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

DIGEST OF BILL

Purpose

To amend the restrictive trade practices, consumer protection and other provisions of the Trade Practices Act 1974 (the Principal Act) following submissions made on proposed changes to the Principal Act.

Background

This Bill, together with the Trade Practices (Transfer of Market Dominance) Amendment Bill 1986, replaces the Trade Practices Amendment Bill 1985 (the 1985 Bill) which was withdrawn in the Senate. This Bill is virtually identical to the 1985 Bill except that the amendments to section 50 of the Principal Act relating to the acquisition of the shares or assets of a corporation that dominates a market have been deleted. These amendments are now contained in the Trade Practices (Transfer of Market Dominance) Bill 1986. For further background on the withdrawal of the 1985 Bill and the section 50 amendments refer to the Digest for the Trade Practices (Transfer of Market Dominance) Amendment Bill 1986 (86/26).

There are no specific powers in the Constitution to enable the Commonwealth to legislate on consumer or trade practices. The first attempt to legislate in this area occurred in 1906 with the passage of the Australian Industries Preservation Act which attempted to regulate the anti-competitive conduct of certain groups. This Act was challenged in the High Court in the case of Huddart Parker and Co. Pty. Ltd v Moorehead.[1] In that case, the High Court rejected the Commonwealth's argument based on sub-section 51(xx) of the Constitution (the Corporations
Power), and declared the majority of the Act unconstitutional.

This setback dissuaded Governments from attempting similar legislation until 1965 when the original Trade Practices Act was passed. This Act also attempted to regulate trade practices and was challenged in the High Court. In the Concrete Pipes Case,[2] the legislation was again declared invalid. However, the case marked a turn about in the High Court's view of the Corporations Power. The Court expressly overruled the Huddart Parker decision and ruled that the Commonwealth had power to regulate the trading activities of trading companies. The legislation declared invalid, i.e. the Trade Practices Act 1965, did not fall within this principle.

However, the decision did prompt the Government to take further legislative action. The Restrictive Trade Practices Act was passed in 1971. Under this Act, a Tribunal was established to examine certain agreements and practices of corporations. The Tribunal had the power to declare that activities were not in the public interest. If such a declaration was made, any such agreement became unenforceable and the Tribunal had power to make various orders restraining the corporation from engaging in any practice declared to be against the public interest. However, there were various problems with the operation of the Restrictive Trade Practices Act 1971. The range of activities that could be examined were relatively narrow, and enforcement of the law depended on the Tribunal becoming aware of, and successfully prohibiting, those activities within its scope.

Many of these problems were rectified with the passage of the Principal Act which made a wide range of restrictive trade practices illegal and introduced consumer protection provisions. The Principal Act's operation extends beyond corporations to deal with persons supplying goods or services where such an extension is valid under constitutional provisions other than the Corporations Power (e.g. section 51(i), the power to make laws with respect to interstate trade and commerce or section 122, the Territories power).

An extensive review of the Principal Act was conducted in 1976 by the Swanson Committee[3] and a large number of amendments were made in 1977 to ensure that the Principal Act performed its dual functions of controlling restrictive trade practices and monopolisation and of protecting consumers from unfair commercial practices.[4]
A further review of the Principal Act was undertaken when the current Government came into office in 1983 and this led to the issuing of a discussion paper, titled 'The Trade Practices Act: Proposals for Change', in February 1984. Wide ranging debate on the proposed changes followed. They were substantially amended as a result of the submissions received from various bodies. A further paper, titled 'Recall of Unsafe Products', was issued in June 1985 and a number of its proposals are implemented by this Bill including the compulsory recall power.

Outline

As well as amending a number of the substantive provisions of the Principal Act, the Bill deals with certain administrative provisions. A new Division is to be introduced into the Principal Act to deal with product safety and recall.

Main Provisions

For a detailed analysis of the clauses of the Bill, refer to the Explanatory Memorandum.

The definition of consumer contained in section 4B of the Principal Act is to be amended by clause 5. The section defines consumer by reference to the value of the good or service provided. Generally, a person will be a consumer, and therefore covered by the Principal Act, if the good or service provided is valued at $15,000 or less. The monetary limit is to be increased to $40,000.

A new sub-section 6(4) is to be inserted in the Principal Act by clause 9. The proposed sub-section will extend the unfair practices provisions of the Principal Act to the promotional activities of professionals. Its operation will be restricted to the Territories.

Clause 17 will amend section 46 of the Principal Act which aims to prevent the misuse of market power. A new test is to be introduced to determine when a corporation will fall within section 46. The test will be whether a corporation has a substantial degree of power in a market. Proposed sub-section 46(3) will provide a guide for determining the extent of power in a market. If a corporation is found to have a substantial degree of power in a market it will be prohibited from engaging in any conduct set out in proposed sub-section 46(1) (i.e. from
eliminating or substantially damaging a competitor, preventing entry to the market, or preventing or deterring a person from engaging in competitive conduct in the market).

Clause 18 will amend section 50 of the Principal Act to clarify the situations in which corporations will be deemed to be associated for the purpose of determining whether those corporations are in a position to dominate a market. The amendments also prohibit the acquisition of shares by a natural person if, as a result of the acquisition, that person would be in a position to dominate the market (proposed sub-section 50(1A)).

Proposed section 50A will deal with the acquisition of the control of a corporation outside Australia where such an acquisition would, or would be likely to, place the person acquiring control in a position to dominate an Australian market (clause 19).

