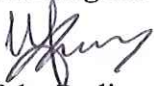


Examined and certified by:

  
 Clerk of the Parliament

In the name and on behalf of Her Majesty Queen Elizabeth the Second I hereby assent to  
 this Act this 12<sup>th</sup> day of December 2019



*(Signed)*  
 Queen's Representative

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An Act to—

- (a) establish the Competition and Regulatory Authority; and
- (b) provide for the functions and powers of the Authority; and
- (c) provide for review of, and appeals from, decisions of the Authority.

The Parliament of the Cook Islands enacts as follows—

**1 Title**

This Act is the Competition and Regulatory Authority Act 2019.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the assent of the Queen's Representative.

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**Part 1**

**Preliminary matters**

**3 Purpose**

The purpose of this Act is to establish an authority, to be known as the Competition and Regulatory Authority, with responsibility for administering and enforcing laws for the regulation of certain industries and activities in the Cook Islands.

**4 Interpretation**

In this Act, unless the context otherwise requires—

**Authority** means the Competition and Regulatory Authority

**compliance period** has the meaning given in section 65

**confidential information** has the meaning given in section 34

**contravening conduct** has the meaning given in section 65

**cooperation arrangement** has the meaning given in section 32

**cooperation request** has the meaning given in section 32

**Court** means the High Court of the Cook Islands

**enactment** means the whole or a portion of any Act or regulations

**immunity agreement** has the meaning given in section 48

**Minister** means the Minister of the Crown who, with the authority of the Prime Minister, is responsible for the administration of this Act

**Ministry** means the Ministry charged for the time being with the responsibility for the administration of this Act

**regulatory enactment** means any other Act or regulation in force in the Cook Islands which expressly confers on the Authority a function or power

**related party** has the meaning given in section 27

**remote access search** has the meaning given in section 51

**review period** has the meaning given in section 80

**reviewable decision** has the meaning given in section 76

**unauthorised disclosure** has the meaning given in section 34

**warning notice** has the meaning given in section 65.

**5 Act binds the Crown**

This Act binds the Crown.

## **Part 2 Establishment**

**6 Establishment of Authority**

(1) The Competition and Regulatory Authority is established as a statutory body.

(2) The Authority is a body corporate and may—

- (a) acquire, hold, and dispose of movable and immovable property; and
- (b) sue and be sued in its own name; and
- (c) so far as is possible for a body corporate, exercise all the rights and powers, enjoy all the privileges, and incur all the liabilities of a natural person of full age and capacity.

**7 Independence**

(1) Except as provided by this Act or by a regulatory enactment, the Authority is not subject to direction or control by the Minister or any other person in the performance of its functions.

(2) Subsection (1) does not—

- (a) apply to a direction given by a court; or
- (b) prevent the Authority from delegating a power or function or engaging a person to provide services to the Authority; or
- (c) affect the operation of the Ministry of Finance and Economic Management Act 1995-96.

**8 Government policy**

In the exercise of its powers under this or any other enactment, the Authority must have regard to published economic policies of the Government.

**9 Membership**

(1) The Authority must have at least 1 and not more than 3 members.

(2) The Minister may, by notice published in the *Gazette*, appoint a member who has been recommended for appointment by the Evaluation Committee.

(3) A member may be appointed on a full time or part time basis.

(4) The Minister must appoint one member to be Chair and, if there is more than one member, another member to be Deputy Chair.

(5) Anything done by or in relation to a person purporting to act under an appointment as a member is not invalid merely because—

- (a) the occasion for the appointment had not arisen; or
- (b) there was a defect or irregularity in connection with the appointment; or

- (c) the appointment has ceased to have effect.

## **10 Eligibility for appointment**

- (1) To be eligible for appointment as, or to remain, a member of the Authority, a person must—
  - (a) have knowledge of or experience in commerce, economics, law, public administration or management; and
  - (b) agree to be present in the Cook Islands for an amount of time that is sufficient to perform his or her functions as a member; and
  - (c) not have any material direct or indirect financial or other interest (including employment) in any company or business which is regulated by the Authority under a regulatory enactment; and
  - (d) have full legal capacity; and
  - (e) not have a conviction for any offence involving dishonesty or corruption in any country; and
  - (f) not be, or have previously been, bankrupt in any country; and
  - (g) not be an employee of the Cook Islands Government.
- (2) To be eligible for appointment as, or to remain, Chair of the Authority, a person must have significant knowledge of and experience in the economic regulation of telecommunications services in competitive markets.
- (3) For the purposes of subsection (1)(g) a person is not an employee of the Cook Islands Government solely by reason of being a member of the Authority.
- (4) A person shall not be disqualified or prevented from being appointed as a member of the Authority by reason of his or her nationality or residency.

## **11 Evaluation**

- (1) When a vacancy exists for appointment of a member of the Authority, the Minister must request the recommendation of one or more candidates for appointment by an Evaluation Committee comprising—
  - (a) the Financial Secretary; and
  - (b) the Public Service Commissioner; and
  - (c) the Solicitor-General.
- (2) If a position referred to in subsection (1) is vacant or the person filling that position is unavailable, the official next in seniority must take his or her place on the Evaluation Committee.
- (3) The Evaluation Committee must, on request by the Minister—
  - (a) seek applications by suitably qualified persons for membership of the Authority; and
  - (b) obtain such further information, references and expert advice as it reasonably considers to be necessary to evaluate applications; and
  - (c) evaluate eligible applications; and
  - (d) recommend to the Minister the appointment as a member of the Authority one or more eligible persons; and

- (e) in respect of each person it recommends for appointment, recommend terms and conditions of appointment, including in respect of remuneration, benefits, expenses, allowances and time required to be spent in the Cook Islands.
- (4) The Minister must not appoint a person as a member—
  - (a) who has not been recommended for appointment by the Evaluation Committee; or
  - (b) on terms and conditions that differ in substance from those recommended by the Evaluation Committee for the appointment of that person.

## **12 Term**

A member—

- (a) holds office for a period specified in the notice of appointment, which may be up to 3 years from the date of appointment; and
- (b) is eligible to be re-appointed; and
- (c) may resign from office by giving 1 month's written notice of resignation to the Minister; and
- (d) ceases to hold office if he or she ceases to meet the eligibility requirements under section 10(1).

## **13 Remuneration and expenses**

- (1) A member is entitled to the terms (including remuneration) that are recommended by the Evaluation Committee.
- (2) A member is entitled to be reimbursed for actual and reasonable travelling and other expenses incurred in carrying out his or her office as a member.
- (3) The remuneration and expenses of a member must be paid out of the funds of the Authority.

## **14 Immunity**

The following persons have no civil, criminal, or administrative liability (and no damages or penalties may be imposed on them) for any act or matter done or omitted to be done in good faith in the exercise or purported exercise of their respective functions under this Act or any regulatory enactment:

- (a) the Government or a Minister;
- (b) the Authority;
- (c) a member of the staff of the Authority or an agent of the Authority;
- (d) a person acting under an authority conferred by the Authority.

## **15 Removal**

- (1) The Minister may remove a member of the Authority from office if the member—
  - (a) has failed to attend 3 consecutive meetings of the Authority without good cause; or
  - (b) has failed to comply with an obligation to disclose an interest; or

- (c) has been disqualified, under the laws of the Cook Islands or another country, from acting as a director or executive officer of a body corporate; or
  - (d) has ceased to meet the eligibility requirements under section 10(1).
- (2) The Minister must give a member who is removed from office under this section notice in writing informing that person of his or her removal from office.

**16 Vacancy**

- (1) The office of a member becomes vacant if the member—
    - (a) dies; or
    - (b) completes a term of office and is not re-appointed; or
    - (c) resigns from office; or
    - (d) is removed from office.
  - (2) If the office of a member becomes vacant, the Minister may request the Evaluation Committee recommend the appointment of a suitable person to fill the vacancy.
- 
- (3) A person appointed to fill a vacancy holds office for the term that is specified in the member's letter of appointment and, subject to section 12, that term may extend beyond the remainder of the term of the member whose office became vacant.

**17 Staff and consultants**

- (1) The Authority may employ any staff and engage on contract for any services any other persons that it considers necessary to perform its functions.
- (2) The Authority may determine the remuneration and other conditions of employment of its staff and persons engaged on contracts for services.
- (3) The Authority may provide and maintain schemes (whether contributory or not) for the payment of retirement benefits, gratuities, or other allowances to its employees or former employees and their dependants.

**18 Delegation**

- (1) Subject to subsection (2), the Authority may, by resolution, delegate any of its functions or powers to any of the following:
  - (a) a member;
  - (b) a staff member of the Authority;
  - (c) a person holding or acting in a specified position in the Ministry.
- (2) The Authority must not delegate the power of delegation under this section.
- (3) A delegation—
  - (a) may be subject to conditions specified in the resolution; and
  - (b) may be varied or revoked at will; and
  - (c) does not prevent the Authority from performing the delegated function or exercising the delegated power.
- (4) A delegated function or power—
  - (a) must be carried out under the resolution for it; and



- (b) when carried out by the delegate, is taken for all purposes to have been performed or exercised by the Authority.
- (5) If a delegate purports to act under a delegation, it must be presumed, unless the contrary is established, that the delegate had the delegation and acted under it.

