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PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES REVISION BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Lionel Bowen, M.P.)

TRADE PRACTICES REVISION BILL 1986OUTLINE

The purpose of this Bill is to amend the Trade Practices Act 1974. The principal amendments are designed to effect significant improvements to the restrictive trade practices provisions (Part IV) and the consumer protection provisions (Part V) of the Act. The other amendments contained in the Bill form two broad categories - amendments of a technical character necessary to close loopholes, and amendments bringing up to date provisions relating to the administration and functioning of the Trade Practices Commission and the Trade Practices Tribunal.

2. Prior to the 1983 general election the ALP opposition released a business regulation paper in which it outlined, amongst other things, proposals to amend the Trade Practices Act. The Prices and Incomes Accord also highlights the need to amend certain sections of the Trade Practices Act. In February 1984, following a departmental review of the operation of the Act, the Government released a Green Paper entitled The Trade Practices Act: Proposals for Change. When releasing the paper the Government emphasised that the paper was intended as a catalyst for public discussion and that the proposals did not represent a final Government position. 120 submissions were received on all aspects of the proposals which were reassessed in the light of these submissions. Green Paper proposals have been significantly modified as a result of that reassessment.

3. The most significant amendment to Part IV is in cl.17 (misuse of market power). It will lower the threshold of s.46, to apply the provision to those corporations which have a substantial degree of market power and improve the effectiveness of s.46 in other respects. A new provision

(s.50A) will extend the application of the act to mergers and acquisitions which occur outside Australia but which have anti-competitive effects in Australia.

4. The major amendments to the consumer protection provisions of the Act are in cl.5 (amending the definition of 'consumer'), cl.22 (prohibition of unconscionable conduct), cl.35 (inserting a new Division in Part V dealing with product safety and product recall) and cl.55 (giving the Commission the power to take representative actions on behalf of consumers).

FINANCIAL IMPACT STATEMENT

5. The proposals put forward in the Bill have only a minor impact on Government expenditure.

6. The Bill does not involve any additional staff or resources for the Trade Practices Commission. The only direct impact on Government expenditure concerns the administration of the reserve mandatory recall powers. This requires 5 staff in the Office of Consumer Affairs, to monitor industry product recall systems and advise the Attorney-General on the need to exercise the reserve powers when those systems are not adequate, to arrange testing of allegedly unsafe goods, and to conduct advertising to notify the public of unsafe goods. The full year cost is estimated at \$250,000.

7. As noted above, this Bill enhances the Trade Practices Act's ability to protect consumers and promotes fair business practices, to the ultimate benefit of the whole community. Further, if as expected, several of the State Governments enact legislation mirroring Division 1, Part V of the Act and repealing existing State legislation thereby rendered unnecessary, the costs for business and industry of complying with Government regulation in the consumer protection area will be reduced.

8. The financial impact of the revised merger authorization procedures depends upon the extent to which they are utilized by business. Even if there is a considerable increase in merger authorization applications, the effect on staff and resource requirements for the Trade Practices Commission should be minimal.

ABBREVIATIONS

9. The following abbreviations are used in this Explanatory Memorandum:

Act: Trade Practices Act 1974 as amended prior to any amendments effected by this the Trade Practices Revision Bill 1986.

Bill: Trade Practices Revision Bill 1986

Commission: Trade Practices Commission

Tribunal: Trade Practices Tribunal.

NOTES ON INDIVIDUAL CLAUSES

PART I PRELIMINARY

Clause 1: Short title

Clause 2: Commencement

10. Sub-cl.2(1) provides that the following provisions will come into operation on the day on which the Act receives the Royal Assent:

- . cls.1 and 2, which deal with the short title and commencement of the Act; and

sub-cl.49(1), 51(1) and 64(1) in relation to the power to grant consent orders and make consent determinations.

11. Sub-cl.2(2) deems cls.74, 75 and 76, which amend the Statute Law (Miscellaneous Provisions) Act (No. 2) 1984, to have come into operation on 25 October 1984. Sub-cl.2(3) provides that cl.31, which deals with the repeal of ss.62, 63 and 63AA, and cl.35, which inserts a new Division 1A - Product Safety and Product Information, in Part V of the Act, shall come into operation on 1 July 1986. Sub-cl.2(4) provides that the remaining provisions of the Bill shall come into operation on a date to be proclaimed.

