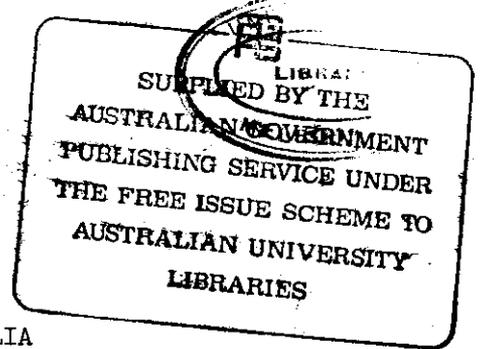


1976



COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT BILL 1977

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Business and
Consumer Affairs, the Honourable John Howard, MP)

17435/76—Recommended retail price 35c

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TRADE PRACTICES AMENDMENT BILL 1977

EXPLANATORY MEMORANDUM

In August 1976 the Trade Practices Act Review Committee established by the Government in April 1976 reported on the operation of the Trade Practices Act 1974. This Bill is intended to implement such of the recommendations of that Committee as can be adopted immediately.

RESTRICTIVE TRADE PRACTICES AND MERGERS

2. Clause 20 substitutes new provisions for the existing section 45 (contracts, arrangements and understandings in restraint of trade), section 46 (monopolization) and section 47 (exclusive dealing). Clause 21 repeals section 49 (price discrimination) and clause 22 amends section 50 (mergers). Wherever the effect of the conduct on competition is an element of the contravention, a single test--"substantially lessening competition"-- is now used.

3. Related companies are treated as a single unit for all purposes. A "market" for goods or services has been defined to include substitutable or competitive goods or services (clause 5, new section 4D).

Contracts, arrangements or understandings affecting competition

4. The new section 45 prohibits contracts,

arrangements or understandings which have the purpose or effect of substantially lessening competition in a market, or of effecting a collective boycott. "Contract" for this purpose includes commercial leases and licences of land (clause 5, new section 4G). The expression "restraint of trade", which is used in the present section 45, has been omitted. For the purposes of the new section, effects on competition are tested by reference to a market for goods or services, in contrast with the present section which tests such effects solely by reference to the parties. There is no competition test for collective boycotts.

5. Price-fixing. Contracts, arrangements or understandings between competitors having the purpose or effect of fixing, controlling or maintaining the price of goods or services are deemed to have the purpose or effect of substantially lessening competition in a market (new section 45A).

Subject to the availability of authorization in some classes of case, price-fixing between competitors is thereby absolutely prohibited. Included within the prohibition are agreements between a number of competitive suppliers whereby it is agreed that specific resale prices will be recommended by each of them to resellers of their products (new section 45A (6)).

6. The absolute prohibition of price-fixing does not, however, apply to -

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venture relating to the selling price of
the joint venture product (new section 45A
(2)),

agreements on the price to be paid by
a collective buying group (new section
45A (3)(a)), or

agreements relating to the price at which
the members of such a buying group will
jointly advertise the goods on resale (new
section 45A (3)(b)).

7. Covenants affecting competition. The High Court has recently made it clear (in the case of Quadramain v. Sevastapol) that the existing section 45 does not cover anti-competitive covenants running with an interest in land. New section 45B now makes specific provision for restrictive covenants which have the purpose or effect of substantially lessening competition. However, covenants protecting residential interests are specifically exempted (new section 45B (9)). New section 45C prevents restrictive covenants from being used for the purpose of fixing, controlling, or maintaining prices.

8. Common law and severance. To the extent that the common law doctrine of restraint of trade and the principles relating to the severance of restrictive provisions from such contracts are not displaced by the prohibitions and remedies in the Trade Practices Act, it is intended that they should continue in operation. New sections 4K and 4L

(clause 5) carry out that intention.