## **19 Annual plan**

- (1) The Authority must, within 6 months after the end of each financial year, prepare a plan setting out the Authority's proposed activities in the forthcoming financial year and at least the two following financial years.
- (2) The Authority must give a copy of its plan to the Minister who must arrange for it to be tabled in Parliament.

## **20 Annual report**

- (1) The Authority must, within 6 months after the end of each financial year, prepare a report on its activities in the preceding financial year.
- (2) The report must include the following information in relation to the financial year—
  - (a) a summary of complaints received; and
  - (b) an outline of investigations carried out; and
  - (c) an outline of proceedings to which the Authority is a party; and
  - (d) a summary of the outcomes that have been achieved by the Authority; and
  - (e) any other information required under any other enactment.
- (3) The Authority must give a copy of its report to the Minister who must arrange for it to be tabled in Parliament.

# **Part 3 Meetings**

## **21 Meetings of Authority**

- (1) If the Authority has more than 1 member, meetings of the Authority must be held as often as necessary to enable the Authority to perform its functions.
- (2) A meeting of the Authority may be convened by the Chair by giving notice in writing to—
  - (a) all members of the Authority; and
  - (b) the Ministry.
- (3) The Chair must convene a meeting on request by another member.
- (4) A meeting of the Authority must be presided over by—
  - (a) the Chair; or,
  - (b) in the absence of the Chair, the Deputy Chair.
- (5) The Authority may make rules regulating the procedure to be followed at meetings of the Authority and at meetings of its committees.
- (6) The Authority must keep written minutes of all of its meetings and of all meetings of any committee of the Authority.

**22 Quorum for meetings**

- (1) The quorum for a meeting of the Authority is a majority of its members.
- (2) A member who participates in a meeting by telephone, video conferencing, or other electronic means is to be regarded as being present for the meeting if—
  - (a) that member is able to hear the other members who are actually present at the meeting; and
  - (b) the members who are actually present at the meeting are able to hear that member.

**23 Voting at meetings**

- (1) Subject to subsection (2), each member who is present at a meeting of the Authority has one vote.
- (2) The presiding member has a deliberative vote and, if the number of votes for and against a motion is equal, also a casting vote.
- (3) Voting must not be carried out by secret ballot.
- (4) A decision supported by a majority of the votes cast at a meeting of the Authority at which a quorum is present is the decision of the Authority.
- (5) The result of a vote must be recorded in the minutes.

**24 Resolutions without meeting**

- (1) A resolution is a valid resolution of the Authority, even if it is not passed at a meeting, if—
  - (a) it is in writing; and
  - (b) proper notice of it is given to all members; and
  - (c) a majority of members sign or assent to the proposed motion and communicate that to the Chair by letter, fax, or other electronic transmission.
- (2) Subject to subsection (3), the date of a resolution referred to in this section is the date on which the last of the members constituting a majority signs or assents to the resolution.
- (3) A resolution proposed under subsection (1) must be referred to a meeting for consideration if any member requests that by notice in writing to the Chair.
- (4) A request under subsection (3) must be made within 14 days after the date on which notice referred to in paragraph (1)(b) was given.

**25 Decisions not invalidated**

A decision of the Authority is not invalidated solely by—

- (a) any defect in the appointment of a member; or
- (b) a vacancy among its members; or
- (c) the absence of a member from the meeting at which the decision was made; or
- (d) any irregularity in the procedures adopted by the Authority that does not affect the decision.

**26 Disclosure of interests**

- (1) A member must disclose in writing to each other member all interests the member has that could conflict with the proper performance of the functions of the member's office.
- (2) Disclosure must be made as soon as practicable after the member becomes aware of the interest.
- (3) A member who has an interest in a particular matter that could conflict with the proper performance of the functions of the office must not perform those functions unless—
  - (a) the member has complied with subsection (1); and
  - (b) each of the other members has consented to the member performing those functions despite the possible conflict of interest.
- (4) For the purposes of subsections (1) and (3), it does not matter whether an interest is direct, indirect, pecuniary, or non-pecuniary, and it does not matter when the interest was acquired.
- (5) If the Chair becomes aware that a member who is performing, or about to perform, a function as a member has an interest that could conflict with the proper performance of the function, the Chair may give the member a direction to disclose the interest, or not to perform the function.
- (6) The Authority must take reasonable steps to ensure that members of the Authority's staff, persons otherwise engaged by the Authority, and other persons exercising or performing powers or functions of the Authority make proper and adequate disclosure of their interests.
- (7) The Authority must record, and maintain a register of, all disclosures under this section.

**27 Related parties' interests**

- (1) A member is taken to have an interest and section 26 applies if—
  - (a) a related party of a member has an interest; and
  - (b) the interest could conflict with the proper performance by the member of the functions of his or her office.
- (2) In this section, "**related party**" in relation to a member means any of the following:
  - (a) a spouse, child, or parent of the member;
  - (b) a company of which the member is a director or executive officer, and a subsidiary of the company;
  - (c) a company of which a spouse, child, or parent of the member is a director or executive officer;
  - (d) a company in which the member, or a spouse, child, or parent of the member, has a controlling interest.

**Part 4****Functions, powers, and duties****28 Functions of Authority**

The Authority has the following functions:

- (a) to investigate conduct that may infringe an enactment under which the Authority has an enforcement responsibility;
- (b) to promote public understanding of the value of competition and the role of regulation;
- (c) to promote the use of internal controls and risk management measures by businesses to ensure compliance with the regulatory enactments;
- (d) to take any steps that may be appropriate and authorised by this or any other Act to enforce compliance;
- (e) to advise the Minister on matters of competition and regulation;
- (f) to perform any other functions conferred by this Act or any other enactment.

## **29 General powers of Authority**

- (1) The Authority has all the powers necessary and convenient for performing its functions.
- (2) Without limiting subsection (1), the Authority may—
  - (a) make, give effect to, assign or accept the assignment of, vary, or rescind any agreement; or
  - (b) receive and spend money; or
  - (c) with the approval of the Financial Secretary, borrow money; or
  - (d) invest funds of the Authority that are not immediately required, in a manner approved by the Financial Secretary; or
  - (e) with the approval of the Minister, become a member or affiliate of any international body whose functions or objects include the promotion of competition or consumer protection; or
  - (f) with the approval of the Minister, enter into agreements with other regulatory bodies, in the Cook Islands or overseas.
- (3) The Authority has any other powers that are expressly conferred on it by any other enactment.

## **30 Power to exchange information**

- (1) The Authority may provide to an overseas agency any information, or a copy of any document, that the Authority holds, but only if the Authority—
  - (a) considers that to do so will assist the overseas agency in performing those functions of the overseas agency that correspond to functions of the Authority; and
  - (b) is satisfied that appropriate protections are or will be in place to maintain the confidentiality of anything provided.
- (2) When carrying out its functions, the Authority may use any information, or a copy of any document, provided to it by an overseas agency.
- (3) Despite the other provisions of this Part or any cooperation arrangement, the Authority may provide any information to an overseas agency with the consent of the person to whom the information relates.

**31 Power to assist overseas agencies**

- (1) If the Authority receives a request from an overseas agency to investigate a matter related to the functions of the overseas agency and to provide the overseas agency with information or documents resulting from the investigation (a “**cooperation request**”), the Authority may comply with the request, but only if it is satisfied that—
  - (a) compliance will not substantially affect the performance of the Authority’s other functions; and
  - (b) appropriate protections are or will be in place to maintain the confidentiality of anything provided; and
  - (c) it is appropriate to do so.
- (2) The matters to be considered in deciding whether it is appropriate to comply with a cooperation request include—
  - (a) the terms of any relevant cooperation arrangement;
  - (b) whether the Authority is likely to be able to comply with the request;
  - (c) the cost to the Authority of complying with the request;
  - (d) whether another source could more conveniently satisfy the request;
  - (e) the extent to which the functions of the overseas agency correspond with the functions of the Authority;
  - (f) whether the overseas agency would be likely to comply with a similar request made by the Authority;
  - (g) whether it would be more appropriate for the request to be dealt with under the Mutual Assistance in Criminal Matters Act 2003.
- (3) The Authority may, in complying with a cooperation request, impose conditions relating to any of the following:
  - (a) maintaining the confidentiality of information and documents provided to the overseas agency;
  - (b) the storage or use of, or access to, that information and those documents;
  - (c) copying, returning or disposing of any of that information and those documents;
  - (d) the costs incurred by the Authority in complying with the request.
- (4) The Authority may exercise powers under Part 5 in complying with a cooperation request.
- (5) If the Authority exercises a power under Part 5 in complying with a cooperation request, it must specify, in any notice given for the purpose of exercising the power, that it is exercising the power to comply with such a request.
- (6) The Authority must not, unless subsection (7) applies, provide a copy of a statement to an overseas agency if the statement—
  - (a) was made to the Authority or an investigator in the course of an investigation (whether or not the investigation was conducted under a request); and
  - (b) might tend to incriminate the person or make the person liable to a pecuniary penalty under the law of another country.
- (7) This subsection applies if the overseas agency gives the Authority a written undertaking—

- (a) that it will not use the statement in a prosecution of the person, or a proceeding for a pecuniary penalty or like proceedings; and
- (b) that, to the extent that it is within the ability of the overseas agency to do so, it will ensure that those statements are not so used by any other agency of the foreign country.

