

1971

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

RESTRICTIVE TRADE PRACTICES BILL 1971

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Foreign
Affairs, the Hon. N.H. Bowen Q.C.).

RESTRICTIVE TRADE PRACTICES BILL 1971EXPLANATORY MEMORANDUM.

The purpose of the Bill is to overcome the constitutional defects that have been found by the High Court to exist in the Trade Practices Act 1965-1971 ('the existing Act').

2. The Bill provides for the repeal of the existing Act and for the re-enactment of similar provisions on a different constitutional basis. Some changes have been made in provisions concerning the manner of fixing the remuneration and certain related matters for the statutory office holders. Some other changes that were made by the Senate are mentioned below. Apart from these matters and some minor drafting changes, the Bill differs from the existing Act only to the extent that is necessary to remedy the constitutional defects, and to include appropriate transitional provisions mentioned below.

Constitutional Foundation

3. The new provisions, other than the overseas cargo shipping provisions in Part XIII and the provisions inserted by the Senate, are founded exclusively on the power to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (Constitution s.51(xx)). The relationship to that power is provided for in a number of particular provisions such as those defining the agreements and practices to be covered. In consequence, the Bill does not contain provisions corresponding to the following provisions in the existing Act:

- . s.7 - constitutional operation of the Act,
- . s.7A - operation by virtue of reference of power by Tasmania,
- . s.8 - complementary legislation by States, and

- s.66A - constitutional operation of resale price maintenance provisions.

The overseas cargo shipping provisions in Part XIII are founded, as in the existing Act, on the power to make laws with respect to 'trade and commerce with other countries, and among the States' (Constitution s.51(i)).

Differences between the Bill and
the Trade Practices Act 1965-1971

- 4. The differences between the provisions of the Bill and those of the existing Act, other than differences of a purely drafting nature, are as indicated below.

PART I - PRELIMINARY

Clause 1 - Short Title.

- 5. The short title is to be the Restrictive Trade Practices Act 1971.

Clause 2 - Commencement.

- 6. The new provisions are to come into operation on a date to be proclaimed. This has regard to the need for regulations to be made.

Clause 3 - Parts of the Bill.

- 7. Parts I-III and V-XIV of the Bill correspond to Parts I, II, III, IV, V, VI, VIA, VII, VIII, IX, X, XI, and XII of the existing Act. Part IV was inserted by the Senate. Part XV contains the transitional provisions. Part XVI corresponds to Part XIII of the existing Act.

Clause 4 - Repeal.

- 8. Clause 4 provides for the repeal of the existing Act.

Clause 5 - Definitions.

9. In addition to definitions corresponding to those in s.5 of the existing Act, the words 'corporation' and 'person' are defined for the purposes of the new provisions. A corporation is defined in the terms of the corporations referred to in s.51(xx) of the Constitution, and a person is defined to include a body corporate as well as a natural person.

PART II - CONSTITUTION OF THE TRADE
PRACTICES TRIBUNALClause 8 - Qualifications of members.

10. Only Federal judges or persons of like status, and not barristers and solicitors of five years' standing as under the existing Act, are eligible for appointment as presidential members of the Tribunal. As amended, the clause will accord with what has always been the practice with respect to the appointment of presidential members.

Clause 10 - Remuneration and allowances.

11. The remuneration and allowances of members of the Tribunal are specified rather than being left to be prescribed by regulation as before. The rates specified are the same as those prescribed under the existing Act. There is no provision corresponding to section 12 of the existing Act which relates to the rights of a public servant appointed to the Tribunal. There is no need for such a provision.

Clause 13 - Suspension and removal of members.

12. Clause 13(7.) provides for a presidential member to cease to hold office if he ceases to be a judge or a person of like status. This provision follows from the amendment to clause 8.

PART III - THE COMMISSIONER, THE REGISTRAR
OF THE TRIBUNAL AND OTHER OFFICERS

Clause 24 - Remuneration and allowances.

13. The remuneration and annual allowance of the Commissioner is specified rather than being left to be prescribed by regulation as before. The rates specified are the same as those prescribed under the existing Act.

PART IV - PREDATORY PRICING
AND MONOPOLIZATION.

14. This Part contains offence provisions relating to predatory pricing and monopolization. These provisions were inserted by the Senate and are unacceptable to the Government.

PART V - EXAMINABLE AGREEMENTS AND
PRACTICES.

Clause 37 - Examined Agreements.

15. An examinable agreement is defined in similar terms to s.35 of the existing Act except that -

- . there is an additional requirement that the parties to the agreement carrying on competitive businesses must include at least one corporation, and
- . a restriction of one of the specified kinds must be accepted by such a corporation instead of by any party to the agreement.

There is no provision corresponding to s.35(4.) of the existing Act (agreements made before the commencement of the Act not examinable agreements until thirty days after that date).

Clause 38 - Examinable Practices.

