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TRADE PRACTICES AMENDMENT BILL 1977

(As introduced May 1977)

EXPLANATORY MEMORANDUM

The Trade Practices Amendment Bill 1977 was first introduced into the House of Representatives on 8 December 1976, with the intention that it be available to the public for study and comment. That Bill lapsed upon prorogation of the Parliament in February 1977.

2. The present Trade Practices Amendment Bill 1977 alters the previous Bill to take account of the decisions of the Government following the submissions made to it on the previous Bill.

RESTRICTIVE TRADE PRACTICES AND MERGERS

3. Clause 23 substitutes new provisions for the existing section 45 (contracts, arrangements and understandings in restraint of trade), section 46 (monopolization) and section 47 (exclusive dealing). Existing section 49 (price discrimination) is retained. Clause 25 substitutes new provisions for the existing section 50 (mergers).

4. Wherever effect upon competition is an element of the contravention, a single test--"substantially lessening competition"-- is now used. Related companies are treated as a single unit for all purposes. A "market" for goods or services has been defined to include substitutable or competitive goods or services (new section 4E, clause 6).

Contracts, arrangements or understandings affecting competition

5. The new section 45 prohibits contracts, arrangements or understandings which have the purpose or effect of substantially lessening competition in a market. "Contract" for this purpose includes commercial leases and licences of land (new section 4H, clause 6). The expression "restraint of trade", which is used in the present section 45, has been omitted. For the purposes of the new section, effects on competition are tested by reference to a market for goods or services, in contrast with the present section which tests such effects solely by reference to the parties.

6. Price-fixing - Contracts, arrangements or understandings between competitors having the purpose or effect of fixing, controlling or maintaining the price of goods or services are deemed to have the purpose or effect of substantially lessening competition in a market (new section 45A).

Subject to the availability of authorization in some classes of case and the exceptions listed in the next paragraphs, price-fixing between competitors is thereby absolutely prohibited. Included within the prohibition are agreements between a number of competitive suppliers whereby it is agreed that specific resale prices will be recommended by each of them to resellers of their products (new section 45A(7)).

7. The absolute prohibition of price-fixing does not apply to -

. agreements between the parties to a joint

venture relating to the selling price of joint venture goods or services (new section 45A(2)),

- . price recommendation agreements, having 50 or more parties, relating to the supply or acquisition of goods or services (new section 45A(3)),
- . agreements on the price to be paid by a collective buying group (new section 45A(4)(a)), or
- . agreements relating to the price at which the members of such a buying group will jointly advertise the goods on resale (new section 45A(4)(b)).

8. Covenants affecting competition - The High Court has recently made it clear (in the case of Quadramain v. Sevastapol) that the existing section 45 does not cover all anti-competitive covenants running with an interest in land. New section 45B now makes specific provision for restrictive covenants which have the purpose or effect of substantially lessening competition. There is, however, specific exemption for covenants protecting residential interests (new section 45B(8)(a)) and for covenants for the purposes of religious, charitable or public benevolent institutions (new section 45B(8)(b),(c)). New section 45C prevents restrictive covenants from being used for the purpose of fixing, controlling, or maintaining prices.

9. Common law and severance - To the extent that the common law doctrine of restraint of trade and the principles relating to the severance of restrictive provisions from such contracts are not displaced by the

prohibitions and remedies in the Trade Practices Act, it is intended that they should continue in operation. Further, the operation of the Act is not to affect any legal or equitable obligation to respect a confidence. New sections 4L and 4M (clause 6) deal with these matters.

Boycotts

10. The Bill contains special provisions for the prohibition of collective boycotts. Collective primary boycotts (where the boycott seeks to restrict the dealings of the parties with the target person) are prohibited as "exclusionary provisions" (defined in new section 4D (clause 6)) - new section 45(2)(a)(i) and 45(2)(b)(i). Collective secondary boycotts (where the boycott seeks to restrict the dealings of persons, other than the parties, with the target person) are prohibited where they have or are likely to have a prescribed effect - new section 45D.

11. Special exemptions have been provided to avoid the application of the boycott provisions to matters of remuneration, conditions of employment, termination of employment, hours of work or working conditions of employees, or to concerted action by consumers - see new section 4(1)(clause 5(m), the definition of "services" which excludes the performance of work under a contract of service), new section 45D(3)(clause 23), new section 51(2)(a) and new section 51(2A)(clause 26).