PART II AMENDMENTS TO THE TRADE PRACTICES ACT 1974

Clause 3: Principal Act

Clause 4: Interpretation

12. The definition of 'special price' is being deleted consequent on the deletion from s.56 of that term. Sub-s.5 is being deleted as no longer necessary, because sub-s.22(2) of the Acts Interpretation Act 1901 provides that express references in an Act to 'corporations' shall not be taken to imply that references in the Act to 'persons' do not also include references to corporations.

Clause 5: Consumers

13. As a result of inflation over the past 8 years, the real value of the \$15,000 monetary limit in s.4B has been significantly eroded, and an adjustment to the monetary limit is needed to restore the protection given by the Act to consumers and small business. It is also proposed to provide specific protection under the Act for purchasers of trucks, following consideration of the Report of the National Road

Freight Industry Inquiry (the May Report) published in September 1984.

14. The monetary limit in s.4B is therefore increased from \$15,000 to \$40,000, to provide for inflation over the last 8 years and to provide some additional protection for small business purchases. An amendment to sub-para.4B(1)(a)(ii) provides that all purchases of commercial road vehicles (as defined by a new sub-s.4B(4)) are deemed to be consumer purchases. In this way, truck owner-operators who purchase a truck for use in their business are afforded the protection offered by the warranties and conditions implied by Division 2 of Part V.

Clause 6: Exclusionary provisions

15. Difficulties arose in TPC v TNT Management Pty Ltd & Ors (1985) ATPR 40-512, whether primary boycotts of identified classes of persons are prohibited as distinct from boycotts of particular persons. A primary boycott is, in essence, collective refusal to deal by competitors to the detriment of another competitor or a person from whom the parties to the collective action could or do supply or acquire goods or services.

16. S.4D is being amended to clarify that the provision includes particular classes of persons, by adding 'or classes of persons' after 'particular persons' in sub-paras.4D(1)(b)(i) and (ii).

Clause 7: Severability

17. This amendment is consequential on the enactment of the proposed s.87A (cl.56), relating to the power of the Court to prohibit payment or transfer of moneys or other property.

Clause 8: Extended application of Parts IV and V

18. This amendment relates to private proceedings where the extraterritorial operation of the Act is relied upon. S.5 provides for the extraterritorial operation of the Act in the circumstances there set out.

19. S.82 provides that a person who suffers loss or damage caused by the conduct of another person in contravention of the Act may recover damages.

20. The extraterritorial application of the Act may impinge upon foreign laws or policies in operation in the place where the circumstances in question took place. In the case of government initiated proceedings under the Act it is possible for the government to take account of the home State's interests and, if necessary, to engage in consultations for this purpose with the foreign government concerned. In the absence of a provision such as is now proposed, it is not possible to do this in the case of private proceedings.

21. New sub-s.5(3) provides that where a claim for damages by a private plaintiff under s.82 is made, the plaintiff may not rely at the hearing on extraterritorial conduct without the consent in writing of the Minister.

22. New sub-s.5(4) provides that a person other than the Minister or the Commission is not entitled without the consent in writing of the Minister to apply for an order under sub-s.87(1) or sub-s.87(1A) of the Principal Act if the conduct the subject of the proceedings was extraterritorial.

23. New sub-s.5(5) requires the Minister to give the consent required under new sub-ss.5(3) or 5(4) unless in his opinion either the law of the other country required or specifically authorized the conduct concerned or that it is not in the national interest to give his consent.

Clause 9: Additional operation of Act

24. S.6 has the effect of giving provisions of the Act an additional operation in certain circumstances. The amendments proposed are largely consequential on other amendments, except for those set out in sub-cl.(f).

25. The new sub-s.6(4) makes it clear that Division 1 of Part V applies, in the Territories, to the promotional activities of individuals engaged in a professional activity (eg doctors, dentists and lawyers). At present, by virtue of s.6, the Act applies to the conduct of individuals in trade or commerce in the Territories, as well as to corporations. However, the established interpretation of 'trade or commerce' excludes certain professional business activity.

