

THE TRADE PRACTICES BILL 1965

Short Summary by the Honourable B. M. Snedden, Q.C., M.P., Attorney-General
of the Commonwealth

THIS short summary of the Trade Practices Bill 1965 is designed to explain the Bill as simply and as briefly as possible. While it is correct as far as it goes, it is of necessity not a full description. For further detail the Bill itself should be consulted.

PURPOSE OF THE BILL

The purpose of the Bill is, as described in its title, 'to preserve competition in Australian trade and commerce to the extent required by the public interest'.

AGREEMENTS AND PRACTICES

The Bill makes

examinable—

- (a) five identified types of *agreements*, and
- (b) four identified types of *practices*,

whether in relation to goods or services, and makes

unlawful—

two identified practices, namely, collusive tendering and collusive bidding.

LAWFULNESS OF EXAMINABLE AGREEMENTS AND PRACTICES

No activity pursuant to an examinable agreement or an examinable practice is unlawful unless and until the Tribunal, described below, has determined that the agreement or practice is contrary to the public interest. That activity is then unlawful in the future.

EXAMINABLE AGREEMENTS

The *agreements* identified are those between competitors or persons who would be in competition if it were not for the agreement.

These have sometimes been referred to as 'multilaterals' or 'horizontal'.

The agreements of this kind which the Bill covers are those by which the parties limit their freedom to compete with each other in relation to—

- (a) prices,
- (b) rebates,
- (c) output,
- (d) market areas (zoning), or
- (e) persons to be dealt with (boycotts).

The agreement is examinable whether it relates to goods or services.

Registration of Agreements

An agreement is required to be *registered*, if—

- (a) it relates to goods, or
- (b) it relates to a service by way of:
 - (i) production or treatment of goods, or construction of buildings;
 - (ii) work on land (such as road-making);
 - (iii) distribution of goods; or
 - (iv) transport of goods.

Agreements in relation to what might be described as 'pure services' (i.e. having no reference to goods or land) are not registrable, even though they are examinable (for example, the services of hairdressers or of travel agents).

EXAMINABLE PRACTICES

The *practices* identified all consist of conduct stemming from the possession of economic power. These have sometimes been referred to as 'unilaterals' or 'verticals'

The practices of this kind which the Bill covers are—

- (a) a buyer 'wringing out' a discriminatory price advantage;
- (b) a seller forcing another person's product on the buyer;
- (c) on behalf of an association, inducing a refusal to deal with someone; and
- (d) monopolization

Monopolization

Monopolization has as its commencing point an individual or combination in a 'dominant position' in a line of trade or commerce, which is defined as being the supplier of a third of the goods or services of any description in Australia or a part of Australia. (The 'line of trade or commerce' and the 'part of Australia', that is, the relevant market, in any particular case of monopolization, will be determined by the Trade Practices Tribunal, on the particular facts in that case.)

The practice of the individual (or combination) is examinable if, being in a dominant position, he—

- (a) prevents competitors getting goods or services or outlets;
- (b) price-cuts to substantially damage a competitor; or
- (c) takes advantage of his dominant position in fixing prices

PRACTICES NOT REGISTRABLE

Under the Bill, no *practices* are required to be *registered*

EXCEPTED AGREEMENTS AND PRACTICES

Agreements and practices as described above are *not* within the Bill if they—

- are specifically authorized by or under a Commonwealth or State statute,
- relate to working conditions of employees,
- are made, or engaged in, by the Crown (in the strict sense, as distinct from statutory corporations engaged in trade),
- concern standards approved by the Standards Association of Australia,
- protect the goodwill of a business upon its sale, or
- relate exclusively to industrial property (patents, trade marks, designs and copyrights)—except in the case of monopolization.

POLICY OF THE BILL AS TO PRACTICES

In general, trade practices that are carried on by an individual of his own will, in competition with other individuals and not pursuant to an agreement with his competitors—such as individual resale price maintenance and exclusive dealing (sole agencies)—are not controlled by the Bill, but are left to be controlled by the ordinary forces of the market.

This is subject to the qualification that such a practice may be examinable if the individual is in a 'dominant position'.

Mergers are not controlled by the Bill, but the activities of a business resulting from a merger may be examinable if the merger has put the business in a 'dominant position'

COMMISSIONER OF TRADE PRACTICES

The Bill provides that there will be a Commissioner of Trade Practices.

Those agreements required to be registered will be lodged with the Commissioner, who will maintain them in a Register. Provision will be made to enable agreements to be lodged in each capital city. Only the Commissioner is able to bring an agreement or practice before the Tribunal for determination, and no-one can direct him to do so.

A CLOSED REGISTER

Access to the Register will be limited to the Commissioner and his staff and the Attorney-General or one of his officers specially authorized.