### 32 Power to enter cooperation arrangement

- (1) The Minister may, on behalf of the Government, enter into an arrangement (a “**cooperation arrangement**”) in respect of an overseas agency with—
  - (a) the government of the country in which an overseas agency is established; or
  - (b) if an overseas agency is established by an international body, the governing body of that international body.
- (2) The Authority may, with the written approval of the Minister, enter into an arrangement (also a “**cooperation arrangement**”) with an overseas agency.
- (3) Without limiting what a cooperation arrangement may contain, a cooperation arrangement—
  - (a) must identify the overseas agency to which it relates; and
  - (b) must identify the written laws in connection with which the overseas agency may seek information or documents from the Authority; and
  - (c) must set out how information or documents provided to the overseas agency under the arrangement may be used by the overseas agency, and how they are to be kept secure; and
  - (d) may provide for the reimbursement of the Authority for costs incurred in complying with requests to which the cooperation arrangement applies.
- (4) Before entering into a cooperation arrangement, or giving approval to the Authority to enter into a cooperation arrangement, the Minister must consider—
  - (a) the legal framework relating to the use of compulsorily acquired information in the overseas country; and
  - (b) the potential consequences for consumers and businesses in the Cook Islands of providing information or documents to the overseas agency; and
  - (c) any privacy issues arising from the proposed arrangement.
- (5) The Minister must not enter into a cooperation arrangement, or give approval to the Authority to enter into a cooperation arrangement, unless satisfied that entering into the arrangement is consistent with Cook Islands’ international obligations.
- (6) If a cooperation arrangement is entered into or amended, then, as soon as practicable, notice of the fact must be published in the *Gazette* and a copy of the arrangement placed on the Authority’s website.

### 33 Power to make confidentiality order

- (1) A confidentiality order is an order that prohibits disclosure of information specified in the order except as specified in the order.

- (2) The Authority may, on its own initiative or on application by a person, make a confidentiality order relating to any specified information (including information in a document), provided to or obtained by the Authority or an investigator in connection with—
  - (a) an investigation by the Authority; or
  - (b) the performance of a function of the Authority.
- (3) A confidentiality order may be expressed to have effect for any period that is specified in the order.
- (4) The Authority may, on its own initiative or on application by a person bound by a confidentiality order, vary or revoke the order.
- (5) If a confidentiality order is in effect, a person who discloses information contrary to the order commits an offence and is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.
- (6) It is a defence to an offence against subsection (5) that the defendant did not know, and could not reasonably have known, that the disclosure was contrary to the order.

#### **34 Duty to protect confidentiality**

- (1) The Authority must establish and maintain reasonable procedural safeguards to prevent the unauthorised disclosure of confidential information.
- (2) In this section, “**confidential information**” means—
  - (a) information that has been provided to or obtained by the Authority in the course of, or in connection with, the performance of its functions under this Act or any regulatory enactment, that relates to—
    - (i) the private affairs of a natural person; or
    - (ii) the commercial activities of any person that are of a confidential nature; or
    - (iii) the identity of any person who has given information to the Authority; and
  - (b) information that has been given to the Authority on terms that, or in circumstances that, require it to be held in confidence; and
  - (c) information that the Authority has agreed to treat as confidential.
- (3) In this section, “**unauthorised disclosure**” means disclosure that is prohibited or not authorised by or under subsection (4).
- (4) Disclosure of confidential information is deemed to be authorised where—
  - (a) the information relates to the affairs of a person or undertaking and consent to disclosure has been given by—
    - (i) in the case of a natural person, the person concerned; or
    - (ii) in the case of a company, a director or the company secretary; or
    - (iii) in the case of a partnership, a partner; or
    - (iv) in the case of an unincorporated body, a person concerned in its management or control.

- (b) the information has been lawfully disclosed to the public on an earlier occasion; or
- (c) the disclosure is for the purpose of obtaining advice from a lawyer or other professional adviser acting or proposing to act in a professional capacity in connection with any matter arising under this Act or any other enactment under which the Authority has a function or power; or
- (d) the disclosure is made in accordance with an order of any court or in accordance with an enactment or a requirement made under an enactment; or
- (e) the disclosure is made in connection with any judicial proceedings under this Act or any other Act under which the Authority has a function or power; or
- (f) the disclosure is made to an overseas agency, under a cooperation arrangement under section 32.

**35 Duty to act in good faith**

- (1) Each member of the Authority must act with integrity, honesty, impartiality, and diligence in the performance of the member's office.
- (2) Each employee of the Authority must comply with the Public Service's code of conduct as a term of the individual's appointment.

**36 Duty of transparency**

- (1) The Authority must, in performing its functions under Parts 5 to 8, observe reasonable standards of procedural fairness, act in a timely fashion, and observe the rules of natural justice.
- (2) The Authority must, prior to making a significant substantive or procedural decision under Parts 5 to 8 that affects persons—
  - (a) give notice of the proposed decision by means of the Internet and in any other manner it considers appropriate to bring the proposed decision to the attention of those it considers likely to be affected by it; and
  - (b) give persons who are or who are likely to be affected by the decision an opportunity to make submissions to and be heard by the Authority or to otherwise be consulted; and
  - (c) have regard to the evidence adduced and the matters contained in any submissions or otherwise received in the course of consultations.
- (3) The Authority must, as soon as reasonably practicable after making a significant substantive or procedural decision under Parts 5 to 8 that affects persons—
  - (a) give notice of the decision to persons affected by it, by means the Authority considers reasonable in the circumstances, and
  - (b) make available a written statement of its reasons for the decision.



## **Part 5**

### **Complaints and investigations**

#### *Complaints and investigations*

#### **37 Complaints**

- (1) A person may make a complaint with the Authority that a person has contravened, is contravening or is about to contravene a regulatory enactment.
- (2) The Authority must, if asked, assist a person to make a complaint.

#### **38 Investigations**

- (1) The Authority may, on its own initiative, carry out an investigation into any conduct that constitutes or may constitute a contravention of a regulatory enactment.
- (2) If a complaint is made under section 37, the Authority must carry out an investigation into the conduct to determine whether it constitutes or may constitute a contravention of a regulatory enactment.
- (3) The Authority does not have to carry out an investigation if it does not consider it reasonable to do so and may, in particular, refuse to investigate a complaint under section 37 if it is satisfied that—
  - (a) the complaint is trivial, frivolous, or vexatious; or
  - (b) the complaint is misconceived or lacking in substance; or
  - (c) the Authority does not have jurisdiction in relation to the complaint.

#### **39 Referral**

If the Minister refers specified conduct or alleged conduct to the Authority under this section, the Authority must—

- (a) carry out an investigation to determine whether the specified conduct or alleged conduct occurred and, if it did, whether it constitutes or may constitute a contravention of a regulatory enactment; and
- (b) provide a written report on the investigation to the Minister.

#### *Investigators*

#### **40 Appointment of Investigators**

- (1) The Authority—
  - (a) may, by writing, appoint a person to be an investigator; and
  - (b) must issue an identity card, in the approved form, to each investigator.
- (2) An investigator must carry his or her identity card at all times when exercising a power or performing a function under this Act or any other enactment.
- (3) If an investigator does not, as soon as practicable after ceasing to be an investigator, return his or her identity card to the Authority, the investigator, commits an offence and is liable on conviction to a fine not exceeding \$20,000.
- (4) It is a defence to an offence against subsection (3) that the identity card has been lost or destroyed.

- (5) A person who interferes with or impedes an investigator exercising a power or performing a function under this Act or any other enactment commits an offence and is liable on conviction to—
- (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.

*Investigative powers*

**41 Warnings**

- (1) This section applies if an investigator suspects, or ought to reasonably suspect, that a person (a “**relevant person**”) is engaging or has engaged in conduct that is an offence against this Act or any regulatory enactment, or that would make the relevant person liable to a pecuniary penalty under this Act.
- (2) The investigator must not exercise a power to question the relevant person about the conduct unless the investigator, or another investigator, has warned the relevant person that the relevant person does not have to answer a question, or do anything else in response to a question, about the conduct, but that anything that the relevant person does say or do may be evidence.
- (3) Subsection (4) applies in—
- (a) a prosecution of the relevant person for an offence against this Act or a regulatory enactment; or
  - (b) a proceeding against the relevant person for a pecuniary penalty under this Act or a regulatory enactment.
- (4) Evidence of what the relevant person said or did when questioned in circumstances set out in subsection (1) is not admissible unless it is established that, before the question was asked, the warning required by subsection (2) was given.
- (5) This section does not limit the grounds on which the evidence may be inadmissible.

