

South Australia

Gas Pipelines Access (South Australia) (Greenfields Pipeline Incentives) Amendment Act 2006

An Act to amend the *Gas Pipelines Access (South Australia) Act 1997*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Gas Pipelines Access (South Australia) Act 1997*

- 4 Amendment of section 10—Power to make regulations for the Gas Pipelines Access Law
 - 5 Amendment of Schedule 1—Third party access to natural gas pipelines
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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Gas Pipelines Access (South Australia) (Greenfields Pipeline Incentives) Amendment Act 2006*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Gas Pipelines Access (South Australia) Act 1997*

4—Amendment of section 10—Power to make regulations for the Gas Pipelines Access Law

Section 10(1)—delete subsection (1) and substitute:

- (1) The Governor may make regulations—
 - (a) contemplated by the *Gas Pipelines Access Law*; or
 - (b) for or with respect to any matter or thing necessary to be prescribed to give effect to the *Gas Pipelines Access Law*.

5—Amendment of Schedule 1—Third party access to natural gas pipelines

- (1) Schedule 1, Part 1, section 2, definition of *civil penalty provision*—delete the definition and substitute:

civil penalty provision means—

- (a) section 13, section 13V(3) or section 40; or
 - (b) a provision of the Code that, under the regulations, is a civil penalty provision for the purposes of this Law;
- (2) Schedule 1—after section 13 insert:

Part 3A—Greenfields pipeline incentives

Division 1—Preliminary

13A—Definitions

- (1) In this Part—

Australia's adjacent areas means areas that are identified in section 5A of the *Petroleum (Submerged Lands) Act 1967* of the Commonwealth as adjacent to States, Territories and other parts of Australia;

binding no-coverage determination means a determination under Division 2;

commission—a pipeline is commissioned when the pipeline is first used for the haulage of natural gas, on a commercial basis, between a supplier and a user;

excluded infrastructure in relation to a pipeline means tanks, reservoirs, machinery, equipment or other infrastructure that forms part of the pipeline but is classified by regulation as excluded infrastructure for the purposes of this Part;

foreign source—see definition of *international pipeline*;

greenfields pipeline incentive means—

- (a) a binding no-coverage determination; or
- (b) a price regulation exemption;

greenfields pipeline project means a project for the construction of a pipeline that is to be—

- (a) structurally separate from any existing pipeline (whether or not it is to traverse a route different from the route of an existing pipeline); or
- (b) a major extension of an existing pipeline that is not a covered pipeline; or
- (c) a major extension of a covered pipeline to which the access arrangement for the covered pipeline will not apply;

international pipeline means a pipeline for the haulage of gas from a source beyond the outer limits of Australia's adjacent areas (the ***foreign source***) to Australia;

limited access arrangement means an access arrangement without provision for price or revenue regulation but (subject to any exclusion or modification made by regulation) dealing with all other matters for which the Code requires provision to be made in an access arrangement;

national gas objective—see section 13B;

pipeline means a pipeline (as defined in Part 1)—

- (a) that is an international pipeline; or
- (b) that is classified under this Law as a transmission pipeline or a distribution pipeline;

pipeline coverage criteria—see section 13C;

pipeline description for a pipeline means the description of the pipeline—

- (a) as given in the application for a greenfields pipeline incentive for the pipeline; or
- (b) if that description has been amended under Division 4—the description as amended;

price or revenue regulation means regulation of—

- (a) the prices at which services are to be provided; or
- (b) the revenue to be derived from the provision of services,

(but does not include the provision against price discrimination that is to be included in a limited access arrangement under section 13U);

price regulation exemption means an exemption under Division 3;

relevant Minister means—

- (a) in relation to an international pipeline—the Commonwealth Minister;
- (b) in relation to a pipeline (other than an international pipeline) classified as a transmission or a distribution pipeline—the Minister to whom responsibility is assigned under this Law for deciding whether the pipeline should be, or should cease to be, a covered pipeline;

services means services provided (or to be provided) by means of a pipeline.

- (2) An international pipeline is, for the purposes of this Law, a transmission pipeline.
- (3) Words and expressions used in the Code have, unless the contrary intention appears, the same respective meanings in this Part.

