



Trade Practices Amendment (Access Declarations) Bill 2008

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Contents

Purpose.	2
Background.	2
What is the role of the Legislative Instruments Act 2003?	2
The Roche Products case.	3
Part XIC of the Trade Practices Act	4
The effect of the Roche Products case	5
Committee consideration.	6
Financial implications	6
Main provisions.	6
About acquisition of property on just terms.	7

Trade Practices Amendment (Access Declarations) Bill 2008

Date introduced: 13 February 2008

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: On the day on which it receives the Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend Part XIC the *Trade Practices Act 1974* to make clear that access declarations and notices intended to extend the period of access declarations are not legislative instruments for the purpose of the *Legislative Instruments Act 2003*. The Bill also has retrospective effect.

Background

What is the role of the Legislative Instruments Act 2003?

Delegated legislation involves legislation made by a person or body under authority granted to that person or body by an Act of Parliament. Individually, it is variously known by titles such as regulations, by-laws, rules and ordinances. Collectively they are variously referred to as subordinate legislation, statutory rules and **legislative instruments**.¹

The *Legislative Instruments Act 2003* (the Legislative Instruments Act) defines a 'legislative instrument' as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament'.² An instrument has a legislative character if it determines or alters the content of the law rather than applying the law in a particular

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1. E. Campbell, 'Legislative Instruments Bill 2003 (Cth): What is it all about?', *Australian Law Librarian*, Vol. 11, No. 4, 2003, pp. 328-340 at p. 328.
 2. Subsection 5(1) *Legislative Instruments Act 2003*

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case; and if it affects a privilege or interest, imposes an obligation, or creates, varies or removes a right.³

The definition of a legislative instrument is a comprehensive one. It concentrates on the legislative character of the instrument – that is, what the instrument **does** rather than what it is **called**. In that way, the Legislative Instruments Act captures a multitude of quasi-legislative instruments within its scope that were not previously subject to statutory tabling and/or disallowance obligations.⁴

Relevant key features of the Legislative Instruments Act are as follows:

- It provides for the establishment of a *Federal Register of Legislative Instruments* (the Register).⁵
- All legislative instruments **must be recorded** on the Register. If an instrument is not registered then it is unenforceable.⁶
- It deems certain instruments to be legislative instruments, including regulations, statutory rules, ordinances and proclamations.⁷
- Any instrument that is entered on the Register is also deemed to be a legislative instrument.⁸
- It declares that certain instruments are not legislative instruments.⁹ These include private and public taxation rulings, laws of a self-governing territory, and employment awards and orders.

The Roche Products case

In September 2007 the Federal Court considered the matter of *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (the Roche Products case).¹⁰

Roche Products Pty Limited (Roche) is the sponsor of the weight loss drug orlistat, marketed as Xenical. Since 1 May 2004, Xenical had been available to consumers

3. Subsection 5(2) *Legislative Instruments Act 2003*

4. E. Campbell, op. cit., p. 332.

5. Section 20 *Legislative Instruments Act 2003*

6. Section 31 *Legislative Instruments Act 2003*

7. Section 6 *Legislative Instruments Act 2003*

8. Subsection 5(3) *Legislative Instruments Act 2003*

9. Section 7 *Legislative Instruments Act 2003*

10. [2007] FCA 1352

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through pharmacies without prescription for the treatment of excessive body weight. From 1 September 2006 Roche was permitted by the National Drugs and Poisons Schedule Committee (the Committee) to advertise Xenical directly to consumers, with the drug being included in Appendix H of the Poisons Standard.

Subsequently Roche conducted a large scale television campaign which generated numerous public complaints with significant criticism from the Australian Consumer Association and the AMA. In light of that criticism, the Committee reviewed and reversed its original decision to include orlistat in Appendix H of the Standard.

Roche applied to the Federal Court challenging this decision on the basis that the Committee had made errors in law under sections 52C, 52D and 52E of the *Therapeutic Goods Act 1989* (Cth).