12. Where prohibited secondary boycott conduct is engaged in by members or officers of an employee organisation, special provisions apply in relation to enforcement and remedies. The organisation is to be liable for damages in the place of its members or officers unless it takes all reasonable steps to prevent the prohibited conduct (new

section 45D(5) and (6), clause 23). In any event, pecuniary penalties are not to be imposed on individuals engaging in secondary boycott conduct (new section 76(2), clause 44).

Monopolization

13. The amended sub-sections 46(1) and (4) make it clear that a corporation which substantially controls a market (either as buyer or seller) engages in monopolization only if its purpose is to bring about the prohibited results of eliminating a competitor, preventing the entry of a new enterprise, or deterring competitive conduct. An enterprise is not within the amended section by reason only of the fact that it has invested in plant or equipment (new section 46(5)).

Exclusive Dealing

14. New section 47 covers vertical exclusive dealing practices whereby sellers or buyers deal subject to a condition which restricts the buying or selling decisions of their customers or suppliers. The new section differs from the present section 47 in the following significant respects -

- . it deals with restrictions imposed by buyers on sellers, restrictions which currently fall within the generality of section 45 (new section 47(4)),
- . it omits the present section 47(3),
- . the words in existing section 47(2), "or subject to a contract, arrangement or understanding", have been omitted,
- . the granting, renewal or continuance of commercial leases and licences subject to a condition of exclusive dealing is dealt with specifically (new section 47(8)),
and

- . new sections 47(3), (5), (7) and (9) remove the uncertainty surrounding the application of the present law to refusals to deal for the purpose of achieving exclusive dealing.

Mergers

15. The prohibition contained in new section 50 (clause 25) substantially reduces the categories of mergers to which the Trade Practices Act is to apply. New section 50 only applies to mergers which achieve or strengthen a position of market control or dominance.

CLEARANCE, AUTHORIZATION AND NOTIFICATION OF RESTRICTIVE TRADE PRACTICES AND MERGERS

16. The present provisions for clearance are repealed (clauses 58 and 60). Authorization by the Trade Practices Commission is available for contracts, arrangements, understandings or covenants affecting competition, for boycotts, for exclusive dealing and for mergers (new section 88, clause 52). The Commission does not, however, have power to grant authorization to provisions fixing, controlling or maintaining the price of goods, except for -
- . multi-level agreements incorporating both sellers and buyers (new section 88(2)),
 - . joint venture pricing (new section 88(3)(a)),
 - . price recommendation agreements with not less than 50 parties (new section 88(3)(b)), and

collective buying and advertising groups
(new section 88(4)).

Test for Authorization

17. The test for granting an authorization to contracts, arrangements, understandings or covenants and to exclusive dealing has been simplified (new sections 90(6) and (7), clause 54). For such matters authorization is to be granted if, in all the circumstances, public benefits outweigh anti-competitive detriments.

18. A new authorization test has been provided for boycotts and mergers, consequent upon the changed nature of the prohibition of those matters. That test requires the Trade Practices Commission to be satisfied, in all the circumstances, that the matter results in such a benefit to the public that it should be authorized (new section 90(8) and (9), clause 54).

19. The Minister is given power to direct the Commission to give special consideration to particular matters when determining authorization applications, or public benefit matters arising under the new exclusive dealing procedures (clause 20). The power of the Minister to direct the Commission to grant an authorization to a particular merger application is repealed (clause 54).

Authorization Procedures

20. Public hearings into authorization applications are abolished (clause 17). The Commission is to be required to deal with all authorization applications within four months from receipt of the application but, except in the case of merger applications, this time limit will not come into effect until the Minister so notifies in the Gazette (new section 90(10) and (11), clause 54). All simultaneous

applications for authorization relating to a particular joint venture shall be determined together by the Trade Practices Commission (new section 90(15), clause 54).

Notification Procedure for Exclusive Dealing

21. The Bill provides for a new approach to the administrative adjudication of exclusive dealing (new section 93, clause 58). A corporation which notifies the Commission of exclusive dealing conduct has immunity in relation to that conduct until the Commission issues a notice which has the effect of cancelling that immunity. The Commission may only issue such a notice if it is satisfied that the conduct has the effect of substantially lessening competition and does not result in a benefit to the public, or that any benefit to the public from the conduct would not outweigh the anti-competitive detriments of the conduct (new section 93(3), clause 58).

22. In relation to exclusive dealing conduct, a party may in addition to, or as an alternative to, notification seek authorization for the conduct in the normal way (new section 88(8), clause 52). This will enable an applicant seeking a quick and final decision to take advantage of the time limit to be imposed on the Commission in respect of authorization applications. Where there is both notification and an application for authorization, if the Commission dismisses the application for authorization the immunity given by the notification comes to an end (new section 93(8), clause 58).