13B—National gas objective

- (1) The national gas objective is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.
- (2) The above legislative statement of the national gas objective is for the purposes (and only for the purposes) of this Part and no general intention to reform the objectives or purposes of this Law is to be inferred from it.

13C—Pipeline coverage criteria

For the purposes of this Part, the pipeline coverage criteria are as follows:

- (a) that access (or increased access) to services to be provided by means of the pipeline would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for services to be provided by means of the pipeline;
- (b) that it would be uneconomic for anyone to develop another pipeline to provide the services to be provided by means of the pipeline;
- (c) that access (or increased access) to the services to be provided by means of the pipeline could be provided without undue risk to human health or safety;
- (d) that access (or increased access) to the services to be provided by means of the pipeline would not be contrary to the public interest.

Division 2—Binding no-coverage determinations

Subdivision 1—Application

13D—Application for binding no-coverage determinations for proposed pipelines

- (1) If a greenfields pipeline project is proposed, or has commenced, the service provider may, before the pipeline is commissioned, apply for a determination (a *binding no-coverage determination*) exempting the pipeline from coverage.
- (2) If a price regulation exemption has been granted for an international pipeline, an application for a binding no-coverage determination for the pipeline may be made by the service provider—
 - (a) before the pipeline is commissioned; or
 - (b) after the pipeline is commissioned but before the term of the price regulation exemption comes to an end.
- (3) An application for a binding no-coverage determination is to be made to the NCC.
- (4) An application for a binding no-coverage determination must—
 - (a) include a description of the pipeline (the *pipeline description*); and
 - (b) specify whether the pipeline is—
 - (i) an international pipeline; or
 - (ii) a transmission pipeline (other than an international pipeline); or
 - (iii) a distribution pipeline; and
 - (c) contain any information, or be accompanied by any document, that is required by regulation.
- (5) The pipeline description—
 - (a) must contain the details required under the regulations; but
 - (b) need not describe, or include details of, excluded infrastructure.

13E—Notification of relevant Minister

When the NCC receives an application for a binding no-coverage determination, it must, without delay, notify the relevant Minister of receipt of the application.

Subdivision 2—Investigation and recommendation by NCC

13F—General principles governing NCC's recommendations on applications for binding no-coverage determinations

- (1) In framing a draft or final recommendation on an application for a binding no-coverage determination, the NCC—
 - (a) must give effect to the pipeline coverage criteria; and
 - (b) in deciding whether or not the pipeline coverage criteria are satisfied—
 - (i) must have regard to the national gas objective; and
 - (ii) must have regard to relevant submissions and comments made in response to an invitation under this Subdivision within the time allowed for submissions and comments.
- (2) The NCC gives effect to the pipeline coverage criteria as follows:
 - (a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be against making a binding no-coverage determination;
 - (b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be in favour of making a binding no-coverage determination.

13G—Notice of application

- (1) The NCC must, within 14 days after receiving an application for a binding no-coverage determination, publish a notice on its website and in a newspaper circulating generally throughout Australia.
- (2) The notice must—
 - (a) notify receipt of the application; and
 - (b) include—
 - (i) a short description of the pipeline accompanied by a reference to a website at which the relevant pipeline description can be inspected; and
 - (ii) any further information required by regulation; and
 - (c) invite submissions and comments within 21 days from the date of the notice.
- (3) The NCC is not obliged to give notice of an application under this section if, within 14 days after receiving the application, the NCC rejects the application on the ground—
 - (a) that the applicant has failed to provide the information and materials required under this Part; or

- (b) that the application is frivolous or vexatious.
- (4) A decision under subsection (3) to reject an application must—
 - (a) be in writing; and
 - (b) set out the reasons for the decision; and
 - (c) be given to the applicant without delay.

13H—Draft recommendation

- (1) The NCC must prepare a draft recommendation within 42 days after giving notice under section 13G(1).
- (2) The draft recommendation must—
 - (a) be in writing; and
 - (b) contain a short description of the pipeline accompanied by a reference to a website at which the relevant pipeline description can be inspected; and
 - (c) state the terms of the proposed recommendation and the reasons for it; and
 - (d) contain any other information that is required by regulation.