Monopolization

9. The amended section 46(1) makes it clear that a market-dominating corporation engages in monopolization only if its purpose is to bring about the prohibited results of eliminating a competitor, preventing the entry of a new enterprise, or deterring competitive conduct. A market-dominating enterprise is not within the amended section by reason only of the fact that it has invested in new plant or equipment (new section 46(4)).

Exclusive Dealing

10. New section 47 covers vertical exclusive dealing practices whereby sellers or buyers impose restrictions on the buying or selling decisions of their customers or suppliers. The new section differs from the present section 47 in the following significant respects -

- . it deals with restrictions imposed by buyers on sellers, restrictions which currently fall within the generality of section 45 (new section 47(4)),
- . it omits the present section 47(3),
- . the phrase in existing section 47(2), "subject to a contract, arrangements or understanding", has been omitted to avoid the application of the Act to normal requirements contracts,
- . requirements contracts designed for the purpose of achieving anti-competitive results are dealt with specifically (new section 47(8)),

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the granting, renewal or continuance of commercial leases and licences conditional upon exclusive dealing is also dealt with specifically (new section 47(9)), and new sections 47(3), (5), (7) and (10) remove the uncertainty surrounding the application of the present law to refusals to deal for the purpose of achieving exclusive dealing.

Mergers

11. Section 50 of the Trade Practices Act currently prohibits all mergers which have the effect of substantially lessening competition in a market. Clause 22 of the Bill inserts new sections 50 (2A) and (2B) which remove from that prohibition the acquisition of shares in, or assets of, a company which has (or which belongs to a group which has) an annual turnover of \$3 million or less, unless the acquisition is part of a systematic pattern of take-overs engaged in by the acquiring company in a relevant industry. Further, clause 44 inserts into section 85 a statutory "failing company" defence (new section 85(7)).

CLEARANCE, AUTHORIZATION AND NOTIFICATION
OF RESTRICTIVE TRADE PRACTICES AND MERGERS

12. The present provisions for clearance are repealed, except in relation to mergers (clause 54). Authorization by the Trade Practices Commission is available for contracts, arrangements, understandings or covenants affecting

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competition, for exclusive dealing and for mergers (clause 48, new section 88). The Commission does not, however, have power to grant authorization to provisions fixing, controlling or maintaining the price of goods, except for -

- . multi-level agreements incorporating both sellers and buyers (new section 88(2)),
- . joint venture pricing (new section 88(3)(a)),
- . collective buying and advertising groups (new section 88(4)), and
- . price recommendation agreements with more than 20 parties (new section 88(3)(b)).

13. Test for Authorization. The test for granting an authorization has been simplified (clause 50, new sections 90(6) and (7)). Authorization is to be granted if, in all the circumstances, public benefits outweigh anti-competitive detriments.

14. The Minister is given power to direct the Commission to give special consideration to particular matters when determining authorization applications, or public benefit matters arising under the new exclusive dealing procedures (clause 19). The power of the Minister to direct the Commission to grant an authorization to a particular merger application is repealed (clause 50).

15. Authorization Procedures. Public hearings into authorization applications are abolished (clause 16). The Commission is to be required to deal with all authorization

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applications within four months from receipt of the application but, except in the case of merger applications, this time limit will not come into effect until the Minister so notifies in the Gazette (clause 50, new section 90(8)).

16. Notification Procedure for Exclusive Dealing. The Bill provides for a new approach to the administrative adjudication of exclusive dealing (clause 54). A corporation which notifies the Commission in the prescribed way has immunity in relation to the exclusive dealing conduct so notified until the Commission issues a notice which has the effect of cancelling that immunity. The Commission may only issue such a notice if it is satisfied that the conduct has the effect of substantially lessening competition and does not result in a benefit to the public, or that any benefit to the public from the conduct would not outweigh the anti-competitive detriments of the conduct.