Pre-Decision Conferences

23. Before giving a final decision on an application for authorization or giving a notice in respect of an exclusive dealing notification,

the Commission is required to give all interested parties an opportunity to meet a member of the Commission concerned in the matter to discuss the merits of the application (new section 90A, clause 55 and new section 93A, clause 59). The four month time limit for the determination of authorizations will not run during the course of these discussions (new section 90(14), clause 54).

Confidentiality

24. Confidentiality for documents and oral submissions in authorization and notification matters is to be granted as a matter of right for particulars of:-

- . secret formulae or processes,
- . the cash consideration for a merger, and
- . current cost data

(new section 89(5A)(a), clause 53(d)

and new section 95(3)(a), clause 61(1)).

In other cases, where the Commission in its discretion refuses confidentiality, the person who furnished the document or made the oral submission will be entitled to withdraw it (new section 89(5B) and (5C), clause 53(d) and new section 95(4) and (5), clause 61(1)).

Review by the Trade Practices Tribunal

25. The right given by section 101 of the Act to seek a review by the Trade Practices Tribunal of a determination of the Commission in an authorization matter remains. It is now supplemented by a right to seek review of a Commission decision to give a notice under the exclusive dealing notification provisions (new section 101A, clause 63), (new section 102(4), clause 63). In any

review, the Tribunal is to comply with directions given by the Minister to the Commission as to particular matters to be given special consideration when determining public benefit questions (new section 102(3), clause 63).

CONSUMER PROTECTION

Definition of "consumer"

26. The Bill incorporates a new definition of a "consumer" for the purposes of the Act (new section 4B, clause 6). Consumer transactions are those where the price paid for goods or services is less than \$15,000 (or such greater amount as prescribed by regulation) or the goods or services are of a kind ordinarily obtained for personal, domestic or household use. This will have particular application to the warranties implied by Division 2 of Part V into consumer transactions.

Land Transactions

27. The Bill deals specifically with false representations and other misleading or offensive conduct in relation to land (new section 53A, clause 29). Leases and licences of an interest in land are defined as services for the purpose of the Act (see definition of "services", new section 4(1), clause 5(m)).

False or Misleading Conduct

28. The Bill amends sections 52, 53, 54 and 56 so as -

- . to apply section 52 to conduct that is likely to mislead or deceive (clause 27);
- . to apply section 53 to misrepresentations or false or misleading statements

concerning the composition, history or previous use of goods, the price of goods or services and the existence, exclusion or effect of rights or remedies of consumers (clause 28);

to apply section 54 to offers of gifts or prizes where there is no intention of providing them at all (clause 30);

to extend section 56 to require (subject to special defences) that goods or services advertised at a special price be offered for supply for a reasonable period and in reasonable quantities (clause 32).

29. The Bill prohibits conduct liable to mislead the public as to the nature, the characteristics, the suitability for purpose or the quantity of services (new section 55A, clause 31). A similar prohibition in relation to goods, is already contained in section 55.

30. Section 59 is extended to prohibit misleading statements concerning the profitability, risk and other material aspects of business activities requiring investment of moneys and performance of work associated with the investment (clause 33).

Power to Ban Sale of Unsafe Goods

31. Section 62 is amended to empower the Minister, by notice published in the Gazette, to prohibit for up to 18 months the supply of specified unsafe goods (clause 34).

Goods for Export

32. Goods intended for export are excluded from any consumer product standards and prohibitions of unsafe goods

(new section 62(2AA), clause 34 and new section 63(2AA), clause 35). Goods are presumed to be intended for export if they bear appropriate marking (new section 62(2A), clause 34 and new section 63(2A), clause 35).

Unsolicited Services

33. Asserting a right to payment for unsolicited services is prohibited unless there is reasonable cause to believe that there is a right to payment (new section 64(2A), clause 37). This is similar to the present prohibition, in section 64, in relation to unsolicited goods.

Contracts by way of Competitive Tender

34. The Bill removes from the provisions which imply conditions and warranties into consumer transactions the exception for contracts by way of competitive tender (clauses 38, 39, 40 and 41(1)(a) and (2)).

Warranties relating to Transport Services

35. The statutory warranties provided by section 74 in respect of the transportation of goods are to be limited to transportation otherwise than for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported (new section 74(3)(c), clause 41(1)(c)).