Division 1 of Part V of the Principal Act deals with unfair practices. As the law currently stands, it appears that a statement relating to future events, such as a prediction of future profits, is not covered by the Division unless it is based on past or existing facts or it can be proved that the person making the statement did not believe that it was true or was recklessly indifferent as to the truth of the forecast. A new section 51A is to be inserted by clause 21 whereby representations made by a corporation about the future will be deemed misleading unless the corporation has reasonable grounds for making the representation. The onus of proving that reasonable grounds existed for the making of the representation will rest on the corporation.

Proposed section 52A will prohibit corporations from acting 'unconscionably' in relation to the supply of goods or services for personal, domestic or household use. The matters which a Court may have regard to in determining whether conduct is unconscionable are listed in proposed sub-section 52A(2) (clause 22).

Clause 25 will repeal current section 53B of the Principal Act and substitute new sections 53B and 53C. Proposed section 53B will prohibit corporations from engaging in any conduct that is likely to be misleading in relation to employment opportunities. The current provision only prohibits misleading advertising. Proposed section 53C will require corporations to include the full cash price when making representations regarding part payments.
The definition of bait advertising contained in section 56 of the Principal Act is to be amended to insert an objective, rather than the current subjective, test (clause 26).

Section 58 of the Principal Act, which deals with the acceptance of payment without the intention or ability to supply, is also to be amended to introduce an objective test (clause 27).

Clause 28 will amend section 59 of the Principal Act to prohibit corporations, which have invited people to participate in an activity requiring the performance of work (other than as an employee) from making false or misleading representations about the business.

The prohibition on pyramid selling is to be extended (clause 30 which amends section 61 of the Principal Act).

The practice of requesting payment for unsolicited advertisements is to be prohibited by clause 33 which amends section 64 of the Principal Act.

Clause 35 will introduce a new Division 1A into the Principal Act to deal with product safety, recall and information. It will come into effect from 1 July 1986 (sub-clause 2(2)). The major features of the new Division will be:

- the Minister will be empowered to publish, in the Gazette, a notice stating that certain goods are under investigation. The notice may also state any risks associated with the goods (proposed section 65B);

- proposed section 65C will prohibit the supply of goods which breach safety standards; allow regulations in respect of consumer product safety standards and prohibit the export of goods which breach standards without Ministerial approval. It will also empower the Minister to publish, in the Gazette, a notice declaring goods that will or may cause injury to be unsafe;

- proposed section 65F will deal with the compulsory recall of products. Where, after 1 July 1986, a corporation supplies goods that
are likely to be used by a consumer and the Minister is satisfied that the goods may cause injury or breach safety standards and that the supplier has not taken satisfactory action to prevent injury, the Minister may require the supplier to recall the goods, provide information on the defect and/or inform the public that the corporation will repair or replace the goods or issue a refund. The Minister will also be empowered to give directions on how a recall is to be conducted. Corporations will be required to comply with a recall notice and to cease supply of those goods (proposed section 65G). As well, if a corporation contravenes proposed section 65G, it may be liable for civil action (proposed section 65H);

suppliers affected by proposed sections 65C or 65F will be able to seek a conference (proposed section 65J). If such a conference is requested, the Trade Practices Commission (the Commission) will be required to call one. Membership of such a conference is listed in proposed sub-section 65J(5);

proposed section 65K deals with recommendations made by the Commission after a conference. It may recommend that the notice proposed to be published under proposed sections 65C or 65F be published in its original form, suggest modifications or that no notice be published;

proposed section 65L will allow the Minister to by-pass the procedures laid down in proposed sections 65J and 65K where there is an imminent risk of death, serious illness or serious injury;

where the Minister decides to act otherwise than in accordance with the Commission's recommendations, the reasons for this decision must be published in the Gazette (proposed section 65P);

the Minister will be empowered to obtain certain information from a corporation (proposed section 65Q).
Clause 37 will substitute a new section 73 in the Principal Act. The new provision will make linked credit providers jointly and severally liable with the trader in certain circumstances. This will bring the Principal Act into line with certain State legislation.

The maximum level of fines that may be imposed for breaches of Part V of the Principal Act (which deals with consumer protection) is to be doubled to $100,000 for corporations and $20,000 for a natural person (clause 47 which amends section 79 of the Principal Act). As well, the clause will amend section 79 to make it an offence against the Principal Act to aid, induce, conspire or to be knowingly involved in a breach of Part V of the Principal Act. Such offences now come under provisions of the Crimes Act 1914. The time limit for prosecutions of 12 months, which is imposed by the Crimes Act 1914, is to be excluded and a 3 year limit set (proposed sub-section 79(6)).

Section 84 of the Principal Act, which deals with circumstances in which it is necessary to establish a corporation's intention is to be amended by clause 53 to overcome the effect of recent Court decisions. Under the new provisions, it will be sufficient to show that the directors, servants or agents who engaged in the conduct under consideration were acting within their actual or apparent authority and had the required state of mind.

Clause 55 will amend sub-section 87(1A) and insert a new sub-section 87(1B) in the Principal Act. These provisions will enable the Commission to act as a representative of specific, named people when instituting proceedings under Part V of the Principal Act. This will allow a Court to make whatever orders it considers appropriate to compensate those people if the action is successful.

Proposed section 87A will empower a Court to freeze certain assets of a person in respect of whom an action for a breach of Part V has been initiated on the application of the Minister or the Commission (clause 56).

Section 163 of the Principal Act is to be amended to remove the requirement that the Commission gain the Attorney-General's consent before instituting proceedings for a breach of Part V of the Principal Act (clause 71).
For further information, if required, contact the Law and Government Group.

References

1. Huddart Parker & Co. Pty Ltd v Moorehead (1909) 8 CLR 330.
3. Trade Practices Review Committee, headed by Mr T.B. Swanson.