16. The practices of obtaining discrimination in terms of dealing, forcing another person's product and inducing a refusal to deal are defined, in paragraphs (a) and (c), (d) and (e), and (f) (g) and (h), respectively, of clause 38(1.), in substantially the same terms as in s.36(1.) of the existing Act, except that -

- . the practices are limited to conduct engaged in by a corporation, and conduct engaged in by a person in relation to a corporation, and
- . the Senate has deleted the words 'by any express or implied threat or promise' that followed the word 'person' in line 3 of paragraph (a) of clause 38(1.).

In addition, the Senate has inserted paragraph (b) in clause 38(1.). This makes discriminatory dealing by a supplier an examinable practice. Clause 38(1.) (b) and the amendment to clause 38(1.) (a) are not acceptable to the Government.

Clause 39 - Monopolization

17. The examinable practice of monopolization is defined in similar terms to those in s.37 of the existing Act, except that it is limited to conduct on the part of a corporation. For the purpose of ascertaining whether a corporation is in a dominant position in the trade in goods or services of a particular description, regard may be had to the market share of a combination of which the corporation is a member (sub-clause (5.)). A 'combination' is defined for this purpose in clause 41 in similar terms to those in s.37(4.) of the existing Act.

PART VI - REGISTRATION OF CERTAIN
AGREEMENTS

Clause 44 - Particulars to be furnished of certain agreements.

18. Particulars of an agreement that becomes subject to registration (clause 43), and of a variation or determination of such an agreement, are to be furnished for registration, as under the existing Act, within thirty days after the agreement becomes subject to registration or the variation or determination occurs.

Clause 45 - Failure to furnish particulars an offence.

19. While any party to an agreement may furnish particulars of that agreement for registration under clause 44, failure to furnish particulars of an agreement as required is an offence on the part only of corporations that are parties to the agreement.

PART VII - EXAMINATION OF AGREEMENTS
AND PRACTICES BY THE TRIBUNAL

Clause 53 - Effect of Determinations.

20. Where a restriction under an examinable agreement is determined by the Tribunal to be contrary to the public interest, the restriction become unenforceable on the part of or against a corporation, rather than unenforceable generally as under the existing Act.

Clause 54 - Orders in consequence of determinations.

21. Where the Tribunal determines a restriction under an examinable agreement to be contrary to the public interest, the Tribunal's power to make consequential restraining orders is limited to orders binding such of the parties to the agreements as are corporations or corporations acting on

behalf of trade associations connected with the agreement (sub-clauses (1.) and (3.)). In the case of an agreement providing for an examinable practice, the Tribunal's existing power to restrain any party to such an agreement from entering into similar agreements is to be limited so as to be exercisable only against a party engaging in the practice (sub-clause (4.)).

Clause 59 - Duration and operation of orders.

22. Where a trade association is a party to proceedings, the Tribunal's power to make orders binding on persons acting on behalf of that trade association is limited to orders binding corporations (sub-clause (4.)).

Clause 60 - Further consideration by Tribunal of determinations and orders upon change of circumstances.

23. The Tribunal's power, upon a change of circumstances, to substitute new determinations and orders or to vary existing ones is expressly limited to the making of orders and determinations of a kind that could be made in the original proceedings (sub-clause (8.)).

PART VIII - RESALE PRICE MAINTENANCE.

Clause 68 - Definition of resale price maintenance.

24. The practice of resale price maintenance is defined in substantially the same terms as in s.66B of the existing Act, except that it is limited to -

- conduct on the part of a corporation (sub-clauses (1.) and (2.)), and
- conduct on the part of a person, other than a corporation, engaged in in relation to a corporation (sub-clauses (1.) and (3.)).

Clause 71 - Statements as to the minimum price of goods.

25. Under this provision, which is substantially the same as s.66E of the existing Act, a supplier is permitted to continue to supply goods marked with a minimum resale price where the goods were so marked before a specified date and are supplied within twelve months from that date. The date specified is 9 August 1971, the date on which Part VIA of the existing Act came into operation (sub-clause (3.)).

Parts IX and X - Enforcement of Orders of the Tribunal - Provisions Relating to the Tribunal.

26. These Parts are substantially the same as Parts VII and VIII of the existing Act.

Part XI - Collusive Tendering and Collusive Bidding.

Clause 98 - Collusive tendering

27. Collusive tendering is an offence only if engaged in by a corporation (sub-clause (2.)).

Clause 99 - Collusive bidding.

28. Collusive bidding is an offence only if engaged in by a corporation (sub-clause (2.)).

Part XII - Civil Remedies.

29. This Part is substantially the same as Part X of the existing Act.

Part XIII - Overseas Cargo Shipping.

30. This Part is substantially the same as Part XA of the existing Act, except that there is no provision corresponding to s.90C(3.) (agreements made before the commencement of the existing Act not to become conference agreements until thirty days after that date). Particulars of a conference agreement that becomes subject to filing (clause 112), and of a variation or determination of such an agreement, are to be furnished for filing, as under the existing Act, within thirty days after the agreement becomes subject to filing or the variation or determination occurs.