13I—Publication of draft recommendation and invitation to make submissions and comments

- (1) The NCC must, without delay—
 - (a) give copies of the draft recommendation to—
 - (i) the applicant; and
 - (ii) the AEMC; and
 - (iii) the relevant Regulator; and
 - (b) publish the draft recommendation on the NCC's website; and
 - (c) make the draft recommendation available for inspection during business hours at the offices of the NCC.
- (2) The NCC must publish, on its website and in a newspaper circulating throughout Australia, notice of the draft recommendation inviting written submissions and comments on the draft recommendation within 14 days after publication of the notice.

13J—Consideration of submissions and comments and making of final recommendation

- (1) The NCC must, within 28 days after the end of the period allowed for making submissions and comments on the draft recommendation, consider all submissions and comments made within the time allowed and make its final recommendation.

- (2) The final recommendation must—
 - (a) be in writing; and
 - (b) contain a short description of the pipeline accompanied by a reference to a website at which the relevant pipeline description can be inspected; and
 - (c) state the terms of the final recommendation and the reasons for it; and
 - (d) contain any other information that is required by regulation.
- (3) The NCC must, without delay—
 - (a) deliver the final recommendation to the relevant Minister; and
 - (b) give copies of the final recommendation to—
 - (i) the applicant; and
 - (ii) the AEMC; and
 - (iii) the relevant Regulator; and
 - (c) publish the final recommendation on the NCC's website; and
 - (d) make the final recommendation available for inspection during business hours at the offices of the NCC.

Subdivision 3—Ministerial determination of application

13K—Minister's decision on application

- (1) The relevant Minister must, within 42 days of receiving the NCC's recommendation, decide whether or not to make a binding no-coverage determination.
- (2) In deciding whether to make a binding no-coverage determination, the relevant Minister—
 - (a) must give effect to the pipeline coverage criteria; and
 - (b) in deciding whether or not the pipeline coverage criteria are satisfied in relation to the pipeline—
 - (i) must have regard to the national gas objective; and
 - (ii) must have regard to (but is not bound by) the NCC's recommendation; and
 - (iii) may take into account any relevant submissions and comments made to the NCC under Subdivision 2.
- (3) The relevant Minister gives effect to the pipeline coverage criteria as follows:
 - (a) if the Minister is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the Minister must not make a binding no-coverage determination;

- (b) if the Minister is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the Minister must make a binding no-coverage determination.
- (4) A binding no-coverage determination, or a decision not to make a binding no-coverage determination, must—
 - (a) be in writing; and
 - (b) contain a short description of the pipeline the subject of the determination, accompanied by a reference to a website at which the relevant pipeline description can be inspected; and
 - (c) set out the relevant Minister's reasons for the determination or decision.

13L—Effect of determination

- (1) A binding no-coverage determination takes effect when made and remains in force for a period of 15 years from the commissioning of the pipeline.
- (2) An application for coverage of a pipeline to which a binding no-coverage determination applies can only be made before the end of the period for which the determination remains in force if the coverage sought in the application is to commence from, or after, the end of that period.

13M—Consequences of Minister deciding against making binding no-coverage determination for international pipeline

- (1) If—
 - (a) the Commonwealth Minister decides against making a binding no-coverage determination for an international pipeline; and
 - (b) the applicant asks the Commonwealth Minister to treat the application as an application for a price regulation exemption,the Commonwealth Minister may treat the application as an application for a price regulation exemption under Division 3.
- (2) If the Commonwealth Minister decides to treat an application for a binding no-coverage determination as an application for a price regulation exemption, the Commonwealth Minister may—
 - (a) refer the application back to the NCC for a recommendation; or
 - (b) proceed to determine the application without a further recommendation from the NCC.

Division 3—Price regulation exemptions

Subdivision 1—Application for price regulation exemption

13N—Application for price regulation exemption

- (1) If a greenfields pipeline project for construction of an international pipeline is proposed, or has commenced, the service provider may, before the pipeline is commissioned, apply for a price regulation exemption for the pipeline.
- (2) The application is to be made to the NCC.
- (3) An application for a price regulation exemption must—
 - (a) include a description of the international pipeline (the *pipeline description*); and
 - (b) contain any information, or be accompanied by any document, that is required by regulation.
- (4) The pipeline description—
 - (a) must contain the details required under the regulations; but
 - (b) need not describe, or include details of, excluded infrastructure.