**42 Self-incrimination**

- (1) A person is not excused from producing a document or thing as required by section 43, or from answering a question as required by section 44, on the ground that the contents of the document, or the thing, or the answer, may tend to incriminate the person or make the person liable to a fine or pecuniary penalty.
- (2) Subsection (3) applies if—
- (a) a person is required to produce a document or thing, or answer a question, under section 43 or 44; and
  - (b) when so required, the person objected on the ground that the document, or the thing, or the answer, may tend to incriminate the person or make the person liable to a pecuniary penalty,
- (3) If this subsection applies the contents of the document, the thing, or the answer is not admissible in evidence in a prosecution of the person for an offence against this Act or a regulatory enactment, or in proceedings against the person for a pecuniary penalty.

- (4) Subsection (3) does not apply to a prosecution of the person for false or misleading answers (including in respect of an offence against sections 43, 44, or 47).

**43 Requirement to produce documents and things**

- (1) Where the Authority considers it necessary or desirable for the purposes of carrying out a function or exercising a power under this Act or any regulatory enactment, an investigator may, by notice in writing, require a person to produce any document or thing relevant to an investigation at a time and place specified in the notice.
- (2) The notice must indicate the subject matter and purpose of the investigation, and draw attention to the penalties under this Act for—
  - (a) failing to comply with the requirement; and
  - (b) providing false or misleading documents; and
  - (c) destroying or falsifying documents.
- (3) If a person produces a document or thing as required under subsection (1), an investigator may do either of the following:
  - (a) make copies of it or take extracts or samples from it;
  - (b) require the person to give an explanation of or further particulars about the document or thing.
- (4) If an investigator makes requirement under subsection (3)(b) in writing, the investigator may require the explanation and particulars to be provided in writing.
- (5) A person who fails or refuses to comply with a requirement under subsection (1) or (3)(b) commits an offence and is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000, or imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.
- (6) It is a defence to an offence under subsection (5) that the defendant had a reasonable excuse for failing or refusing to comply.
- (7) A person who is required under subsection (3)(b) to give an explanation of, or further particulars about, a document or thing commits an offence if the person—
  - (a) gives an explanation that is, or particulars that are, inaccurate or incomplete; and
  - (b) knew that the explanation or further particulars were inaccurate or incomplete, or was reckless whether they were accurate or complete.
- (8) A person who commits an offence against subsection (7) is liable on conviction—
  - (a) in the case of an individual, a fine of \$20,000, or imprisonment for 24 months, or both; and
  - (b) in any other case, a fine of \$150,000.

**44 Requirement to answer or respond**

- (1) An investigator may, by notice in writing, require a person to do either or both of the following:

- (a) attend before an investigator, at a time and place specified in the notice, to answer questions relevant to the investigation;
  - (b) provide written responses to questions set out in the notice that are relevant to the investigation.
- (2) The notice must indicate the subject matter and purpose of the investigation, and draw attention to the penalties under this Act for failing to comply with the requirement.
- (3) A person who fails or refuses to comply with a requirement under subsection (1) commits an offence and is liable on conviction to a penalty not exceeding a fine of \$20,000, or imprisonment for 24 months, or both.
- (4) It is a defence to an offence against subsection (3) that the defendant had a reasonable excuse for failing or refusing to comply.
- (5) A person who attends as required by a notice under subsection (1) and answers a question put to the person by an investigator, or who provides a written response to a question set out in a notice under subsection (1), commits an offence if—
  - (a) the answer given by the person is inaccurate or incomplete; and
  - (b) the person knew that the answer was inaccurate or incomplete, or was reckless whether it was accurate or complete.
- (6) A person who commits an offence against subsection (5) is liable on conviction to a penalty not exceeding a fine of \$20,000, or imprisonment for 24 months, or both.

#### **45 Investigator may administer oath or affirmation**

- (1) An investigator may—
  - (a) require a person to verify on oath or affirmation the accuracy and completeness of the answers the person gives to a question put by an investigator under section 44; and
  - (b) administer the oath or affirmation for the purpose of paragraph (a).
- (2) A person who fails or refuses to comply with a requirement under subsection (1) commits an offence and is liable on conviction to a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both.
- (3) It is a defence to an offence against subsection (2) that the defendant had a reasonable excuse for failing or refusing to comply.

#### **46 Authority may require statutory declaration**

- (1) The Authority may require a person giving any explanation, further particulars, answer, or statement to the Authority under this Part to verify the truth of the explanation, particulars, answer or statement, by statutory declaration.
- (2) If a person fails to comply with a requirement made under this Part to give any explanation, further particulars, answer, or statement to the Authority, the Authority may require that person to state, by statutory declaration, the reasons for the failure.
- (3) For the purpose of subsection (1) or (2), any member of the Authority may administer an oath or affirmation.

#### **47 False or misleading statements**

- (1) A person commits an offence if—

- (a) the person makes a statement (whether orally, in a document or in any other way) to an investigator in relation to the exercise by the investigator of his or her powers under this Act or any other enactment; and
  - (b) the statement is false or misleading in a material particular.
- (2) If a person commits an offence against subsection (1), the person is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.
- (3) It is a defence to an offence against subsection (1) that the defendant did not know, and could not reasonably be expected to have known, that the statement was false or misleading.
- (4) A person commits an offence if—
  - (a) the person makes a statement (whether orally, in a document or in any other way) to an investigator in relation to the exercise by the investigator of his or her powers under this Act or any other enactment; and
  - ~~(b) the statement is false or misleading in a material particular; and~~
  - (c) the person knows or believes that the statement is false or misleading in a material particular.
- (5) If a person commits an offence against subsection (4), the person is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.
- (6) For the purposes of subsections (1) and (4), and without limiting when a statement may be false or misleading, a statement may be false or misleading because it does not include some relevant matter.

#### **48 Immunity Agreements**

- (1) The Authority may, in exchange for a person's cooperation in an investigation or in proceedings under this Act or a regulatory enactment, agree with the person, on any terms it considers appropriate, that it will not take enforcement action against that person or any officer, director, employee or agent of that person in respect of a possible contravention of this Act or a regulatory enactment ("**immunity agreement**").
- (2) The Authority must not, while an immunity agreement is in force, take enforcement action in relation to a possible contravention of the law to which the immunity agreement applies.
- (3) The Authority may terminate an immunity agreement if—
  - (a) the other party to the agreement agrees to the termination; or
  - (b) the Authority has reasonable cause to believe that the information on which it based its decision to make the agreement was incomplete, false, or misleading in any material particular; or
  - (c) the Authority is satisfied that the other party to the agreement, or a director, officer, employee or agent of that party, has failed to a material extent to comply with the terms of the agreement.

- (4) Before terminating an immunity agreement, the Authority must give notice in writing to the other party to the agreement and consider any representations about the proposed termination that are made by that party to the Authority.

### *Searches*

#### **49 Search warrants**

- (1) For the purpose of conducting an investigation, an investigator may enter a place and search it for documents and things relevant to the investigation.
- (2) An investigator may do so only—
- (a) with the consent of the occupier of the place; or
  - (b) if authorised by a warrant issued under section 50; or
  - (c) if the investigator or some other investigator believes on reasonable grounds that it is necessary to enter the place urgently to prevent the loss or destruction of a document or other thing that may afford evidence of a contravention of a competition or consumer law.

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#### **50 Issue of warrants**

- (1) A Judge may, on application, issue a warrant for the purpose of this Act.
- (2) The application must—
- (a) be made by an investigator; and
  - (b) be made under the rules of the court for which the Judge is presiding; and
  - (c) be accompanied by oral or written information (given on oath or affirmation) in support of the application.
- (3) The Judge may require further information.
- (4) If it is impracticable to apply for the warrant in person, the application may be made by email, telephone or other appropriate means and—
- (a) the Judge may issue the warrant if satisfied that it is impracticable for the applicant to apply in person for the warrant; and
  - (b) if the Judge issues the warrant—
    - (i) the Judge must prepare and sign the warrant and tell the applicant its terms; and
    - (ii) the applicant must prepare an instrument in the same terms as the warrant and write on it the Judge's name and the time at which and the day on which the warrant was signed; and
    - (iii) the applicant must give to the Judge who signed the warrant, not later than 24 hours after it was signed, the application, any written information mentioned in subsection (2)(c) and the instrument mentioned in sub-paragraph (ii).
- (5) Without limiting the matters that are relevant to determining whether it is impracticable to apply for the warrant in person, the following are relevant:
- (a) the period for doing what the warrant authorised;
  - (b) the time that would be taken if an application were to be made in person.
- (6) While the warrant remains in force, the instrument referred to in subsection (4)(b)(ii) may be used instead of the warrant.

- (7) In any proceeding, a court must not find that anything was done under a warrant issued under subsection (4) unless the warrant, signed in accordance with subsection (4)(b)(i), is admitted in evidence in the proceeding.
- (8) A warrant under this Act to enter or search a place authorises the investigator named in the warrant, and any other investigator, to execute the warrant with any assistance that is necessary.