17. In relation to exclusive dealing conduct, a party may in addition to, or as an alternative to, notification seek authorization for the conduct in the normal way (clause 48, new section 88(7)). This will enable an applicant seeking a quick and final decision to take advantage of the time limit to be imposed on the Commission in respect of authorization applications. Where there is both notification and an application for authorization, if the Commission dismisses the application for authorization the immunity given by the notification comes

to an end (clause 54, new section 93(8)).

18. Pre-Decision Conferences. Before giving a final decision on an application for authorization or giving a notice in respect of an exclusive dealing notification, the Commission is required to give all interested parties an opportunity to meet a member of the Commission concerned in the matter to discuss the merits of the application (clause 51, new section 90A and clause 55, new section 93A). The four month time limit for the determination of authorizations will not run during the course of these discussions (clause 50, new section 90(11)).

19. Confidentiality. Confidentiality for documents and oral submissions in clearance, authorization and notification matters is to be granted as a matter of right for particulars of:-

- . secret formulae or processes,
- . the cash consideration for a merger, and
- . current cost data (clause 49(d), new section 89(5A)(a) and clause 57, new section 95(3)(a)).

In other cases, where the Commission in its discretion refuses confidentiality, the person who furnished the document or made the oral submission will be entitled to withdraw it (sub-clause 49(d), new section 89(5B) and (5C) and clause 57, new section 95(4) and (5)).

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Review by the Trade Practices Tribunal.

20. The right given by section 101 of the Act to seek a review by the Trade Practices Tribunal of a determination of the Commission in an authorization matter remains. It is now supplemented by a right to seek review of a Commission decision to give a notice under the exclusive dealing notification provisions (clause 59, new section 101A); this review is confined to questions of public benefit.

ACTIONS OF EMPLOYEES

21. New section 45D prohibits boycotts by employees which have the purpose of hindering or preventing the supply of goods or services by the employer to a corporation if that action would have substantial adverse effects on the business of the corporation whose supplies are curtailed (clause 20).

22. New section 51(2)(a) exempts from the restrictive trade practices and mergers provisions - other than section 45D (employee boycotts) and section 48 (resale price maintenance) - conduct relating to the remuneration, conditions of employment, hours or working conditions of employees (clause 23).

CONSUMER PROTECTION

Definition of "consumer"

23. The Bill incorporates a new definition of a

"consumer" for the purposes of the Act (clause 5, new section 4B). Consumer transactions are those where the price paid for goods or services is less than \$15,000 (or such greater amount as prescribed by regulation) or the goods or services are of a kind ordinarily obtained for personal, domestic or household use. This will have particular application to the warranties implied by Division 2 of Part V into consumer transactions.

Land Transactions

24. The Bill deals specifically with false representations and other misleading or offensive conduct in relation to land (clause 26, new section 53A). Leases and licences of an interest in land are defined as services for the purpose of the Act (clause 5, new section 4G).

False or Misleading Conduct

25. The Bill amends sections 52, 53, 54 and 56 so as -

- . to apply section 52 to conduct that is likely to be misleading or deceptive (clause 24);
- . to apply section 53 to misrepresentations or false or misleading statements concerning the composition, history or previous use of goods, the price of goods or services and the existence, exclusion or effect of rights or remedies of consumers (clause 25);
- . to apply section 54 to offers of gifts or prizes where there is no intention of

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providing them at all (clause 27);
to extend section 56 to require (subject to special defences) that goods or services advertised at a special price be offered for supply for a reasonable period and in reasonable quantities (clause 29).

26. The Bill prohibits conduct liable to mislead the public as to the nature, the characteristics, the suitability for purpose or the quantity of services (clause 28, new section 55A). A similar prohibition in relation to goods, is already contained in section 55.

27. Section 59 is extended to prohibit misleading statements concerning the profitability, risk and other material aspects of business activities requiring investment of moneys and performance of work associated with the investment (clause 30).

Power to Ban Sale of Unsafe Goods

28. Section 62 is amended to empower the Minister, by notice published in the Gazette, to prohibit for up to 18 months the supply of specified unsafe goods (clause 31).