As a preliminary matter the Federal Court considered whether the decision by the Committee had been administrative or legislative in character. Looking at what the decision **does** rather than what it is **called** the Federal Court concluded that it was legislative in character. It based its conclusion on the fact that, amongst other things, the decision of the Committee to include a substance in a particular schedule of the Poisons Standard determines the future lawfulness of conduct in relation to that substance.¹¹ In addition the Federal Court recognised that the Poisons Standard is an important element of a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods. It also forms part of a framework for the States and Territories to adopt a uniform approach to the control and regulation of poisons in Australia.¹²

The consequence of this decision was that every decision by the Committee under section 52B(2) of the *Therapeutic Goods Act 1989* is a legislative instrument and is, therefore, required to be recorded on the Register.

Part XIC of the Trade Practices Act

The Trade Practices Amendment (Telecommunications) Bill 1996 inserted Part XIC into the *Trade Practices Act 1974* (TPA).

Part XIC sets out an access regime for the telecommunications industry. The regime provides for the declaration of carriage services and related services by the Australian Competition and Consumer Commission (ACCC) after a public inquiry in accordance with section 505 of the *Telecommunications Act 1997*.¹³ Once declared, standard access

11. [2007] FCA 1352, paragraph 31.

12. [2007] FCA 1352, paragraph 34.

13. Subsection 152AL(3) of the *Trade Practices Act 1974*.

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obligations¹⁴ apply to carriers or carriage service providers supplying those services, unless an exemption applies.¹⁵

Section 152ALA of the TPA provides that a declaration under section 152AL must specify an expiry date for the declaration. That date must occur in the 5-year period beginning when the declaration was made.

Subsection 152ALA(4) provides that the ACCC may, by notice published in the *Gazette*, extend or further extend the expiry date of a specified declaration under section 152AL so long as the extension or further extension is for a period of not more than 5 years.

There are a number of access declarations [currently](#) in force, such as the High Frequency Unconditioned Local Loop Service and the Domestic Digital Mobile Terminating Access Service. On the understanding that access declarations are not legislative instruments for the purposes of the Legislative Instruments Act, the ACCC has not registered any access declarations on the Register.¹⁶

The effect of the Roche Products case

Following on the Roche Products case, there was concern that access declarations which were made by the ACCC under Part XIC of the TPA were ‘legislative in character’ and so fell within the definition of a ‘legislative instrument’ in the Legislative Instruments Act. If that was so, then the failure to record access declarations on the Register may have the unintended consequence that they are unenforceable. Thus any legal action to, say, impose access obligations on carriers or providers on the basis of an existing Part XIC declaration could potentially be blocked or overturned by a court. If that were to occur, the existing telecommunications access regime would be rendered inoperative.

The objective of the Bill is to ‘provide certainty to the telecommunications sector’ by providing that access declarations and extensions of periods of access are not legislative instruments.¹⁷ Furthermore, the Bill has retrospective effect – it provides that declarations and extensions of periods of access dating from before the commencement of the Bill should also be deemed not to have been legislative instruments.

14. Section 152AR of the TPA sets out the standard access obligations.

15. The TPA contains another access regime – in Part IIIA. The amendments in the subject bill do not refer to Part IIIA and do not affect the operation of Part IIIA.

16. Explanatory Memorandum, p. 1.

17. Explanatory Memorandum, p. 1.

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Committee consideration

There is no information to indicate that the Bill has been referred to any Committee.

Financial implications

Whilst the Explanatory Memorandum states the Bill is not expected to have any financial impact on Commonwealth expenditure or revenue, it is notable that it does have provision (item 3) for the payment of compensation if its operation does result in the acquisition of property other than on just terms.¹⁸ There is no information provided as to whether any acquisition is likely to occur, and if so, what the value of such property might be.