## **51 Remote access searches**

- (1) In this section, “**remote access search**” means a search of a thing such as an Internet data storage facility that does not have a physical address that a person can enter and search.
- (2) A warrant may authorise the remote access search of a thing if the Judge issuing the warrant is satisfied that the thing is not located at a physical address that a person can search.
- (3) A warrant that is intended to authorize a remote access search must contain, in reasonable detail, particulars of the access information that identifies the thing to be searched remotely.
- ~~(4) A person who conducts a remote access search must, on completion of the search, send an electronic message to the email address of the thing searched—~~
  - (a) attaching a copy of the search warrant; and
  - (b) setting out the following particulars—
    - (i) the date and time of the commencement and completion of the search;
    - (ii) the name and job title of the person who had overall responsibility for that search;
    - (iii) the address of the office to which inquiries should be made.
- (5) If the person conducting the remote access search is unable to deliver the electronic message required by subsection (4) (or it is returned undelivered), the person must take all reasonable steps to identify the user of the thing searched and to send the information referred to in subsection (4)(a) and (b) to that person.

## **52 Remote access search of thing authorised by warrant**

Every person executing a search warrant authorising a remote access search may—

- (a) use reasonable measures to gain access to the thing to be searched; and
- (b) if any intangible material in the thing is the subject of the search or may otherwise be lawfully seized, copy that material (including by means of previewing, cloning, or other forensic methods).

## **53 Period of warrants**

- (1) A warrant is to specify the day, not more than 14 days after its issue, on which it ceases to be in force.
- (2) Another warrant may be issued before or after a warrant has ceased to be in force.

**54 Search powers**

Every search warrant authorises the investigator executing it:

- (a) to enter and search the place, vehicle, or other thing that the person is authorised to enter and search, and any item or items found in that place or vehicle or thing, at any time that is reasonable:
- (b) to request any person to assist with the entry and search:
- (c) to use any force in respect of any property that is reasonable for the purposes of carrying out the search and any lawful seizure:
- (d) to seize anything that is the subject of the search or anything else that may be lawfully seized:
- (e) to bring and use in or on the place, vehicle, or other thing searched any equipment, to use any equipment found on the place, vehicle, or other thing, and to extract any electricity from the place, vehicle, or other thing to operate the equipment that is reasonable to use in the circumstances, for the purposes of carrying out the entry and search:
- (f) to copy any document, or part of a document, that may lawfully be seized:
- (g) to use any reasonable measures to access a computer system or other data storage device located (in whole or in part) at the place, vehicle, or other thing if any intangible material that is the subject of the search may be in that computer system or other device:
- (h) if any intangible material accessed under paragraph (g) is the subject of the search or may otherwise be lawfully seized, to copy that material (including by means of previewing, cloning, or other forensic methods either before or after removal for examination):
- (i) to take photographs, sound and video recordings, and drawings of the place, vehicle, or other thing searched, and of any thing found in or on that place, vehicle, or other thing, if the person exercising the power has reasonable grounds to believe that the photographs or sound or video recordings or drawings may be relevant to the purposes of the entry and search.

**55 Items of uncertain status may be seized**

If a person executing a search warrant is uncertain whether any item found may lawfully be seized, and it is not reasonably practicable to determine whether that item can be seized at the place or vehicle where the search takes place, the person executing the warrant may remove the item for the purpose of examination or analysis to determine whether it may be lawfully seized.

**56 Powers of persons called to assist**

- (1) Every person called on to assist an investigator executing a search warrant is subject to the control of the investigator with overall responsibility for executing that warrant.
- (2) Every person called on to assist an investigator executing a search warrant may:
  - (a) enter the place, vehicle, or other thing to be searched:
  - (b) while under the direction of the person executing the warrant, use reasonable force in respect of any property for the purposes of carrying out the entry and search and any lawful seizure:



- (c) search areas within the place, vehicle, or other thing that the person executing the warrant has determined may lawfully be searched;
  - (d) seize anything that is the subject of the search or anything else that may be lawfully seized;
  - (e) take photographs, sound and video recordings, and drawings of the place, vehicle, or other thing, and things found in or on the place, vehicle, or other thing, if the person executing the warrant has determined that those things may be lawfully taken;
  - (f) bring into or onto the place, vehicle, or other thing searched and use any equipment, make use of any equipment found in or on the place or in the vehicle or other thing, or extract electricity from the place, vehicle, or other thing for the purposes of operating the equipment that the person executing the warrant has determined may be lawfully used;
  - (g) use any reasonable measures to access a computer system or other data storage device located (in whole or in part) at the place, vehicle, or other thing if any intangible material that is the subject of the search may be in that computer system or other device;
- 
- (h) if any intangible material accessed under paragraph (g) is the subject of the search or may otherwise be lawfully seized, to copy that material (including by means of previewing, cloning, or other forensic methods either before or after removal for examination);
  - (i) copy any document, or part of a document, that the person exercising the power has determined may be lawfully copied.
- (3) If a Police officer is assisting an investigator executing a search warrant, that Police officer may, without any direction or supervision by the person he or she is assisting, exercise any power ordinarily exercisable by that Police officer.
  - (4) The person executing a search warrant must—
    - (a) accompany any assistant on the first occasion when the assistant enters the place, vehicle, or other thing to be searched; and
    - (b) provide such other supervision of any assistant as is reasonable in the circumstances.
  - (5) Subsection (4) does not apply if the assistant is a Police officer.

**57 Obstruction of search**

- (1) It is an offence for a person to obstruct or interfere with any person exercising a power under a warrant issued under section 50.
- (2) A person who commits an offence against subsection (1) is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.

**58 Destroying or falsifying documents**

- (1) A person commits an offence if, having been required to produce a document under section 43 (Requirement to produce documents or things) or under a warrant issued under section 50 (Issue of warrants), the person—

- (a) intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it; or
  - (b) causes or permits its destruction, disposal, falsification or concealment.
- (2) A person who commits an offence against subsection (1) is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both; and
  - (b) in any other case, a fine not exceeding \$150,000.

## **Part 6**

### **Inquiries**

#### **59 Inquiry by Authority**

- (1) The Authority may conduct an inquiry if it considers that an inquiry is necessary or desirable for the purpose of carrying out the Authority's functions.
- (2) Subject to subsection (3), the Authority must conduct an inquiry into any matter related to the Authority's functions that the Minister or Parliament refers to the Authority, by written notice specifying terms of reference for the inquiry.
- (3) The Authority is not obliged to conduct an inquiry if the Authority considers that it does not have available to it funds or other necessary resources that are reasonably adequate to enable it to do so having regard to its other functions.

#### **60 Notice of inquiry**

- (1) The Authority must publish notice of an inquiry by means of the Internet and in any other manner the Authority considers appropriate.
- (2) A notice under subsection (1) must specify—
  - (a) the purpose of the inquiry; and
  - (b) the period during which the inquiry is to be held; and
  - (c) the period within which members of the public may make submissions; and
  - (d) details of any public hearings; and
  - (e) any matters the Authority would like submissions to address.
- (3) If the inquiry relates to a matter referred to the Authority by the Minister or by Parliament, the notice shall include the terms of reference for the inquiry or specify the location at which the terms of reference may be obtained.

#### **61 Conduct of inquiry**

- (1) An inquiry by the Authority—
  - (a) may be conducted in any manner the Authority considers appropriate; and
  - (b) may (but need not) involve public hearings.
- (2) The Authority is not bound by the rules of evidence in the conduct of an inquiry.
- (3) The Authority may exercise any of its powers under Part 5 (complaints and investigations) in conducting an inquiry that relates to a matter referred to the Authority by the Minister or by Parliament.

**62 Inquiry reports**

- (1) The Authority must deliver a copy of its report on an inquiry to the Minister as soon as reasonably practicable after the completion of the report.
- (2) The Authority must identify in a report any information that the Authority considers is confidential information.
- (3) If confidential information is excluded from a report, a note to that effect must be included in the report at the relevant place.
- (4) The Minister must cause a copy of the report (excluding any confidential information)—
  - (a) to be tabled in Parliament within 10 sitting days after receiving the report, if Parliament is sitting; and
  - (b) to be made available to the public by means of the Internet and in any other manner the Minister considers appropriate—
    - (i) within 14 days after tabling it in Parliament, if Parliament is sitting; or
    - (ii) within 28 days after receiving it from the Authority, if Parliament is not sitting.

## **Part 7 Enforcement**

**63 Authority may prosecute**

- (1) Proceedings in relation to a contravention against or arising under this Act or a regulatory enactment may be commenced and continued by the Authority or a person authorised in writing by the Authority to do so.
- (2) Subsection (1) does not limit the operation of any other law or the power of the Attorney-General under section 10 of the Crown Law Office Act 1980 relating to the institution and conduct of proceedings.

**64 Administrative settlement**

The Authority may settle proceedings with another party on agreed terms, if the Court has not yet determined those proceedings.