26. The proposed sub-s.73(6) provides that proceedings under that section must be brought against the supplier corporation as well as the credit provider unless the supplier corporation has been dissolved or is commenced to be wound up. The new sub-s.6(5) makes similar provision in respect of natural person suppliers who have died or are the subject of certain bankruptcy action.

Clause 10: Acting Chairman

27. Because the office of Chairman is vital to the functioning of the Commission, sub-s.11(1) provides that the Governor-General may appoint an acting Chairman when there is a vacancy in the office of Chairman. A problem arose recently where for the first time a vacancy was about to occur in the office of Chairman. The form of sub-s.11(1) precluded an appointment being made before the day the office became vacant. This amendment overcomes this problem by empowering the Governor-General to prospectively appoint a person to act as Chairman from a date when there is expected to be a vacancy

in the Office of the Chairman, thus enabling acting arrangements to be made in anticipation of a vacancy occurring.

Clause 11: Disclosure of interests by members (of the Commission)

28. Following the recommendations contained in the 1979 report of the Committee of Inquiry Concerning Public Duty and Private Interest (the Bowen Committee), successive governments have been moving to ensure consistency of legislation dealing with conflicts of duty and personal interests of statutory office holders. The opportunity is being taken to amend s.17 along lines recommended by that Committee.

Clause 12: Meetings of Commission

29. The amendment to s.18 allows the Commission more flexibility in the way its meetings can be held.

Clause 13: Commission to comply with direction of Minister and requirements of the Parliament

30. Sub-s.29(1) empowers the Minister, subject to certain limitations, to give directions to the Commission concerning the performance of its functions. The amendment to para.29(1)(b) of the Act extends the Minister's power to give directions to the Commission in relation to the exercise of its adjudication function generally; but the existing limitations on the Minister's power of direction concerning particular applications being considered by the Commission (e.g. merger authorization applications) are retained.

31. S.29 is also being amended so that the Minister cannot give directions to the Commission relating to the performance of its functions or the exercise of its powers under ss.65J, 65K, 65M or 65N, ie. when it is conducting a conference or making a recommendation in relation to a proposed product recall or banning order.

Clause 14: Disclosure of interests by members (of the Tribunal)

32. In line with cl.11, the Bowen Committee recommendations are being applied to the Tribunal by this clause.

Clause 15: Contracts, Arrangements or Understandings Restricting Dealings or Affecting Competition

33. This clause extends the operation of the exclusion in sub-s.45(6) so that it prevents s.45, and in particular its prohibition on exclusionary provisions (s.40), from applying to arrangements which, while coming within the definition of exclusive dealing in s.47, do not contravene that section because they do not have the purpose or the effect of substantially lessening competition (sub-s.47(10)).

Clause 16: Covenants in relation to prices

34. Sub-s.45C(1) incorrectly quotes words in sub-s.45B(1) by referring to "any market" rather than "a market". Cl.16 corrects the quotation.

Clause 17: Misuse of market power

35. The amendments to s.46 are designed to lower the threshold test for determining whether the section is applicable to the conduct of a corporation. The amendments also address the mode of proof. The new marginal note 'misuse of market power' is a more accurate characterisation of conduct of the kind to which s.46 is directed than 'monopolisation' as used in the Act now.

36. The amendment to sub-s.46(1), substituting the words 'a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of' is a composite provision. It should therefore, in the

final analysis, be construed as a single provision even if particular words or expressions need to be looked at separately in the first instance.

Threshold test

37. The test of whether a corporation has 'a substantial degree of power in a market' is substituted for the previous test of a corporation 'being in a position substantially to control a market'. The new test is intended to provide a lower threshold for the operation of s.46. The section may be invoked in relation to a corporation that has a lesser degree of market power than is required under the present provision.

38. The expression 'power' is synonymous with 'market power' (see new sub-s.46(4)).

39. 'Market power' is a recognised economic concept which has been subject to considerable analysis in economic literature.

40. The use of the word 'degree' in the expression 'degree of power in a market' reflects the fact that 'market power' is a relative concept. All participants in a market possess a degree of market power which may range from negligible to very great.

