

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**TRADE PRACTICES AMENDMENT (BETTER BUSINESS CONDUCT) BILL 1995**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Small Business, Customs and Construction, Senator  
the Hon Chris Schacht)

# TRADE PRACTICES AMENDMENT (BETTER BUSINESS CONDUCT) BILL 1995

## GENERAL OUTLINE

This Bill amends the *Trade Practices Act 1974* (the Principal Act).

The primary purpose of this Bill is to amend the Principal Act to prohibit harsh or oppressive conduct in circumstances where:

- ◆ two parties are in a pre-existing commercial relationship (this relationship may or may not be based on contract);
- ◆ the nature of that relationship gives one party a significant advantage in bargaining power; and
- ◆ the stronger party knowingly exploits that advantage to engage in conduct or impose terms and conditions of a contract that are, subject to a reasonable person test, outside prevailing market conditions.

Specifically, this Bill prohibits the exploitation of '*economically captive*' firms where commercial freedom is impaired by the nature of the relationship between the parties giving the corporation opportunity to extract extra-market rents. This Bill is not a prohibition on harsh or oppressive outcomes, but is a prohibition on exploitative conduct that leads to harsh or oppressive outcomes.

## FINANCIAL IMPACT STATEMENT

There are no budgetary implications.

## NOTES ON CLAUSES

### PART 1 - PRELIMINARY

#### Clause 1 - Short Title

1. This clause provides for the Act to be cited as the *Trade Practices Amendment (Better Business Conduct) Act 1995*.

#### Clause 2 - Commencement

2. This clause provides that this Act is to commence on 1 July 1996.

#### Clause 3 - Amendments

3. This clause amends the Principal Act in accordance with the applicable items in the Schedule of Amendments of the Principal Act.

### PART 2 - SCHEDULE OF AMENDMENTS OF THE PRINCIPAL ACT

#### Item 1 - Subsections 6(3) and (4)

4. This item provides for the application of the Amendments of the Principal Act to:

- (a) persons whose conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast;
- (b) the effect they would have if their operation was confined to conduct in an internal Territory, the Territory of Christmas Island or The Territory of Cocos (Keeling) Islands; or
- (c) the promotional activities of a professional person by virtue of inclusion in the activities of a corporation engaged in trade or commerce.

#### Item 2 - Insertion of new Part (PART IVB - HARSH OR OPPRESSIVE CONDUCT)

5. This item inserts into the Principal Act a new Part (Part IVB) which prohibits harsh or oppressive conduct in certain circumstances.

## ***New Section 51AC - Harsh or Oppressive Conduct***

### ***Subsection 51AC(1) - Application of provision***

6. This subsection limits the application of the Amendments to particular circumstances in keeping with the purposes of the Act.

7. Subsection 51AC(1) limits the application to commercial relationships between a corporation and another party (the other person). This includes commercial relationships between a corporation and an unincorporated firm or individual engaged in trade and commerce. Paragraph 51AC(1)(a) limits the application to commercial relationships characterised by a regular or continuous supply of goods or services. For the purposes of these Amendments, parties to a single transaction with no ongoing interaction are not deemed to be in a commercial relationship. This provision applies in circumstances where a commercial relationship has terminated, such as at the conclusion of a lease or supply contract.

8. Paragraph 51AC(1)(b) further limits the application of the Amendments to commercial relationships of major significance to the activities of the other person. The nature of the commercial relationship between the parties must be such that it is integral to the ongoing commercial activity of the other person.

9. These Amendments seek to address the exploitation of '*economically captive*' firms where commercial choices are limited to such an extent that it is not possible for the other person to adequately protect their own interests. However, the Amendments are not an attempt to equalise disparities in bargaining power. It is, therefore, critical that the inability of the other person to adequately protect their own interests arises out of the nature of the commercial relationship, rather than the commercial environment in general. Paragraph 51AC(1)(c) limits the application of the Amendments to circumstances where the nature of the commercial relationship and the surrounding circumstances significantly limits the other person's freedom of commercial choice. This subsection ensures the corporation is only held responsible for those economic circumstances which are within their control and arise out of the commercial relationship between the parties.

### ***Subsection 51AC(2) - Commercial relationship not to include initial negotiations***

10. This subsection excludes from the coverage of the Amendments the negotiation period which leads to the commercial relationship. The negotiation period is taken to be that period before the other person first accepts goods or services from the corporation or provides to the corporation payment for goods or services.

### ***Subsection 51AC(3) - Prohibition on harsh or oppressive conduct***

11. This subsection prohibits corporations to whom the Amendments apply, as determined by subsection 51AC(1), from:

- (a) knowingly engaging in harsh or oppressive conduct; or
- (b) engaging in conduct that the corporation ought reasonably to have known would be harsh or oppressive.

12. The subsection contains a constructive knowledge test where a Court can, in certain circumstances, impute that a corporation should reasonably have known that particular conduct would constitute harsh or oppressive conduct under the Amendments. As well as requiring the

corporation to maintain a degree of vigilance with regard to its commercial conduct, the subsection, in conjunction with the other Amendments, places upon the other person a significant degree of responsibility to promptly inform the corporation of the oppressive nature of its conduct.

*Subsection 51AC(4) - Factors Courts may have regard to in determining conduct to be harsh or oppressive*

13. This subsection provides a non-exhaustive list of factors which a Court may have regard to in determining whether a corporation has engaged in conduct that is harsh or oppressive. This provision in no way limits the factors to which a Court may have regard.