### *Warnings*

**65 Warning notice**

- (1) The Authority may issue a notice (a "**warning notice**") to a person who has engaged or is engaging or is proposing to engage in conduct that the Authority has reasonable cause to consider would contravene a regulatory enactment.
- (2) A warning notice must—
  - (a) describe the conduct that is alleged to constitute the contravention (the "**contravening conduct**"); and
  - (b) identify the person that has engaged or is engaging or proposes to engage in the contravening conduct; and
  - (c) identify the evidence or other materials that the Authority relies on in support of its allegations; and

- (d) state that the Authority requires the person to cease or refrain from the contravening conduct and not to repeat that conduct; and
  - (e) specify any other requirements that the Authority requires the person to satisfy; and
  - (f) specify the period in which the person must cease the contravening conduct or satisfy the other requirements specified in the notice (the “**compliance period**”); and
  - (g) state that, if the conduct continues or if other requirements specified in the notice are not satisfied within the compliance period, that the Authority may bring proceedings in the Court against the person in respect of the contravening conduct.
- (3) A warning notice may include any one or more of the following requirements:
- (a) that the person must provide the Authority with a plan for remediation of the contravention;
  - (b) that the person must provide the Authority with a compliance program;
  - (c) that the person must appoint an independent external auditor to monitor compliance on terms specified by the Authority;
  - (d) that the person must pay to the Government an amount not exceeding the amount determined by the Authority as representing any profit gained or loss avoided by the contravening party as a result of the contravening conduct;
  - (e) that the person must compensate any person for any loss or damage caused by the contravening party’s contravening conduct;
  - (f) that the person must lodge with the Authority a performance bond or guarantee of a specified amount, which must be forfeited to the Government if the person repeats the contravening conduct or in other circumstances specified in the Authority’s notice;
  - (g) that the person must supply specified services either generally or to specified persons or class of persons—
    - (i) at a specified charge (which may be zero); or
    - (ii) on specified terms or subject to specified conditions;
  - (h) that the person must cease to supply specified services for a specified period, either generally or to specified persons;
  - (i) that the person must not withhold any specified goods or services from specified persons or class of persons;
  - (j) that the person must not enforce a specified contract (or class of contracts) in whole or part;
  - (k) that the person must not refrain from making or giving effect to an agreement of the kind specified by the Authority;
  - (l) that the person must offer to enter into a variation to an agreement;
  - (m) that the person must procure the involvement, assistance, or co-operation of any other person over which it exercises control in satisfying the requirements of the warning notice;
  - (n) that the person must enter into an undertaking in which it makes a commitment to the requirements specified by the Authority in the warning notice under subsection (2)(e).

- (4) A warning notice must not require the person to whom the notice is issued to pay a fine or pecuniary penalty.
- (5) Before issuing a warning notice to any person, the Authority must:
  - (a) give that person a notice under this section that it proposes to issue a warning notice to that person; and
  - (b) consider any representations made in accordance with the notice.

**66 Effect of warning notice**

- (1) The Authority must not bring any proceedings against a person in the Court in respect of contravening conduct if—
  - (a) a warning notice has been issued to that person in relation to that conduct; and
  - (b) the compliance period has not expired.
- (2) The Authority may, either of its own volition or on application made to it in writing, extend the compliance period specified in a warning notice, if it considers that there is a good reason for doing so.
- (3) The Authority may at any time before the expiry of the compliance period withdraw a warning notice with effect from a date specified in the notice, by notice in writing given to the person to whom the warning notice has been issued.
- (4) A person to whom a warning notice has been issued is not obliged to comply with the warning notice but the Authority may bring proceedings in the Court against the person in respect of the contravening conduct if, on expiry of the compliance period, the Authority has reasonable cause to believe that the person—
  - (a) has continued to engage in the contravening conduct; or
  - (b) has not satisfied any requirement of the warning notice.
- (5) If the Authority brings proceedings in the Court against a person in respect of the contravening conduct, the Court may take into account, as an aggravating factor in determining any penalty or other remedy, that the person had the opportunity to comply with a warning notice and failed to do so.
- (6) The Authority may publish a warning notice by making it available to the public by the Internet but, before doing so, must give the person to whom the warning notice has been or will be issued a reasonable opportunity to make submissions on why the warning notice should not be published in whole or in part.
- (7) If a person to whom a warning notice has been issued enters into an undertaking with the Authority in respect of the contravening conduct, the warning notice is deemed, from the date of the undertaking, never to have been made.

*Undertakings*

**67 Undertakings**

- (1) The Authority may accept from a person an undertaking to take any action or refrain from taking any action that the Authority considers appropriate to address its concerns about a possible contravention of a regulatory enactment.

- (2) The action referred to in subsection (1) does not include making a payment to the Government.
- (3) If the Authority accepts an undertaking under this section, it may agree—
  - (a) not to commence an investigation or, if it has commenced an investigation, to terminate it; and
  - (b) not to bring proceedings in the Court or, if it has brought proceedings, to terminate them.

#### **68 Consequences of accepting undertaking**

- (1) If the Authority accepts an undertaking under section 67, it may not—
  - (a) commence or continue an investigation; or
  - (b) bring or continue proceedings in the Court, in relation to any alleged contravention of a competition rule in so far as that investigation or those proceedings relate to matters that are addressed by the undertaking.
- (2) To avoid doubt, the Authority may still commence or continue an investigation or bring or continue proceedings in the Court, after accepting an undertaking under this section—
  - (a) in relation to matters that are not addressed by the undertaking; or
  - (b) in relation to persons who are not subject to the undertaking.
- (3) If the Authority decides to accept an undertaking under section 67, it must, as soon as practicable after accepting it—
  - (a) give notice in writing of that decision to the person who made the undertaking, together with a copy of the undertaking; and
  - (b) register the undertaking on the register of undertakings maintained under section 72.

#### **69 Withdrawal of acceptance of undertaking**

- (1) The Authority may, by notice in writing given to the person who made the undertaking, withdraw its acceptance of an undertaking, with effect from the date specified in the notice, if—
  - (a) it has reasonable grounds for believing that there has been a material change of circumstances since the undertaking was accepted; or
  - (b) it has reasonable grounds for suspecting that the person who made the undertaking has failed to comply with the undertaking; or
  - (c) it has reasonable grounds for suspecting that the information on which it based its decision to accept the undertaking was incomplete, false or misleading in a material particular.
- (2) The date specified in the notice given under subsection (1) may be earlier than the date on which the notice is given if the Authority is satisfied that any information—
  - (a) on which it based its decision to accept the undertaking; and
  - (b) which was provided to it by the person who made the undertaking, was incomplete, false or misleading in a material particular.
- (3) If an acceptance is withdrawn under this section—
  - (a) the undertaking is no longer binding on the person who made it; and
  - (b) subject to subsection (4), the Authority may—

- (i) commence an investigation; or
  - (ii) bring proceedings in the Court, with respect to any alleged contravention of the relevant regulatory enactment that has occurred after the date specified in the notice given under subsection (1).
- (4) The Authority may not bring proceedings authorized by subsection (3) more than 2 years after the date specified in the notice given under subsection (1).

#### **70 Variation, substitution, and release of undertaking**

- (1) At any time after the Authority has accepted an undertaking, it may, if it is satisfied that a variation of the undertaking or new undertaking will address its concerns about a possible contravention of a regulatory enactment, accept from the person who has made the undertaking—
  - (a) a variation of the undertaking; or
  - (b) a new undertaking in substitution for it.
- (2) The Authority may release any person from an undertaking that the person has made under this Part if—
  - (a) it is requested to do so by that person; or
  - (b) it has reasonable grounds for believing that its concerns about the alleged contravention of the regulatory enactment no longer arise.

#### **71 Enforcement of undertaking**

- (1) If the Authority considers that a person has failed to comply with any undertaking that the person has made under this Part and which has been accepted by the Authority, it may apply to the Court for an order under subsection (2).
- (2) If the Court is satisfied that a person has failed to comply with an undertaking that the person has made under this Part and that has been accepted by the Authority, the Court may make all or any of the following orders:
  - (a) an order directing the person to take any action or refrain from taking any action, as is specified in the undertaking;
  - (b) an order directing the person to pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the person's failure to comply with the undertaking;
  - (c) an order directing the person to compensate any person for any loss or damage caused by the person's failure to comply with the undertaking;
  - (d) any other order that the Court considers appropriate.

#### **72 Register of undertakings**

- (1) The Authority must establish and maintain a register of undertakings made under this Part containing—
  - (a) a copy of all undertakings accepted under this Part (including any undertaking accepted in substitution for another); and
  - (b) a copy of all variations of undertakings accepted under this Part; and
  - (c) where any acceptance of an undertaking has been withdrawn, notice of that withdrawal; and

- (d) where any undertaking has been released, notice of that release.
- (2) The Authority may omit confidential information from any entry made in the register under this section and if confidential information has been omitted, that fact must be disclosed on the register.
- (3) The Authority must make the register available for inspection by any person—
  - (a) at the offices of the Authority during ordinary business hours; and
  - (b) by means of the Internet or a similar electronic network; and
  - (c) in any other manner the Authority considers appropriate.