41. The word "substantial" is used in several different contexts in the Act, and its meaning may change according to the context. Thus in Tillmanns Butcheries Pty Ltd v The Australasian Meat Industry Employees' Union and Ors (1979) ATPR 40-138 at page 18,500, in the context of 'substantial loss or damage', Deane J. preferred a meaning for 'substantial' of 'real or of substance as distinct from ephemeral or nominal' to the alternative 'large or weighty'. However, in the context of s.46, 'substantial' is intended to signify 'large or weighty' or 'considerable, solid or big' (Palser v Grinling [1948] A.C. 291 at page 317).

42. The word imports 'a greater rather than less' degree of power, per Smithers J. in Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd (1982) ATPR 40-315 at p.43,888. At the same time, 'substantial' in this context is not intended to require the high degree of market power connoted by the reference in existing s.46(1) to being in a position substantially to control a market, or by the reference in existing s.46(3) to the power to determine the prices of a substantial part of the goods in a market.

43. New sub-s.(3) provides a guide to the way in which 'market power' is to be determined. It requires ~~that~~ consideration be given to the extent to which the conduct of a firm is or is not constrained by competition on the part of other participants in the market, potential entrants to the market, suppliers or purchasers.

44. The circumstances which give rise to absence of competitive constraint upon a corporation are diverse. They are not confined to size or market share in relation to competitors, or to those matters combined with technical knowledge, raw materials or capital. Other matters such as easier access to supplies or government controls on the market are relevant if they bear upon the extent to which the corporation can act without being constrained by competition. Thus market power can be derived from statutory limitations on competition (e.g. through the creation of statutory monopolies) in the same way as any other constraints on competition can affect the operation of the market.

45. A corporation having a 'substantial degree of market power' may have a lesser degree of market power than that of a corporation which 'would be, or be likely to be, in a position to ... dominate a market' as provided in s.50. 'Dominance' connotes a greater degree of independence from the constraints of competition than is required by a 'substantial degree of market power'. Whatever the position in regard to 'dominance', more than one firm may have a 'substantial degree of power' in a particular market.

46. In Europemballage and Continental Can v. Commission /1973/ CMLR 199; United Brands v. Commission /1978/ 1 CMLR 429 and Hoffman La Roche v. Commission /1979/ 3 CMLR 211 the court had to determine the degree of market power in order to decide the question of dominance. Although the test of dominance is higher than that applying in the case of a substantial degree of market power, these cases adopt a similar approach to that envisaged by new sub-section 46(3) for the purpose of determining the degree of market power.

Prohibited conduct

47. A corporation having the requisite degree of market power is not prohibited from engaging in any conduct directed to one or other of the objectives set out in paras.46(1)(a), (b) and (c). Such a prohibition would unduly inhibit competitive activity in the market-place. The section is not directed at size as such, nor at competitive behaviour as such. What is prohibited, rather, is the misuse by a corporation of its market power.

48. A corporation which satisfies the threshold test by reason of its market power is not permitted by s.46(1) to take advantage of that power for the purpose of one or other of the objectives set out in paras.(a), (b) and (c). Those paragraphs describe various ways in which competition may be impaired in a market.

49. The term take advantage in this context indicates that the corporation is able, by reason of its market power, to engage more readily or effectively in conduct directed to one or other of the objectives in paragraphs (a), (b) and (c). It is better able, by reason of its market power, to engage in that conduct. Its market power gives it leverage which it is able to exploit and this power is deployed so as to 'take advantage of' the relative weakness of other participants or potential participants in the market. Whether this is so in a particular case is a matter to be inferred from all the circumstances.

50. Likewise, the reference to purpose in this context indicates that the conduct of the corporation, by which it takes advantage of its market power, must be directed to impairing competition in a market in one of the ways set out in paras. (a), (b) and (c).

51. Sub-s.(7) makes it clear that whether a corporation has taken advantage of its power for a particular purpose is a matter which may be ascertained by inference from conduct or other relevant circumstances. While explicit statements if proved may establish the necessary purpose, direct evidence of that kind is not essential. The court may draw the necessary inference from conduct or other circumstances without the need for direct evidence. The ability to draw such an inference does not of course change the onus of proof. Proof of particular conduct or other circumstances may however give rise to a need for the other party to adduce evidence in order to rebut an inference which might otherwise be drawn. This amendment does not, by inference, limit the ways in which purpose may be proved in relation to other sections of the Act containing a purposive element.