Main provisions

Item 1 of the Bill adds subsections 152AL(9) to (14) after existing subsection 152AL(8).

The proposed amendments provide that the following are not and never were 'legislative instruments' for the purposes of the Legislative Instruments Act:

- an existing access declaration under section 152AL: **proposed subsection 152AL(9)**
- a variation of an existing access declaration: **proposed subsection 152AL(10)**
- a revocation of a declaration: **proposed subsection 152AL(11)**
- a declaration which was made and ceased before the commencement of the proposed amendments: **proposed paragraphs 152AL(12)(a), (b) and (c)**
- a variation or revocation of a declaration made before the commencement of the proposed amendments: **proposed paragraph 152AL(12)(d)**

Item 2 of the Bill adds subsections 152ALA(10) to (13) after existing subsection 152ALA(9).

Proposed subsection 152ALA(10) provides that a notice extending an expiry date issued in accordance with subsection 152ALA(4) is not and never has been a 'legislative instrument' for the purposes of the Legislative Instruments Act:

Where, before the commencement of the proposed amendments

- an access declaration was made and
- a notice extending the expiry date of an access declaration was published and
- the access declaration ceased to be in force

18. Explanatory Memorandum, p. 2.

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then, according to **proposed subsection 152ALA(11)**, the notice is taken to never have been a legislative instrument.

Item 3 inserts **proposed section 152AQC** at the end of Division 2 of Part XIC of the TPA.

Under **proposed subsection 152AQC(1)**, if the operation of any of the proposed amendments in items 1 and 2 result in an acquisition of property from a person otherwise than on ‘just terms’, then the Commonwealth is liable to pay a reasonable amount of compensation to the person. In circumstances where the parties are unable to agree on the amount of compensation, **proposed subsection 152AQC(2)** provides that the person from whom the property has been acquired may take action against the Commonwealth in the Federal Court.

Proposed subsection 152AQC(3) inserts definitions of the terms ‘acquisition of property’ and ‘just terms’ so that they have the same meaning as in paragraph 51(xxxi) of the Constitution.

About acquisition of property on just terms

There is, entrenched in section 51(xxxi) of the Constitution, a guarantee which stipulates that property acquired by the Commonwealth Government must be acquired ‘on just terms’.

In *Grace Bros Pty Ltd v Commonwealth*¹⁹, Dixon J said that the inquiry about ‘just terms’ should not just be directed to the question of whether the individual owner is placed in a situation in which in all respects he will be as well off as if the acquisition had not taken place.

The inquiry must rather be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country. I say “the individual” because what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual.²⁰

Quick and Garran²¹ have remarked that it was legitimate to take into account any offsetting benefits the owner realised as a result of the scheme involving the expropriation,

19. (1946) 72 CLR 269

20. [*Grace Bros Pty Ltd v Commonwealth*](#) (1946) 72 CLR 269 at 290.

21. J. Quick and R. Garran, *The annotated constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, p. 641.

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but in some cases the High Court has taken a view more favourable to the property owner. For example in *Georgiadis*, Brennan J stated:

In determining the issue of just terms, the court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it is shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.²²

Proposed subsection 152AQC(1) refers to an acquisition otherwise than on just terms in the context of section 51(xxxi) of the Constitution but then provides that the Commonwealth is liable to pay a 'reasonable amount of compensation'. It should be noted that this subsection:

- does not specifically apply paragraph 51(xxxi) Constitution to the acquisition
- does not require 'just terms'
- provides that the Commonwealth is liable to pay a 'reasonable amount of compensation', as distinct from 'just terms'.

It should be noted, however, that use of such a provision is commonplace, for example, section 519 of the *Environment Protection and Biodiversity Conservation Act 1999* and in section 60 of the *Northern Territory Emergency Response Act 2007*.

22. [*Georgiadis v Australian and Overseas Telecommunications Corporation*](#) [1994] HCA 6; (1994) 179 CLR 297 at 310–1.

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