### **73 Procedural requirements**

- (1) This section applies if the Authority proposes to—
  - (a) accept an undertaking under section 67; or
  - (b) withdraw its acceptance of an undertaking under section 69; or
  - (c) accept a variation of an undertaking under section 70; or
  - (d) accept a new undertaking in substitution for another under section 70; or
  - (e) release a person from an undertaking under section 70.
- (2) Before the Authority takes any action referred to in subsection (1) it must give notice of the proposed action by means of the Internet and in any other manner it considers appropriate to bring the proposed action to the attention of those it considers likely to be affected by it.
- (3) The Authority must have regard to any representations made to it in response to a notice under subsection (2).
- (4) If the Authority decides to proceed with the proposed action it must—
  - (a) publish notice that it has so decided by means of the Internet and in any other manner the Authority considers appropriate; and
  - (b) send a copy of the notice to any person named in the relevant undertaking.
- (5) If the Authority decides not to proceed with the proposed action it must—
  - (a) publish notice that it has so decided by means of the Internet and in any other manner the Authority considers appropriate; and
  - (b) send a copy of the notice to any person named in the relevant undertaking.

## **Part 8 Reviews and appeals**

### *Judicial review*

#### **74 Judicial review**

Nothing in this Part limits the rights of a person under the Judicature Act 1980-81 to apply for judicial review of a decision made by the Authority or the Review Panel.

#### **75 Decision remains in effect**

If a person brings judicial review proceedings in respect of any decision of the Authority or the Review Panel—



- (a) that decision remains effective until determined otherwise as a result of those judicial review proceedings; and
- (b) the Court may not stay the effect of that decision of the Authority or the Review Panel or grant any other kind of interim relief.

*Review Panel*

**76 Application for review**

- (1) A party to a reviewable decision by the Authority may apply for review of that decision by the Review Panel.
- (2) For the purposes of this Part, a “**reviewable decision**” is a decision of the Authority that is expressly identified in a regulatory enactment as reviewable by the Review Panel.
- (3) An application for review of a decision must—
  - (a) be in writing; and
  - (b) set out the decision or part of the decision to which the application relates; and
  - (c) set out in detail the grounds on which the applicant seeks review; and
  - (d) set out in detail the decision sought on review; and
  - (e) be accompanied by any information that the applicant considers should be taken into account by the Review Panel on the review; and
  - (f) be submitted to the Minister within 14 days after—
    - (i) written notice of the Authority’s decision was given to the applicant; or
    - (ii) the decision was deemed to have been made, in the case of a deemed decision.

**77 Panel of experts**

- (1) The Queen’s Representative may, by Order in Executive Council, on the advice of the Minister, appoint a panel of experts from which members may be appointed to sit as a Review Panel.
- (2) A person must not be appointed to the panel of experts unless the Minister is satisfied that the person has appropriate skills and expertise in industry, commerce, economics, law, accountancy, public administration, or consumer affairs.
- (3) A member of the panel of experts must be appointed for a term of 5 years and on conditions determined by Cabinet on the recommendation of the Minister.
- (4) A member may resign from the panel of experts by giving the Queen’s Representative 3 months’ notice in writing of the member’s intention to resign.
- (5) The following persons must not be appointed to the panel of experts:
  - (a) a member or employee of the Authority; or
  - (b) a director, officer, employee, or contractor of a person who is subject to regulation by the Authority under a regulatory enactment; or

- (c) a person who has a material direct or indirect financial interest in or with a person who is subject to regulation by the Authority under a regulatory enactment; or
  - (d) a person who has been convicted of any offence involving dishonesty or corruption in any country; or
  - (e) a person who is, or has previously been, bankrupt in any country; or
  - (f) a member of Parliament; or
  - (g) an employee of the Cook Islands Government (other than as a member of the panel of experts).
- (6) The Minister must remove from the panel of experts a person referred to in subsection (5), as soon as practicable after the Minister becomes aware of that circumstance.
- (7) To avoid doubt, a person may be eligible for appointment to the panel of experts despite not being resident in the Cook Islands.

**78 Review Panel**

- (1) The Minister must, within 14 days of receiving an application for review of a reviewable decision, appoint a Review Panel comprising 3 members of the panel of experts to consider and determine the application for review.
- (2) The Review Panel must not include any member of the panel of experts who has a direct or indirect pecuniary interest in the outcome of the review.
- (3) A member of a Review Panel is entitled to be paid remuneration and allowances determined by Cabinet on the recommendation of the Minister.

**79 Decision remains in effect unless stayed**

- (1) Subject to subsection (2), any decision of the Authority remains effective until determined otherwise as a result of Review Panel proceedings.
- (2) The Review Panel may stay the operation of the decision of the Authority to which an application for review relates on any terms that the Review Panel considers appropriate.
- (3) If it decides to stay the operation of a decision of the Authority, the Review Panel must ensure that notice of its decision—
- (a) is given to the Minister, the Authority, and any person to which the decision of the Authority applies; and
  - (b) is published by means of the Internet and in any other manner the Review Panel considers appropriate.

**80 Review period**

- (1) Subject to subsection (2), the Review Panel must decide an application for review within 8 weeks of receiving the application (“**review period**”).
- (2) The review period may be extended—
- (a) with the consent of the applicant; or
  - (b) if the Review Panel considers on reasonable grounds that the review period must be extended to allow for proper consideration of the application and has given notice in writing to the parties.
- (3) If the Review Panel has not determined the application before the expiry of the review period, the decision of the Authority is deemed to be confirmed.

**81 Review procedure**

- (1) On a review the Review Panel—
    - (a) may consider only the information that was available to the Authority when it made the decision that is the subject of the application for review; and
    - (b) is not bound by the rules of evidence; and
    - (c) may adopt any procedures that it sees fit.
  - (2) After considering an application for review, the Review Panel must either—
    - (a) confirm the decision of the Authority; or
    - (b) return the matter to the Authority with any directions that the Review Panel considers appropriate.
  - (3) If a matter is returned to the Authority by the Review Panel, the Authority must remake its decision in accordance with any directions of the Review Panel, including any directions in relation to the retrospective effect of the remade decision.
  - (4) The Review Panel must give written notice of the Review Panel's decision, and the reasons for that decision to—
    - (a) the parties to the review; and
    - (b) the Minister; and
    - (c) the Authority.
  - (5) Except as provided in subsection (6), the Review Panel has no power to award costs against a party to a review.
  - (6) The costs of the Review Panel must be borne by the Authority to the extent that the application is successful and by the applicant to the extent that the application is unsuccessful, as determined by the Review Panel.
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## **Part 9 Financial**

**82 Funds**

The funds of the Authority consist of—

- (a) all money paid by the Government to the Authority and appropriated for that purpose by Parliament; and
- (b) all other money and property, including fees, levies, interest, and accumulations of income, received by the Authority.

**83 Fees and charges**

- (1) The Authority may charge a fee for—
  - (a) making any application to the Authority or the Review Panel under this Act; and
  - (b) the provision of any service.
- (2) The amount of the fees chargeable under this section must be prescribed in regulations made under section 100.

- (3) The amount of any fee that may be prescribed in a regulation under section 100 is not limited by reference to the amount of administrative or other costs incurred or likely to be incurred in relation to the application or service to which the fee relates.
- (4) A regulation under section 100 may provide for—
  - (a) the amount of any fee to be charged by reference to a scale, hourly rate, or other formula or mechanism set out in the legislation; and
  - (b) the payment of different fees by different persons or different classes or descriptions of person; and
  - (c) fees that are to be paid annually or at different intervals; and
  - (d) the reduction, waiver, or refund, in whole or in part, of any fee, either on the happening of a certain event or in the discretion of the Authority.
- (5) The amount of any unpaid fee is recoverable in the Court as a debt due to the Authority.

**84 Levies**

- (1) A supplier of regulated goods or services, or a prescribed class of suppliers of regulated goods or services, must pay to the Authority the levy determined in accordance with regulations made under section 100.
- (2) The amount of any levy that may be prescribed in a regulation under section 100 is not limited by reference to the amount of administrative or other costs incurred or likely to be incurred in relation to the application or service to which the levy relates.
- (3) The amount of any unpaid levy is recoverable in the Court as a debt due to the Authority.

**85 Expenses**

The expenses of the Authority, including the remuneration of members and staff of the Authority, must be paid out of the funds of the Authority.

**86 Investment of funds**

Funds not immediately required by the Authority may be invested in a manner approved by the Financial Secretary.

**87 Exemption from tax**

- (1) The Authority is exempt from taxation under the Income Tax Act 1997 and the Value Added Tax Act 1997.
- (2) To avoid doubt, subsection (1) does not apply to or in relation to any remuneration, benefits or expenses paid out of the funds of the Authority to a member of the Authority.

