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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT BILL 1978

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Business and
Consumer Affairs, the Honourable W.C. Fife, M.P.)

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

- to amend the absolute prohibition of price-fixing to extend retrospectively the existing exception relating to joint venture pricing of services to correspond more closely to the existing exception relating to joint venture pricing of goods (clause 8);
- to provide a specific prohibition of false or misleading job advertisements (clause 11);
- to provide for actions against manufacturers and importers of goods, with respect to certain statutory obligations (clause 14).

2. The Bill also seeks to make a number of more minor amendments.

RESTRICTIVE TRADE PRACTICES

Exclusionary Provisions

3. A more restricted definition of an exclusionary provision (sections 4D and 45) is provided by limiting to those goods or services which are the subject of the

provision the question of when parties are competitive with each other. A provision is an exclusionary provision only if two or more of the parties are competitive with each other in relation to goods or services. It will now not be an exclusionary provision by reason only that parties are competitive with each other in relation to goods or services unrelated to the subject matter of the provision (clause 4).

Joint Ventures

4. The absolute prohibition of price-fixing (section 45A) is amended to extend the existing exception of joint ventures for the supply of services to correspond more closely with the existing exception of joint ventures relating to goods. The absolute prohibition of price-fixing will not apply to agreements relating to the price at which joint venture parties supply, in proportion to their respective interests in the joint venture, services made available as a result of the joint venture. This amendment will be retrospective to 1 July, 1977 - the date of the commencement of the Trade Practices Amendment Act 1977 (clause 8).

Forcing Another Supplier's Products

5. Clause 9 removes the existing distinction in relation to the practice of forcing another supplier's products (section 47), between the products of a corporation that is related to the original supplier and those of a corporation that is not so related.

CLEARANCE, AUTHORISATION AND NOTIFICATION PROCEDURES

6. Clause 16 provides for the reference to persons in competition with each other, where used in section 88(2), to have the same meaning as is now given to the reference in existing sections 45A and 45C.

7. The authorization test for those forms of exclusive dealing conduct which are not tested by reference to their anti-competitive purpose or effect is to be the same as is now provided for other conduct which is also not tested by reference to competition (section 90). In the authorization determination in such cases, the benefits to the public of the conduct are not weighed against anti-competitive detriments (clause 17).

8. Clause 19 ensures that section 93 (which allows for notification of exclusive dealing, and for the removal of the benefits of notification by a notice from the Trade Practices Commission) applies consistently to conduct whether it has anti-competitive purpose or anti-competitive effect.

9. Some existing references to clearances are removed, consequential upon the repeal of the clearance procedure by the Trade Practices Amendment Act 1977 (clauses 15 and 18).

EXCEPTIONS

10. Clause 20 confirms the continuing validity of Regulations exempting particular conduct of primary industry organisations which were in force immediately before the date of commencement of the Trade Practices Amendment Act

1977 (1 July, 1977), even though the former sections referred to in those Regulations, were repealed by that Act and replaced by new provisions.

TRADE PRACTICES COMMISSION AND TRIBUNAL

11. Section 13 is amended to empower the Minister to consent to a member of the Commission engaging in paid employment outside the duties of his office (clause 6).

12. Clause 7 inserts new section 44A to enable the Minister to make a dormant appointment of a person to act as the Registrar, or as a Deputy Registrar, of the Trade Practices Tribunal (see also clause 3). The appointment would only come into effect upon the absence, or inability to perform his office, of the occupant of the office, or upon a vacancy in the office.

CONSUMER PROTECTION

False Representations and other Misleading or Offensive Conduct in Relation to Land

13. Clause 10 amends section 53A of the Act to clarify the interpretation of that section by removing any implication that it provides an exclusive treatment of the application of Division 1 of Part V of the Act to land transactions.

False Representations in Relation to Employment

14. Clause 11 inserts new section 53B which prohibits a corporation from making materially false or misleading statements in job advertisements.

Product Safety Standards

15. Clause 12 amends section 62 of the Act to extend the consumer product safety standards and unsafe goods provisions to members of the public in addition to users of the goods.