FAILURE TO REGISTER

Failure to register an agreement as required is an offence. There is a defence where the failure to register is due to 'honest inadvertence'. Notwithstanding failure to register, the agreement remains lawful and examinable.

TRADE PRACTICES TRIBUNAL

The Bill provides that there will be a Tribunal to determine whether an agreement or practice is contrary to the public interest. Only the Tribunal has this function.

The Tribunal has--

- (a) a President and Deputy Presidents who must be barristers or solicitors; and
- (b) other members who must have experience in commerce, industry or public administration.

The Tribunal's enquiries will be conducted in an atmosphere of informality. The Tribunal will not be bound by the rules of evidence, and it will have wide discretion to decide its own rules of procedure.

The Tribunal can sit at the same time in different divisions.

Usually each division will be composed of one lawyer and two other members.

Except for matters of law each member will have equal power of decision, and a majority view will prevail.

PRELIMINARY CONSULTATION BY COMMISSIONER

Before an agreement or practice can be taken before the Tribunal for examination the Commissioner must--

- (a) have formed the opinion that it is contrary to the public interest; and
- (b) have held consultations with the parties for the purpose of ascertaining whether the agreement or practice can be altered so that it would not be, in the opinion of the Commissioner against the public interest.

If these consultations are successful the Commissioner will certify the agreement (or practice) which has been agreed to as a result of the consultations. The Commissioner then gets the approval of the President of the Tribunal to the agreement as altered. The approved agreement becomes a public document and is not subject to further examination by the Tribunal unless there is change of circumstances.

If the consultations are not successful, the Tribunal will determine the matter.

ADVANCE CLEARANCE

A businessman wanting an advance clearance for his agreement or practice can ask the Tribunal to have the Commissioner look at it if

- the agreement or practice is related to the employment of new capital, and is necessary for the success of the proposed venture, and
- the new capital would, unless a clearance was given, be unlikely to be employed.

The Commissioner will either certify it to the Tribunal, as above, or, without delay, bring it before the Tribunal for determination.

PUBLIC HEARINGS

Hearings by the Tribunal are public but a hearing or part of a hearing can be in private if the Tribunal is of the opinion that it would be unfair to a party to hear it in public—e.g. in relation to a secret manufacturing process. The Tribunal itself will decide what part, if any, should be so heard.

UNDERTAKINGS

During the hearing before the Tribunal a party to an agreement or practice may give an undertaking to the Tribunal not to give effect to some part of the agreement or practice. The undertaking would normally bring the matter to an end. It would not be an admission that the agreement or practice was against the public interest, but the party would be liable to be punished if he broke his undertaking.

THE PUBLIC INTEREST

In examining an agreement or practice the Tribunal is directed by the Bill to take as the basis of its consideration the principle that the preservation and encouragement of competition are desirable in the public interest. The Tribunal weighs against the detriment in a restriction of competition any effect that the agreement or practice has to benefit—

- (a) consumers, employees, &c.
- (b) small businesses,
- (c) new enterprises,
- (d) full use of industrial resources,
- (e) quality, quantity and price, or
- (f) competition in overseas markets,

and reaches a decision on balance as to whether the agreement or practice is contrary to the public interest.

The Tribunal is required to state the reasons which led to its decision.

'CEASE AND DESIST' ORDER

If the Tribunal determines that it is against the public interest it will make an order that the parties cease giving effect to the agreement or practice.

REVIEW

When the Tribunal has made its determination, anyone who was a party to the examination proceedings can apply to a *Review Division* of the Tribunal, constituted by three Presidential members, to order the determination to be reconsidered on the ground that

- the determination is based on reasons that are inconsistent with the reasons for another decision of the Tribunal,
- the determination is of such importance that, in the public interest, it should be reconsidered, or
- a material error of law was made by the Tribunal.

Reconsideration would be by a Tribunal constituted by one Presidential member and two other members—who might, but need not, be the members who originally made the determination.

BREACH OF 'CEASE AND DESIST' ORDER

If the parties disobey an order of the Tribunal it will be a contempt of the Tribunal, for which they may be prosecuted in the Commonwealth Industrial Court at the instance of the Attorney-General. The contempt can be punished as if the contempt of the Tribunal were a contempt of that Court, which, being a superior Court of record, can punish a contempt by fine, sequestration of the assets of a company, or by imprisonment.

ACTION FOR DAMAGES

Provision is made in the Bill for a person to bring proceedings to recover any damages that he has suffered by the action of another person who has disobeyed an order of the Tribunal or who has made a collusive tender or a collusive bid.

COLLUSIVE TENDERING AND BIDDING

Collusive tendering and collusive bidding are offences under the Bill. Upon prosecution for collusive tendering it would be a defence if the tender were shown to be pursuant to an agreement registered with the Commissioner which had not been found by the Tribunal to be contrary to the public interest.