**88 Accounts, audit, and estimates**

- (1) The Authority must—
  - (a) keep accounts and other records that accurately record and explain its financial transactions and its financial position; and
  - (b) ensure that a statement of accounts is prepared as soon as practicable after the end of each financial year; and

- (c) ensure that forecasts provided for budgetary purposes are as accurate as possible, take account of all relevant information available at the time they are prepared, are free from methodological and arithmetic error, and are subject to appropriate internal and external quality assurance; and
  - (d) ensure that sound financial management systems and controls are operating; and
  - (e) ensure that information required by the Minister responsible for the budget meets stated requirements with respect to timeliness, completeness, accuracy, and format; and
  - (f) ensure that the Authority provides the Ministry with all information reasonably required by the Ministry to enable it to meet Crown reporting requirements.
- (2) The statement of accounts must give a true and fair view of—
- (a) the state of affairs of the Authority as at the end of that financial year; and
  - (b) the results of the operations and cash flows of the Authority in that financial year.
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- (3) The statement of accounts must include the details referred to in subsections 25(1) and (2) of the *Ministry of Finance and Economic Management Act 1995-96*, as they relate to the Authority.

**89 Authority to appoint auditor**

- (1) As soon as practicable after the commencement of this section, the Authority must appoint an auditor to audit its statement of accounts.
- (2) The auditor must, as soon as practicable after the end of each financial year—
  - (a) audit the accounts and statement of the Authority; and
  - (b) submit a report on the statement of accounts to the Authority.

**90 Financial year**

The financial year of the Authority is—

- (a) the period beginning on the day on which this Act comes into operation and ending on the next 30 June; and
- (b) the period of 12 months ending on 30 June in each subsequent year.

**Part 10**

**General and miscellaneous provisions**

*Offences*

**91 Ancillary contraventions**

- (1) A person must not—
  - (a) aid, abet, counsel or procure a contravention of this Act or a regulatory enactment; or
  - (b) induce, whether by threats or promises or otherwise, a contravention of this Act or a regulatory enactment; or
  - (c) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of this Act or a regulatory enactment; or

- (d) conspire with others to effect a contravention of this Act or a regulatory enactment.
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to the penalty provided for contravention of the relevant provision of this Act or the relevant regulatory enactment.

## **92 States of mind, etc, of bodies corporate**

- (1) Subsection (2) applies if in proceedings under this Act or a regulatory enactment, it is established that a director, employee or agent of a body corporate—
  - (a) engaged in particular conduct within the scope of his or her actual or apparent authority; and
  - (b) had a particular state of mind for the conduct.
- (2) If this section applies it is presumed that the body corporate engaged in the conduct and had the state of mind for the conduct unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.
- (3) ~~Subsection (4) applies if, in proceedings under this Act or a regulatory enactment, it is established that an employee or agent of an individual—~~
  - ~~(a) engaged in particular conduct within the scope of his or her actual or apparent authority; and~~
  - ~~(b) had a particular state of mind for the conduct.~~
- (4) If this subsection applies, it is presumed that the individual engaged in the conduct and had the state of mind for the conduct unless the individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

## **93 References to engaging in conduct**

- (1) A reference in section 92 to engaging in conduct includes a reference to failing or refusing to engage in conduct.
- (2) A reference in section 92 to the state of mind of a person includes a reference to—
  - (a) the knowledge, intention, opinion, belief or purpose of the person; and
  - (b) the person's reasons for the knowledge, intention, opinion, belief or purpose.
- (3) A reference in section 92 to having a state of mind for conduct includes having a state of mind in connection with that conduct.
- (4) A reference in this Act or a regulatory enactment to a decision of an association includes a decision made on behalf of the association by an agent or representative acting within the scope of his or her authority.

## **94 General penalty for offences, pecuniary penalties, and other orders**

- (1) A person who commits an offence under this Act, or regulations made under this Act, for which no penalty is otherwise provided by this Act or by the regulations is liable on conviction to—
  - (a) in the case of an individual, a fine not exceeding \$20,000 or imprisonment for a term not exceeding 24 months, or both; and

- (b) in any other case, a fine not exceeding \$150,000.
- (2) If, after carrying out such investigation as it considers appropriate, the Authority considers it appropriate to do so, it may apply to the Court for a pecuniary penalty to be imposed on any person it has reasonable cause to believe—
  - (a) has contravened this Act, or any regulatory enactment, or a condition of any telecommunications licence; or
  - (b) has been in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of this Act, or any regulatory enactment, or a condition of any telecommunications licence.
- (3) If the Court is satisfied, on application by the Authority under subsection (2), that a person has contravened or been knowingly concerned in a contravention of this Act, or any regulatory enactment, or a condition of any telecommunications licence, the Court may make any or all of the following orders:
  - (a) an order that the person to pay to the Crown—
    - (i) in the case of an individual, a pecuniary penalty not exceeding \$20,000; and
    - (ii) in any other case, a pecuniary penalty not exceeding \$150,000:
  - (b) an order that the person to pay to the Crown an amount equal to the costs (including fees, charge, disbursements, expenses and remuneration) of and incidental to any investigation into the conduct or affairs of that person, reasonably incurred by the Authority in connection with the proceedings for the contravention:
  - (c) any order that the Court considers appropriate against that person, including any or all of the following orders:
    - (i) an order directing that the person compensate, as specified in the order, any person who has suffered loss or damage as a result of the conduct or contravention:
    - (ii) an order requiring the person to pay to the Crown or to any other specified person, as the Court considers appropriate, an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the contravention:
    - (iii) an order requiring that any person or class of person be given the right to use goods, facilities or services specified in the order on the terms specified in the order:
    - (iv) an order declaring void or voidable any agreement, the making or giving effect to which constitutes the contravention:
    - (v) an order requiring the parties to any agreement, the making or giving effect to which constitutes the contravention, to modify or terminate that agreement:
    - (vi) any other incidental order.
- (4) The standard of proof in proceedings under this section is the standard of proof that applies in civil proceedings.

- (5) An application under subsection (2) may not be made more than 1 year after the contravention ceased or the Authority became aware of the contravention, whichever is the later.

## **95 Injunctions**

- (1) Where on application of the Authority or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute—
- (a) a contravention of a provision of this Act, or any regulatory enactment, or a condition of any telecommunications licence; or
  - (b) attempting to contravene such a provision or condition; or
  - (c) aiding, abetting, counselling or procuring a person to contravene such a provision or condition; or
  - (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision or condition; or
  - (e) being in any way, directly or indirectly, knowingly concerned in, or party to a contravention by a person of such a provision or condition; or
  - (f) conspiring with other persons to contravene such a provision or condition, the Court may grant an injunction in such terms as the Court considers appropriate.
- (2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (3) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised—
- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first mentioned person engages in conduct of that kind.
- (4) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised—
- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first mentioned person refuses or fails to do that act or thing.
- (5) Where the Authority makes an application to the Court for the grant of an injunction under subsection (1), the Court shall not require the Authority or any other person, as a condition of granting an interim injunction under subsection (2), to give an undertaking as to damages.



*Miscellaneous*

**96 Legal professional privilege**

- (1) This Act does not affect the operation of the law relating to legal professional privilege.
- (2) Subsection (1) does not affect any requirement under this Act to disclose the name and address of a client of a person.

**97 Authority may participate in proceedings**

The Authority may, with leave of the Court, or at the invitation of the Court, be joined as a party to or otherwise participate in proceedings involving any alleged contravention of a regulatory enactment.

**98 Court may give advisory opinions**

- (1) The Court may, on the application of the Authority, make an order as to the interpretation, operation or effect of a provision of this Act or a regulatory enactment.
- (2) If it appears to the Court that a person has or may have an interest of any kind that may be affected by a proposed order, the Court must make any orders as it considers appropriate for the person to be notified of the application and to be joined in the proceeding.
- (3) The Authority must give effect to any final order under this section.

**99 Evidence of documents**

- (1) Any determination, decision, rule, regulation, order, or other document of the Authority given by the Authority under or for the purposes of this Act or any other regulatory enactment shall be sufficiently given if it is—
  - (a) in writing; and
  - (b) signed by one (1) or more members of the Authority or by an employee of the Authority authorised for the purpose.
- (2) A copy of a determination, decision, rule, regulation, order, or other document of the Authority that is certified to be a true copy by an employee of the Authority authorised to certify copies of the Authority's documents shall be received in all courts as evidence of the determination, decision, rule, regulation, order, or other document.
- (3) A document purporting to be a copy of a determination, decision, rule, regulation, order, or other document of the Authority and to be certified to be a true copy in accordance with subsection (2) must, unless the contrary is established, be deemed to be a true copy and to be so certified.

*Regulations*

**100 Regulations**

- (1) The Queen's Representative may, by Order in Executive Council, on the advice of the Minister given in accordance with a recommendation of the Authority, make regulations providing for any matters contemplated by this Act, necessary for its full administration, or necessary for giving it full effect.
- (2) Regulations made under subsection (1) may include (without limitation) regulations—

- (a) prescribing forms to be used for the purposes of this Act:
- (b) prescribing matters for which fees or charges are payable under this Act and the amounts of those fees or charges or the hourly rate, formula or other mechanisms to be used for calculating those fees or charges:
- (c) prescribing grounds for an exemption from fees, in whole or in part:
- (d) prescribing matters for which levies are payable under this Act and the amount of those levies, or the formula or other mechanisms to be used for calculating those levies:
- (e) prescribing grounds for an exemption from levies, in whole, or in part.

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This Act is administered by the Ministry of Finance and Economic  
Management.

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