

1976

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT BILL 1976

EXPLANATORY MEMORANDUM

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

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This Bill seeks to amend the Trade Practices Act 1974-1975 in the following significant respects -

- to give the Industrial Court jurisdiction to make declaratory judgments and issue prerogative writs in the nature of prohibition, certiorari and mandamus in matters arising under the Act (clause 15)
- to make it clear that State and Federal Governments may make submissions to the Trade Practices Commission on matters of public interest involved in particular authorization applications (clauses 3(b), 3(c), 5, 10(a) and 12)
- to delete all provisions of the Act providing an interlock with the Companies (Foreign Take-overs) Act 1972-1974 (clauses 9, 10(b)-(d) and 11)
- to delete all references in the Act to "the Superior Court of Australia" (clauses 3(a), 6(1), 8 and 17)
- to delete, except in sections 34, 35, 44 and 170 all references in the Act to "the Attorney-General" and substitute "the Minister" (clause 18 and Schedule)
- to amend paragraph 51(2)(g) of the Act to expand that exception to cover the making, or entering into, of an agreement relating exclusively to exports (clauses 7 and 16).

Expanded powers of the Industrial Court

2. The Industrial Court is to be empowered to make declaratory judgments and issue prerogative writs in the nature of prohibition, certiorari and mandamus in matters arising under

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the Trade Practices Act, other than matters arising under Part V Division 2 (clause 15, new section 163A). These powers must be exercised in accordance with the judicial power of the Commonwealth provided by Chapter III of the Constitution.

3. The Minister, but not the Trade Practices Commission, may institute a proceeding in the Industrial Court seeking such a declaratory judgment or prerogative writ (clause 15, new sub-sections 163A(2) and 163A(3)). The Minister may also intervene as of right in proceedings seeking such a declaratory judgment or prerogative writ commenced in the Industrial Court or any other court (clause 15, new sub-section 163A(2)). The Trade Practices Commission can intervene as of right in such proceedings in the Industrial Court whenever they relate to matters that have been, or could have been, the subject of an application for clearance under the Act (clause 15, new sub-section 163A(3)).

4. Proceedings in the Industrial Court seeking a declaratory judgment or prerogative writ under new section 163A, in relation to the Trade Practices Tribunal, must be before not less than three Judges (clause 15, new sub-section 163A(4)). The Act already provides that the presidential members of the Tribunal shall be, or have the status of, a Judge of a Federal Court (section 31), that the President of the Tribunal shall be equivalent to the Chief Judge of the Industrial Court (section 33), and that the Tribunal when hearing a particular matter shall be constituted by (inter alia) one presidential member (section 37).

Government submissions

5. There are presently technical doubts as to whether Governments have standing to make submissions to the Trade Practices Commission, or the Trade Practices Tribunal, in respect of particular applications for authorization under consideration by those bodies. Such doubts arise from the inter-relationship of the definition of "person" in sub-section 4(1) of the Act and the definition of "person" in sub-section 22(a) of the Acts Interpretation Act 1901-1973. Clauses 3(b), 3(c), 5, 10(a) and 12 of the Bill seek to remove these doubts.

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Interlock with Companies (Foreign Take-overs) Act 1972-1974

6. Sub-sections 89(7) and 90(10)-(14) of the Act currently provide for consideration of a foreign merger under the Companies (Foreign Take-overs) Act 1972-1974 to take precedence over any consideration that may arise by way of an application for authorization under the Trade Practices Act. These provisions are abolished by clauses 9, 10(b)-(d) and 11 of the Bill. The Companies (Foreign Take-overs) Act 1972-1974 ceased to operate on 31 December 1975. That Act was replaced by the Foreign Takeovers Act 1975, which came into operation on 1 January 1976. There is no similar express statutory relationship between the Trade Practices Act and the Foreign Takeovers Act.

References to "the Superior Court of Australia"

7. The Trade Practices Act currently refers to "the Superior Court of Australia" in sub-section 4(1), and sections 76 and 169. That court was never created and in fact the relevant jurisdiction under the Trade Practices Act has always been exercised by the Australian Industrial Court, pursuant to section 169(2) of the Act. That fact is expressly recognized in clause 2 of the Bill, which makes it clear that the Industrial Court has, since the Trade Practices Act came into operation on 1 October 1974, been vested with this jurisdiction.

References to "the Attorney-General"

8. The present administrative arrangements of the Government provide for the Minister for Business and Consumer Affairs to administer the Trade Practices Act 1974-1975, except for Part X and sections 150 to 154 inclusive which are administered by the Minister for Transport. Present express references in the Act to "the Attorney-General" are deleted to accord with these arrangements. However the Attorney-General will continue to have certain responsibilities in relation to appointments to the Trade Practices Tribunal and for the provision of legal aid under the Act; accordingly references to "the Attorney-General" in sections 34, 35, 44 and 170 of the Act remain unaltered.

Exception for export agreements

9. Paragraph 51(2)(g) of the Act presently provides an exception from most of the prohibitions of restrictive trade practices, for agreements relating exclusively to exports. This exception covers conduct (otherwise prohibited) done in pursuance of such an agreement, but omitted the conduct of making the agreement itself. Making such an agreement could be prohibited by paragraph 45(2)(a) of the Act. Clause 7 of the Bill extends the scope of the exception to the making of the agreement. For the exception to operate, particulars of the agreement must be furnished to the Trade Practices Commission within seven days.