Date introduced: 19 March 1986
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

DIGEST OF BILL

Purpose

To amend section 50 of the Trade Practices Act 1974 (the Principal Act) to exclude certain transfers of market power from the provisions of the Principal Act.

Background

This Bill, together with the Trade Practices Revision Bill 1986, replaces the Trade Practices Amendment Bill 1985 (the 1985 Bill) which was withdrawn in the Senate. The 1985 Bill contained amendments to the restrictive trade practices and consumer protection provisions of the Principal Act as well as amendment to section 50 of the Principal Act. In the Second Reading Speech for the Trade Practices Revision Bill 1986, the Attorney-General stated that the 1985 Bill 'was likely to have been rejected by the Senate'[1] and that the amendments to other parts of the Principal Act were likely to be defeated if combined with the amendments to section 50 of the Principal Act. For this reason the 1985 Bill was withdrawn and the amendments to section 50 presented in a separate Bill.

Section 50 of the Principal Act prohibits corporations from acquiring the shares or assets of another corporation if that acquisition would place the corporation acquiring the shares or assets in a position to actually, or be likely to, control or dominate a market for goods or services. Section 50 is subject to Part VII of the Principal Act which allows the Trade Practices Commission (TPC), in certain circumstances, to grant an authorisation
to breach the restrictive trade practices provisions (of which section 50 is part) of the Principal Act. Such authorisations can only be made on the application of the corporation concerned and may be preceded by a public inquiry. In a 1978 case on section 50, it was held that 'subject to any authorisation that may have been granted under Part VII of the Act, a corporation which, by the acquisition of shares in the capital of a body corporate, acquires a controlling interest in a body corporate which is in a position to control or dominate a market for services, thereby contravenes s.50(1)(a) of the Act'.[2]

Amendments contained in the 1985 Bill, which were virtually identical to the provisions of this Bill, would have made it clear that the section 50 prohibition would not apply to the acquisition of the shares or assets of a corporation that was already in a position to dominate a market if the acquisition did not, or was unlikely to, put the body acquiring the shares or assets in a stronger position to dominate the market.

The proposed amendment to section 50 was not debated when the 1985 Bill was passed by the House of Representatives with the proposed product recall provisions being the centre of debate. However, the importance of the amendment to section 50 had been reassessed by the time the 1985 Bill was debated in the Senate in February and March this year. This was largely due to the partial takeover offer made by Bell Resources Limited (Bell) to shareholders of The Broken Hill Proprietary Company Limited (BHP). It appears that the takeover would breach section 50 due to BHP's dominance and control of the steel market.

Bell's formal bid to gain control of BHP commenced on 4 February 1986 when a $1.9 billion offer was made to lift Bell's holding in BHP from 18 per cent to approximately 40 per cent. The bid was subject to seven conditions, including that there be no changes to the companies code except those contained in the 1985 Bill and that there was no material change in the import parity price for Bass Strait crude oil. The formal takeover documents, including the Part A statement, were lodged on 6 February 1986. The takeover offer was changed from a pro rata to proportional bid on 17 February 1986. This gave all BHP shareholders an opportunity to accept the offer which was accompanied by three new conditions relating to the total expenditure to be made by Bell.
On 26 February 1986, the TPC announced that it had commenced proceedings in the Federal Court to restrain Bell from acquiring shares in BHP as such an acquisition would be in breach of section 50 of the Principal Act. On the same day BHP commenced action in the Victorian Supreme Court to have Bell's Part A statement declared invalid and to restrain Bell from sending the documents to BHP shareholders. On 27 February 1986 the Victorian Supreme Court ruled that the takeover documents were not to be sent out until the Court had determined BHP's applications. This effectively halted the takeover bid.

Following meetings with representatives of Bell and BHP, Cabinet announced on 11 March 1986 that the Government would proceed with the amendment to section 50 and would not be holding an inquiry into the takeover.

On 24 March 1986 Bell announced that it would not proceed with the offer as announced. However, on 3 April 1986 Bell announced a new, simplified partial takeover offer.

Main Provisions

The Bill will operate from a day fixed by Proclamation (clause 2).

Section 50 of the Principal Act will be amended by clause 3 to exclude the acquisition of shares or assets in a corporation that dominates a market from the Principal Act if, as a result of the acquisition, the person acquiring the assets or shares will not be, or is not likely to be, in a stronger position to dominate the market.

For further information, if required, contact the Law and Government Group.
References