Application of Part V, Division 2, not to be Excluded or Modified

16. Clause 13 amends section 68 of the Act to render void any attempt to exclude, omit or restrict the right to rescission of a contract provided by section 75A of the Act.

Actions by Consumers Against Manufacturers and Importers

17. Clause 14 inserts into Part V of the Act a new Division, 2A, dealing with actions by consumers against manufacturers and importers of goods. The effect of the amendments is to provide for:-

- manufacturers and importers generally to be concurrently liable with the actual seller of the goods in relation to certain statutory obligations;
- the actual seller of the goods to be able to recover damages from the manufacturer where a consumer could have recovered similar damages from the manufacturer.

(a) Additional Operation of the Act

18. Clause 5 extends the additional operation of the Act to the new Division 2A.

(b) Definition

19. "Manufactured" is defined in new section 74A to include grown, extracted, produced, processed and assembled. A corporation will be regarded as having manufactured goods if it allows itself to be held out, or appear, as the manufacturer. Additionally a corporation which imports goods, the manufacturer of which does not have a place of business in Australia, will also be regarded as having manufactured the goods. Goods, for the purposes of this Division, include those affixed to land or premises.

(c) Extent of Liability

20. New sections 74B-74G set out the circumstances in which the manufacturer of goods will be liable to compensate a consumer for loss or damage. Where appropriate, no liability arises if breaches occur after the goods have left the manufacturer as a result of an act or default of a person other than the manufacturer or through a cause independent of human conduct. It is a pre-condition, for the manufacturer to be liable, that he must have supplied the goods in the course of trade or commerce to a person who acquired them for resupply and the goods must have ultimately been acquired by a consumer. Where these conditions exist, the manufacturer will be liable to compensate the consumer for any loss or damage arising from :-

- the goods not being reasonably fit for a purpose made known to the manufacturer (new section 74B); no liability arises if the consumer did not rely, or if it was unreasonable

for him to rely, on the skill or judgment of the manufacturer;

- the goods not corresponding with a description which the manufacturer has applied, or allowed to be applied, to the goods (new section 74C);
- the goods not being of merchantable quality (new section 74D); no liability arises as to defects drawn to the consumer's attention before the making of the contract to supply the goods. If before the contract is made the consumer examines the goods no liability arises as to defects which the examination should have revealed. The extent of liability for merchantable quality is affected by the price of, or any description applied to, the goods by the manufacturer as well as all other relevant circumstances;
- the goods not corresponding with a sample supplied by the manufacturer (new section 74E); no liability arises if the sample is supplied without the agreement of the manufacturer;
- the manufacturer's unreasonable failure to ensure that facilities for the repair of the goods, or a spare part, are available to the consumer (new section 74F); (provision is made for a manufacturer to limit his liability in relation

to the availability of repair facilities and spare parts);

- the manufacturer's failure to comply with an express warranty made by him in relation to the goods (new section 74G).

(d) Right of Seller to Recover Against Manufacturer

21. New section 74H provides that where the manufacturer of the goods and the seller of the goods are each liable under the Act to the consumer for the same loss or damage, the seller can recover from the manufacturer an amount which is sufficient to indemnify him in respect of his liability to the consumer.

(e) Time for Commencing Actions

22. New section 74J sets out the time limits for the commencement of actions under new Division 2A. In the case of an action under new section 74H proceedings must commence within six years of the cause of action accruing. In all other actions under new Division 2A, proceedings must be commenced within three years.

(f) Application of Division not to be Excluded or Modified Except as Provided

23. New section 74K renders void any exclusion, restriction or modification by contract of the application of new Division 2A. However, new section 74L provides an exception to that rule where the manufacturer limits his liability to

indemnify the seller under new section 74H in respect of goods of a kind not ordinarily acquired for personal, domestic or household use or consumption. In that case a term of a contract is not void by reason only that it limits the manufacturer's liability to the replacement or repair of goods, or the supply of equivalent goods, or the payment of the cost of one or more of the above, unless, in all the circumstances of the case, it is unfair or unreasonable for the manufacturer to rely on such a limitation. The Bill sets out certain criteria to which the Court shall have regard when assessing what is fair or reasonable.