13O—Notification of Commonwealth Minister

When the NCC receives an application for a price regulation exemption, it must, without delay, notify the Commonwealth Minister of receipt of the application.

Subdivision 2—Investigation and recommendation by NCC

13P—General principle governing NCC's recommendation

- (1) In framing its recommendation on an application for a price regulation exemption, the NCC must weigh the benefits to the public of granting the exemption against the detriments to the public.
- (2) In doing so, the NCC—
 - (a) must have regard to the national gas objective with particular reference to—
 - (i) the implications of the exemption for relevant markets (including the effect on market power); and
 - (ii) other possible effects on the public interest; and
 - (b) may have regard to any other relevant matter.

13Q—Invitation of submissions and comments

- (1) The NCC must publish a notice on its website and in a newspaper circulating generally throughout Australia.

- (2) The notice must—
 - (a) notify receipt of the application; and
 - (b) include—
 - (i) a short description of the pipeline accompanied by a reference to a website at which the relevant pipeline description can be inspected; and
 - (ii) any further information required by regulation; and
 - (c) invite submissions and comments within a specified period from the the date of the notice.
- (3) The NCC is not obliged to give notice of an application under this section if the NCC rejects the application on the ground—
 - (a) that the applicant has failed to provide the information and materials required under this Part; or
 - (b) that the application is frivolous or vexatious.
- (4) A decision under subsection (3) to reject an application must—
 - (a) be in writing; and
 - (b) set out the reasons for the decision; and
 - (c) be given to the applicant without delay.

13R—NCC's duty to make recommendation within 42 days

- (1) The NCC must within 42 days after receipt of an application for a price regulation exemption make a recommendation to the Commonwealth Minister on the application.
- (2) As soon as practicable after delivering the recommendation to the Commonwealth Minister, the NCC must—
 - (a) give copies of the recommendation to—
 - (i) the applicant; and
 - (ii) the AEMC; and
 - (iii) the ACCC; and
 - (b) publish the recommendation on the NCC's website; and
 - (c) make the recommendation available for inspection during business hours at the offices of the NCC.

Subdivision 3—Making and effect of price regulation exemption

13S—Making of price regulation exemption

- (1) The Commonwealth Minister must, within 14 days after receiving the NCC's recommendation, decide whether or not to make a price regulation exemption.

- (2) In deciding whether to make a price regulation exemption, the Commonwealth Minister must weigh the benefits to the public of granting the exemption against the detriments to the public.
- (3) In doing so, the Commonwealth Minister—
 - (a) must have regard to the national gas objective with particular reference to—
 - (i) the implications of the exemption for relevant markets (including the effect on market power); and
 - (ii) other possible effects of the exemption on the public interest; and
 - (b) must have regard to (but is not bound by) the NCC's recommendation; and
 - (c) may take into account any relevant submissions and comments made to the NCC under Subdivision 2; and
 - (d) may have regard to any other relevant matter.
- (4) A price regulation exemption, or a decision not to make a price regulation exemption, must—
 - (a) be in writing; and
 - (b) include a short description of the pipeline the subject of the determination accompanied by a reference to a website at which the relevant pipeline description may be inspected; and
 - (c) set out the Commonwealth Minister's reasons for the decision to grant, or not to grant, the exemption.

13T—Effect of price regulation exemption

- (1) If a price regulation exemption is granted, then for a period of 15 years from the commissioning of the pipeline, the services provided by means of the pipeline are not subject to price or revenue regulation under this Law.
- (2) A price regulation exemption is, however, ineffective unless a limited access arrangement, approved by the ACCC, is in force in relation to the relevant pipeline.
- (3) If, while a price regulation exemption remains in force, the Commonwealth Minister makes a binding no-coverage determination for the pipeline, the binding no-coverage determination supersedes the price regulation exemption (which is then terminated) and remains in force for the balance of the period for which the exemption was granted.
- (4) An application for coverage of a pipeline to which a price regulation exemption applies can only be made before the end of the period of exemption if the coverage sought in the application is to commence from, or after, the end of that period.