14. The Amendments are a prohibition on the harsh or oppressive exploitation of those without commercial choice. In determining whether a corporation has exploited the other person in a harsh or oppressive manner, Courts should be able to have regard to the circumstances which led to the opportunity for exploitation. Accordingly, under paragraph 51AC(4)(a) regard may be had to the relative strength of bargaining position held by the parties.

15. Courts may have regard, under paragraph 51AC(4)(b), to the impact of the harsh or oppressive conduct on the other person. A Court may choose to disallow a claim by virtue of the fact that the allegedly harsh or oppressive conduct did not give rise to any substantial detrimental effect on the other person.

16. Under paragraphs 51AC(4)(c) and 51AC(4)(d) a Court may, in determining whether the conduct of a corporation is harsh or oppressive, have regard to standards or norms of industry practice whether set by general behaviour within an industry sector or through an industry code of practice. Conduct which meets those standards, depending on the will of the Court, is unlikely to be harsh or oppressive exploitation.

17. These Amendments seek to prohibit the exploitation of the specific commercial relationship that binds the other person to the corporation. One way of determining whether this has occurred is to determine whether the conduct with respect to the other person, would also be applied by the corporation to a new market entrant in a similar situation. Under paragraph 51AC(4)(e), Courts may have regard to the conduct of the corporation towards persons of a similar class to that of the other person.

18. The Amendments address the harsh or oppressive exploitation of a commercial relationship which occurs in such a way as to limit commercial freedom. Accordingly, under paragraph 51AC(4)(f), a Court may have regard to whether the other person took reasonable steps to protect their own interests.

19. As a counterpart to paragraph 51AC(4)(f), a Court may have regard, under paragraph 51AC(4)(g), to whether a corporation was prepared to negotiate the terms and conditions of a contract, and to the conduct of the corporation in negotiating with the other person. Failure by the other person to take advantage of the opportunity offered by a corporation to negotiate terms and conditions may be a consideration in mitigation of breach of the Amendments.

*Subsection 51AC(5) - Regard to the whole of the relationship and the protection of the legitimate interest of the corporation*

20. This subsection excludes from the coverage of the Amendments conduct which the Court believes is in the legitimate present or future interests of the corporation. In applying the reasonable person test consideration should be had to the commercial relationship as a whole, not just that part which the other person believes allowed for the harsh or oppressive conduct.

*Subsection 51AC(6) - Existing contracts*

21. This subsection exempts from the scope of the Amendments, existing commercial relationships governed by contract existing at time of commencement, conduct pursuant to a contract ongoing at commencement of the Amendments and enforcement of provisions of a contract in place and executed within its terms at commencement of the Amendments.

*New Section 51AD - Mere institution of legal proceedings not harsh or oppressive conduct*

22. This section allows corporations to pursue their legal rights by stating that the commencement of legal proceedings or the submission of a dispute to arbitration will not, in itself, constitute harsh or oppressive conduct.

**Item 3 - Subsection 75B(1) - Interpretation**

23. This item allows for reference to a person involved in a contravention of the Amendments to be read as reference to a person who:

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced the contravention;
- (c) has been knowingly concerned in the contravention; or
- (d) has conspired with others to effect the contravention.

**Item 4 - Paragraph 80(1)(a) - Injunctions**

24. This item gives the Court power to grant an injunction, *inter alia*, where a person is engaged in or proposes to engage in contravention of the Amendments.

**Item 5 - Subsection 82(1) - Action for damages**

25. This item allows for the recovery of the amount of loss or damage arising out of a contravention of the Amendments.

**Item 6 - Section 83 - Finding in proceedings to be evidence**

26. This item allows for a finding of contravention of the Amendments to be *prima facie* evidence of the fact.

**Item 7 - Subsections 84(1) and (3) - Conduct by directors, servants or agents**

27. This item allows for the intent of a corporation to be sufficiently shown by demonstrating that a director, servant or agent of the body corporate was engaged in the relevant conduct and that the director, servant or agent was operating within that person's actual or apparent authority.

**Item 8 - Subsection 86(2) - Jurisdiction of the Courts**

28. This item invests State Courts of appropriate jurisdiction with authority, within the limits of their jurisdictions, over matters arising under the Amendments.

**Item 9 - Paragraphs 86A(1)(b), (4)(b) and 5(b) - Transfer of matters**

29. This item allows the Federal Court to transfer matters brought under the Amendments to an appropriate Court of a State or Territory.

**Item 10 - Paragraph 86B(1)(b) - Transfer of certain proceedings to the Family Court**

30. This item allows matters brought under the Amendments to be transferred by the Federal Court, on the application of the party to the proceeding of its own motion, to the Family Court.

**Item 11 - Subsections 87(1), (1A), (1B) and (1C) - Other orders**

31. This item makes available to a Court the wide range of discretionary orders available under section 87 in matters brought under these Amendments.

**Item 12 - Subsection 87(1CA) - Other orders (commencement of actions)**

32. This item allows for a period of two (2) years from the contravention of the Amendments for an action to be brought by the aggrieved party under section 87(1A).

**Item 13 - Subsection 87(1D) - Other orders (conduct following alleged contravention)**

33. This item allows a Court, in determining whether conduct is harsh or oppressive and arising from the exploitation of an existing commercial relationship, to have regard to the conduct of the corporation following the alleged contravention.

**Item 14 - Paragraphs 87A(1)(b) and (c) - Power of Court to prohibit payment or transfer of moneys or other property**

34. In order to preserve assets to meet liabilities arising from a claim, this item allows for a Court, on the application of the Minister or the Trade Practices Commission, to make an order prohibiting the transfer or payment of moneys or the disposal of property by a corporation in circumstances of alleged breach of the Amendments.



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