Rescission of Contracts for Breach of Condition

36. Consumers are afforded the right to terminate contracts for breach of any of the conditions implied by Division 2 of Part V of the Act even though property in the goods may have passed to the consumer (new section 75A, clause 42).

ENFORCEMENT AND REMEDIES

37. Section 76 is amended to prevent pecuniary penalties being imposed on natural persons involved in a contravention of section 45D (collective secondary boycotts) - new section 76(2), clause 44.

38. Section 79 is amended to remove the penalty of imprisonment for consumer protection offences, and to limit potential penal liability for substantially similar contraventions occurring at or about the same time (clause 45).

39. Section 80 is amended to allow the Court to grant an injunction restraining a person from engaging in prohibited conduct whether or not it appears that the person intends to repeat or continue the conduct or that there is an imminent danger of substantial damage from the conduct (new section 80(4) and (5), clause 46).

40. The Court shall not require, as a condition of granting an interim injunction, that the Minister or the Commission give an undertaking as to damages (new section 80(6), clause 46). The Court is to accept an undertaking as to damages or costs by the Minister on behalf of a private applicant (new sections 80(7), clause 46).

41. The Court is empowered to make orders for affirmative disclosure or corrective advertising in the event of a contravention of the consumer protection provisions of Part V. There is a limitation of \$50,000 on the amount of affirmative disclosure or corrective advertising which may be ordered in relation to any one contravention or any substantially related contraventions (new section 80A, clause 47).

42. Special rules are provided for the remedies of injunction and divestiture in relation to contraventions of the merger provisions. Only the Minister or the Commission may seek the remedy of injunction in such cases (new section 80(1A), clause 46). The Minister, Commission or any other person may apply for an order for divestiture, but must apply within 3 years of the date of the merger (new section 81, clause 48).

43. Section 85(1), which provides that reasonable conduct may be a defence to a consumer protection prosecution, is restructured into separate defences of reasonable mistake, reasonable reliance on information supplied by another person, and default of another person which could not reasonably have been prevented (clause 49).

44. The provisions for ancillary orders in section 87 have been extended to provide for orders to repair goods or supply other specified services (new section 87(2)(e) and (f), clause 50). Section 87 orders in consumer protection matters need not be ancillary to other orders (new section 87(1A), clause 50). The orders under section 87 are, for constitutional reasons, restricted to orders compensating parties to the proceedings only.

Evidence

45. Provision is to be made in the Evidence Act 1905 for facilitating the admission of business records as evidence in proceedings in Commonwealth Courts.

GOVERNMENT COMMERCIAL ACTIVITIES

46. The Bill provides for the Trade Practices Act (other than Part X - shipping) to apply to business undertakings of the Commonwealth Government and its authorities (new section 2A, clause 4). The business of developing and disposing of land in the A.C.T. is specifically exempted (new section 2A(4), clause 4). Regulations may be made to provide for further exemptions (new section 172(2)(c), clause 78).

TRADE PRACTICES COMMISSION

47. The Trade Practices Commission is to be incorporated, particularly in order to remove procedural difficulties in legal proceedings. The Commission may now be sued in its corporate capacity (new section 6A, clause 8).

48. The procedure for appointing part-time members of the Commission has been altered. A person may now be appointed to the Trade Practices Commission as a full time member or as an "associate member". Associate members are to be used part-time as members of the Commission for particular matters (except the annual report), at the direction of the Chairman. The Chairman is to be required to consider whether he should appoint an associate member to the Commission for the purposes of each Commission determination of an authorization application or exclusive dealing notification (new section 8A, clause 10).

TRANSITIONAL PROVISIONS

49. The transitional provisions preserve the full operation of authorizations in force at the commencement of the amended Act (clause 52(3)). Clearances granted under the present Act for contracts, arrangements or understandings in restraint of trade to which new section 45 would apply, or covenants to which new section 45(B) would apply, are deemed to be authorizations granted under the amended Act (clause 52(4)). Authorization applications not finally determined by the Commission are treated as fresh applications under the amended Act (clause 52(2)). Authorization determinations which are the subject of an application for review by the Tribunal, at the commencement of the amended Act, continue before the Tribunal, but the Tribunal is required to consider the review on the basis of the Act as amended (clause 52(2)).

50. Following the abolition of clearances for exclusive dealing, new section 93(7) allows a period of three months for the lodgement of exclusive dealing notifications (clause 58).

51. As already noted in paragraph 9 of this memorandum, the Amendment Bill expressly provides for the application of the common law rules of severability. Clause 80 makes it clear that these rules were not previously generally displaced by the Trade Practices Act 1974.