.
- (3) The powers may also be exercised in relation to any person for the purposes of an inquiry to the extent that the subject matter of the inquiry relates to a subject of Commonwealth power.
- (4) Subsection (3) does not enable a power to be exercised to the extent that it would impair the capacity of a State to exercise its constitutional powers.

Part 8—Miscellaneous

57 Protection from civil actions

- (1) Civil proceedings may not be brought against a member, or a person acting under the direction or authority of a member, in relation to loss, damage or injury of any kind suffered by a person in the course of the proper performance or exercise of the Commission's functions or powers.
- (2) Civil proceedings may not be brought against a person in relation to loss, damage or injury of any kind suffered by another person because the first-mentioned person:
 - (a) made a statement or submission; or
 - (b) gave information or a document;in good faith to the Commission in the course of the proper performance or exercise of the Commission's functions or powers.

58 Charges for services

The Commission may, on behalf of the Commonwealth, charge fees in relation to services provided by it in the course of performing functions referred to in paragraphs 6(1)(f), (g) and (h).

59 Conduct by directors, employees or agents

- (1) If, in proceedings for an offence against this Act in respect of conduct engaged in by a body corporate, it is necessary to establish a state of mind of the body corporate, it is sufficient to show:
 - (a) that the conduct was engaged in by a director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and
 - (b) that the director, employee or agent had that state of mind.
- (2) If:
 - (a) conduct is engaged in on behalf of a body corporate by a director, employee or agent of the body corporate; and
 - (b) the conduct is within the scope of his or her actual or apparent authority;the conduct is taken, for the purposes of this Act, to have been engaged in also by the body corporate unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.
- (3) If, in proceedings for an offence against this Act in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish a state of mind of the person, it is sufficient to show:
 - (a) that the conduct was engaged in by an employee or agent of the person within the scope of the employee's or agent's actual or apparent authority; and
 - (b) that the employee or agent had that state of mind.
- (4) If:
 - (a) conduct is engaged in on behalf of a person other than a body corporate by an employee or an agent of the person; and
 - (b) the conduct is within the employee's or agent's actual or apparent authority;

the conduct is taken, for the purposes of this Act, to have been engaged in also by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

- (5) A reference in subsection (1) to a state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the intention, opinion, belief or purpose.
- (6) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth or of a State or Territory.
- (7) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

60 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

*[Minister's second reading speech made in—
House of Representatives on 4 December 1996
Senate on 13 February 1997]*