Goods for Export

29. Goods intended for export are excluded from any consumer product standards and prohibitions of unsafe goods (clauses 31 and 32, new sections 62(2AA) and 63(2AA)). Goods are presumed to be intended for export if they bear appropriate marking (clauses 31 and 32, new sections 62(2A) and 63(2A)).

Unsolicited Services

30. Asserting a right to payment for unsolicited

services is prohibited unless there is reasonable cause to believe that there is a right to payment (clause 33, new section 64(2A)). This is similar to the present prohibition, in section 64, in relation to unsolicited goods.

Contracts by way of Competitive Tender

31. The Bill removes from the provisions which imply conditions and warranties into consumer transactions the exception for contracts by way of competitive tender (clauses 34, 35, 36 and 37).

Rescission of Contracts for Breach of Condition

32. Consumers are afforded the right to terminate contracts for breach of any of the conditions implied by Division 2 of Part V of the Act even though property in the goods may have passed to the Consumer (clause 38, new section 75A).

ENFORCEMENT AND REMEDIES

33. Section 79 is amended to remove the penalty of imprisonment for consumer protection offences, and to limit potential penal liability for substantially similar contraventions occurring at or about the same time (clause 40).

34. Section 80 is amended to allow the Court to grant an injunction restraining a person from engaging in prohibited conduct whether or not it appears that the person intends to repeat or continue the conduct or that there is an imminent danger of substantial damage from the conduct (clause 41).

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35. The Court shall not require, as a condition of granting an interim injunction, that the Minister or the Commission given an undertaking as to damages. The Court is to accept an undertaking as to damages or costs by the Minister on behalf of a private applicant (clause 41, new sections 80(4),(5),(6)).

36. The Court is empowered to make orders for affirmative disclosure or corrective advertising in the event of a contravention of the consumer protection provisions of Part V (clause 42, new section 80A).

37. Section 85(1), which provides that reasonable conduct may be a defence to a consumer protection prosecution, is restructured into separate defences of reasonable mistake, reasonable reliance on information supplied by another person, and default of another person which could not reasonably have been prevented (clause 44).

38. The provisions for ancillary orders in section 87 have been extended to provide for orders to repair goods or perform other specified services (clause 45, new section 87(2)(e) and (f)). Section 87 orders in consumer protection matters need not be ancillary to other orders (clause 45, new section 87(1A)). The orders under section 87 are, for constitutional reasons, restricted to orders compensating parties to the proceedings only.

Evidence

39. Provision is made for facilitating the admission of business records as evidence in proceedings under the Act (clause 46, new Division 2 of Part VI). These provisions are based upon the New South Wales Evidence Act as recently amended.

TRADE PRACTICES COMMISSION

40. The Trade Practices Commission is to be incorporated, particularly in order to remove procedural difficulties in legal proceedings. The Commission may now be sued in its corporate capacity (clause 7, new section 6A).

41. The procedure for appointing part-time members of the Commission has been altered. A person may now be appointed to the Trade Practices Commission as a full time member or as an "associate member". Associate members are to be used part-time as members of the Commission for particular matters (except the annual report), at the direction of the Chairman. The Chairman is to be required to consider whether he should appoint an associate member to the Commission for the purposes of each Commission determination of an authorization application or exclusive dealing notification (clause 9, new section 8A).

TRANSITIONAL PROVISIONS

42. The transitional provisions preserve the full operation of authorizations and merger clearances in force at the commencement of the amended Act (clause 48(4), clause 56(2)). Clearances under the present Act for contracts, arrangements or understandings in restraint of trade to which new section 45 would apply are deemed to be

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authorizations granted under the amended Act and remain in effect for a period of 12 months (clause 48(5)). Authorization applications not finally determined are treated as fresh applications under the amended Act (clause 48(2)). Following the abolition of clearances for exclusive dealing, new section 93(7) allows a period of three months for the lodgement of exclusive dealing notifications (clause 54).

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