13U—Limited access arrangement

- (1) The service provider—
 - (a) must, within 90 days after the grant of a price regulation exemption, submit a proposed limited access arrangement to the ACCC for approval; and
 - (b) may, at any time after the approval of a limited access arrangement, submit a proposed amendment to the limited access arrangement for approval.
- (2) When the ACCC receives a proposed limited access arrangement, or a proposed amendment to a limited access arrangement, for approval, the ACCC must proceed as follows:
 - (a) the ACCC must publish the proposed limited access arrangement, or the proposed amendment, on its website together with an invitation to the public to make submissions and comments on the proposal within 21 days after the date of the invitation; and
 - (b) the ACCC must consider the submissions and comments made in response to the invitation within the time allowed and publish on its website a draft decision on the proposal together with a further invitation to the public to make submissions and comments on the draft decision within 14 days from the date of the invitation; and
 - (c) the ACCC must then make a final decision on the proposal and may in its final decision—
 - (i) in the case of a proposed limited access arrangement—approve the limited access arrangement with or without amendment;
 - (ii) in the case of a proposed amendment to a limited access arrangement—amend the limited access arrangement in accordance with the proposed amendment or in some other way acceptable to the service provider, or reject the proposed amendment; and
 - (d) the ACCC must then publish its final decision, and the reasons for it, on its website.
- (3) Subsections (1) and (2) operate to the exclusion of the provisions and procedures of the Code for the approval, amendment and review of access arrangements (except sections 2.24 and 2.25 of the Code).
- (4) A limited access arrangement is to contain no provision for price or revenue regulation.
- (5) A limited access arrangement must, however, contain an undertaking, on the part of the service provider, not to engage in price discrimination unless the price discrimination—
 - (a) is conducive to efficient service provision; or

- (b) can be justified on some other rational economic basis.
- (6) Subject to subsection (7), a dispute about access to a pipeline to which a price regulation exemption applies may be dealt with under this Law in the same way as a dispute about access to a covered pipeline.
- (7) An access dispute cannot, however, be resolved by arbitration on terms—
 - (a) regulating the price at which services are to be provided by the service provider (except to the extent that such regulation is necessary to give effect to the undertaking against price discrimination referred to in subsection (5)); or
 - (b) limiting the revenue to be derived by the service provider from the provision of services.

13V—Other obligations to which service provider is subject

- (1) The service provider for a pipeline to which a price regulation exemption applies is subject to the following provisions as if the pipeline were a covered pipeline:
 - (a) Section 13 (Preventing or hindering access);
 - (b) Part 4 of the Code (Ring fencing arrangements);
 - (c) Part 5 of the Code (Information and timelines for negotiation);
 - (d) Sections 7.1 to 7.6 of the Code (Approval required for associate contracts).
- (2) A price regulation exemption is subject to the following conditions:
 - (a) the service provider must not engage in price discrimination contrary to the undertaking contained in the service provider's limited access arrangement; and
 - (b) the service provider must maintain a register of Spare Capacity; and
 - (c) the service provider's limited access arrangement and the register of Spare Capacity are to be accessible on the service provider's website; and
 - (d) the service provider—
 - (i) must, as and when required by the ACCC or the Commonwealth Minister, provide information requested by the ACCC or the Commonwealth Minister (in a manner and form determined or approved by the ACCC or the Commonwealth Minister) on access negotiations and the result of access negotiations; and

- (ii) must report annually to the ACCC and the Commonwealth Minister (in a manner and form approved by the ACCC or the Commonwealth Minister) on access negotiations and the result of access negotiations.
- (3) A service provider must ensure compliance with conditions to which the exemption is subject.