Part XIV - Interpretative Provisions.

31. This Part is substantially the same as Part XI of the existing Act.

Part XV - Transitional ProvisionsClause 146 - s.8 of the Acts Interpretation Act.

32. The transitional provisions are not to affect the operation of s.8 of the Acts Interpretation Act in relation to the repeal of the existing Act. That section operates to preserve rights, liabilities and legal proceedings that are acquired, accrue or are commenced under an Act before it is repealed.

Clause 147 - Continuation of certain appointments.

33. Persons appointed to offices under the existing Act are deemed to have been appointed to the corresponding offices under the new provisions (sub-clause (1.)). The offices in question are those of members of the Trade Practices Tribunal (clause 7), the Commissioner of Trade Practices (clause 22), the Registrar of the Trade Practices Tribunal (clause 33) and the Clerk of Shipping Agreements (clause 111). Members of the Trade Practices Tribunal and the Commissioner of Trade Practices appointed under the existing Act are not required to take another oath of office (sub-clause (2.)). The rights of the Commissioner of Trade Practices under the Officers' Rights Declaration Act are preserved (sub-clause (3.)). The provision of the Public Service Act conferring on the Commissioner of Trade Practices under the existing Act certain powers of a Permanent Head in relation to his staff is amended to refer to the Commissioner of Trade Practices under the new provisions (sub-clause (4.)).

Clause 148 - Secrecy Provisions.

34. The secrecy provisions governing the Commissioner of Trade Practices and his staff apply to information and documents obtained by them under the existing Act as well as under the new provisions.

Clause 149 - The Register of Trade Agreements.

35. So much of the Register kept under the existing Act as consists of particulars of agreements that would have been examinable under the new provisions, if those provisions had been in force at the relevant time, is deemed to form part of the Register kept under the new provisions.

Clause 150 - Commissioner may retain certain documents

36. The Commissioner of Trade Practices is authorized to retain certain documents supplied to him under the existing Act if those documents are referable to one of the bases of constitutional power referred to in ss. 7 and 7A of the existing Act.

Clause 151 - Certain particulars not required to be furnished.

37. Particulars of an agreement that have been furnished for registration under the existing Act do not have to be furnished again under the new provisions. The new provisions apply to such particulars, to the extent that they would have been required to be furnished if the new provisions had been in force at the relevant time, as if the particulars had been furnished under the new provisions.

Clause 152 - Registration of agreements continued.

38. Agreements registered under the existing Act are deemed, to the extent that they would have been subject to registration if the new provisions had been in operation at the relevant time, to have been registered under the new provisions.

Clause 153 - Certain undertaking continued.

39. The undertaking given to the Trade Practices Tribunal by Tasmanian Breweries Pty. Ltd. in proceedings under the existing Act has effect as if it had been given under the new provisions.

Clause 154 - Frozen Vegetables Case.

40. The determination and order of the Trade Practices Tribunal in proceedings between the Commissioner of Trade Practices and several processors of frozen vegetables have effect, except so far as they apply to a person not being a corporation, as if they had been made under the new provisions.

Clause 155 - Certain proceedings continued.

41. Proceedings instituted by the Commissioner of Trade Practices under the existing Act against certain pharmaceutical wholesalers have effect as if they had been instituted under the new provisions.

Clause 156 - Proceedings for exemption continued.

42. An application made by A.H. & A.W. Reed Pty. Limited for exemption under the resale price maintenance provisions of the existing Act has effect as if it had been made under the new provisions.

Clause 157 - Shipping - Certain notices continued.

43. Notices served by the Minister on shipowners under the existing Act requiring them to be represented in Australia by an agent and to have an address for service are deemed to have been served under the new provisions. Appointments of agents made, and addresses notified, in response to such notices are deemed to have been made and notified under the new provisions.

Clause 158 - Shipping - Particulars of agreements continued.

44. Particulars of a conference agreement that have been furnished for filing under the existing Act do not have to be furnished again under the new provisions, and the particulars are treated as if they had been furnished under the new provisions.

Clause 159 - Shipping - Repository of documents continued.

45. Particulars of conference agreements filed in the repository of documents kept by the Clerk of Shipping Agreements under the existing Act are deemed to have been so filed under the new provisions.

Clause 160 - Shipping - Secrecy.

46. The secrecy provisions governing the Clerk of Shipping Agreements and his staff cover information and documents obtained by them under the existing Act as well as under the new provisions.

Clause 161 - Shipping - Undertakings continued.

47. Notices served by the Minister on shipowners under the existing Act requiring them to undertake to negotiate with shipper bodies in certain circumstances, and undertakings given by shipowners in response to such notices, are deemed to have been served and given under the new provisions.

PART XVI - MISCELLANEOUS

Clause 171 - Certain agreements and practices not subject to new provisions.

48. Agreements and practices of certain bodies that are exempted from the operation of the existing Act by regulations under s.106(2.) of that Act are exempted from the operation of the new provisions unless and until these exemptions are ended by regulation.