Division 4—Provisions of general application to greenfields pipeline incentives

Subdivision 1—Extended or modified application of greenfields pipeline incentive

13W—Requirement for conformity between pipeline description and pipeline as constructed

- (1) Subject to this Subdivision—
 - (a) a greenfields pipeline incentive applies to the pipeline as described in the relevant pipeline description; and
 - (b) if the pipeline, as constructed, differs from the pipeline as described in the pipeline description, the incentive does not attach to the pipeline and the service provider is not entitled to its benefit.
- (2) In determining whether a pipeline, as constructed, differs from the relevant pipeline description, excluded infrastructure is not to be taken into account.

13X—Power of relevant Minister to amend pipeline description

- (1) The relevant Minister may, on application by the service provider for a pipeline for which a greenfields pipeline incentive has been granted, amend the relevant pipeline description.
- (2) An amendment cannot, however, be made under this section after the pipeline has been commissioned.
- (3) The relevant Minister—
 - (a) may refer an application for amendment to a pipeline description to the NCC for advice; and
 - (b) if the amendment sought involves a substantial change to the pipeline description as it currently exists—must refer the application to the NCC for advice.
- (4) In framing its advice to the relevant Minister, the NCC must have regard to the criteria that were relevant to the grant of the greenfields pipeline incentive.

- (5) In deciding whether to make the amendment sought, the relevant Minister—
- (a) must have regard to the criteria that were relevant to the grant of the greenfields pipeline incentive; and
 - (b) if the application has been referred to the NCC for advice—must consider (but is not bound by) the NCC's advice.

Subdivision 2—Early termination of greenfields pipeline incentive

13Y—Greenfields pipeline incentive may lapse

- (1) A greenfields pipeline incentive lapses if the pipeline for which it was granted is not commissioned within 3 years after the incentive was granted.
- (2) The regulations may, in a particular case, extend the period of 3 years referred to in subsection (1).

13Z—Revocation by consent

The relevant Minister may, at the request of the service provider, revoke a greenfields pipeline incentive.

13ZA—Revocation for misrepresentation

The relevant Minister may, on application by the relevant Regulator, revoke a greenfields pipeline incentive on the ground that—

- (a) the applicant misrepresented a material fact on the basis of which the application was granted; or
- (b) the applicant failed to disclose material information that the applicant was required to disclose under this Part.

13ZB—Exhaustive provision for termination of greenfields pipeline incentive

A greenfields pipeline incentive does not terminate, and cannot be revoked, before the end of its term except as provided in this Part.

- (3) Schedule 1, Part 6, section 38(13)—after paragraph (a) insert:
 - (ab) to grant, or to refuse, a binding no-coverage determination in relation to a pipeline under Part 3A;
 - (ac) to revoke a greenfields pipeline incentive under section 13ZA;
- (4) Schedule 1, Appendix, clause 2—delete clause 2 and substitute:

2—Law to be construed not to exceed legislative power of Legislature

- (1) This Law is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature.

- (2) If a provision of this Law, or the application of a provision of this Law to a person, subject matter or circumstance would, but for this clause, be construed as being in excess of the legislative power of the Legislature—
- (a) it is a valid provision to the extent to which it is not in excess of the power; and
 - (b) the remainder of this Law, and the application of the provision to other persons, subject matters or circumstances, is not affected.
- (3) Without limiting subclause (2), this Law is not to be construed as imposing any duty on the NCC, the Commonwealth Minister, the ACCC or the Australian Competition Tribunal to perform a function or exercise a power if the imposition of the duty would be in excess of the legislative power of the Legislature.

Note—

The term *function* is defined in clause 10 to include *duty*.

- (4) In particular, if a provision of this Law appears to impose a duty on the NCC, the Commonwealth Minister, the ACCC or the Australian Competition Tribunal to perform a function or exercise a power in matters or circumstances in which the assumption of the duty cannot be validly authorised under the law of the Commonwealth, or is otherwise ineffective, the provision is to be construed as if its operation were expressly confined to—
- (a) acts or omissions of corporations to which section 51(xx) of the *Constitution of the Commonwealth* applies; or
 - (b) acts or omissions taking place in the course of, or in relation to, trade or commerce between this jurisdiction and places outside this jurisdiction (whether within or outside Australia); or
 - (c) acts or omissions taking place outside Australia, or in relation to things outside Australia.
- (5) This clause does not limit the effect that a provision of this Law would validly have apart from this clause.