52. By virtue of s.4F(b), it is sufficient if a requisite purpose (ie directed to s.46(1)(a), (b) or (c)) is one among other purposes of the corporation provided that the requisite purpose was a substantial one. In this context, 'substantial' is intended to signify a purpose which has substance or significance - as distinct from one which is ephemeral or nominal - rather than a purpose which is large, weighty or big.

53. Kinds of conduct which in certain circumstances could be in breach of the provision would include inducing price discrimination, refusal to supply and predatory pricing. These instances are indicative only and, in each case, it would be necessary to establish the requisite degree of market power and that advantage had been taken of the power for one of the specified purposes.

54. In regard to predatory pricing, in Victorian Egg Marketing Board v. Parkwood Eggs Pty Ltd (1978) ATPR 40-081, Bowen C.J. left open the question 'whether in the ordinary course a monopolist can engage in predatory price cutting only if the price is below some particular cost, and not where the price set, although it may deter competitors, is one which merely does not maximise the monopolist's profit' (at p.17,789). It is not the intention of s.46 that pricing, in order to be predatory, must fall below some particular cost. The prohibition in the section may be satisfied 'notwithstanding that it is not below marginal or average variable cost and does not result in a loss being incurred' (at p.17,789). Certainly, though, where a corporation with the requisite market power is, in the absence of countervailing evidence that its pricing was not aimed at destroying actual or potential competition, selling at below average variable cost there may be grounds for inferring that it is taking advantage of its power for a proscribed purpose.

55. On the other hand, a corporation which is able to price its goods very competitively by reason, for example, of economies of scale or the acquisition of new efficient production facilities, would not be inhibited from so doing by reason of the fact that it enjoys a substantial degree of market power. By reflecting in its pricing policy its efficiency it would not, without more, be taking advantage of its market power notwithstanding any effect of its pricing on its competitors.

Clause 18: Mergers and other acquisitions

56. The amendments to s.50 are designed to clarify the application of the provision and to remove uncertainties that have become apparent in the operation of the provision.

57. The amendment to sub-s.50(1) deletes the words 'control or'. The intention of this proposal is to remove the element

of duality and consequential uncertainty that may exist at present with the use concurrently of standards of 'control' and 'dominate'. In TPC v Ansett Transport Industries (Operations) Pty Ltd and Ors (1978) ATPR 40-071, at page 17,717 Northrop J. found that 'The word "dominate" is to be construed as something less than "control". The word is to be construed in its ordinary sense of having a commanding influence on'. The judge noted (at page 17,715) that in evidence given by two economists during the hearing of the case each 'said that the word "control" had no particular usage but tended to suggest something stronger than the word "dominate"'.

58. New sub-s.50(1A) is being inserted to extend the application of s.50 to acquisitions of corporations by natural persons. The amendment to sub-s.50(4) reflects this change.

59. New sub-s.50(2A) extends the application of the Act to include acquisitions by associated companies (not being subsidiary or holding companies) and including what have become known as 'joint venture takeovers'. (The term 'joint venture' is used here in a broader and more general sense than that defined by s.4J.) The need for such a provision was confirmed by the decision in TPC v Bowral Brickworks Pty Ltd and Ors (1984) ATPR 40-480. In this case two corporations in the one market sought to use Bowral (which was not in the market and which they jointly owned) as a 'joint venture' takeover vehicle to acquire a third corporation which was in the same market as the first two. One of the first two corporations could not have done this alone without contravening s.50. In this case it was held that Bowral was not 'related' to its parent corporations, as that term is defined in s.4A. It was then held that Bowral had not been interposed between its parents and the ultimate target and hence Bowral's parents were not acquiring the target 'indirectly' in the sense that the word is used in sub-s.50(1). In addition it was held that the two corporations were not in any relevant sense 'acquiring' shares.

60. To overcome these limitations new sub-s.50(2A) provides that where a body corporate is in a position to exert a substantial degree of influence over the activities of another body corporate that latter body corporate will be taken to be associated with the first body corporate. The effect of this and the consequential amendment to sub-s.50(2) is that for the purposes of determining whether an acquirer is in a position to dominate a market, the market position of any 'associated' body corporates will be aggregated with the position of the acquirer. The provision applies to those bodies corporate whose interests in the acquiring corporation are no more than 50%; interests in excess of that level are already subject to sub-s.50(2) by application of the related corporations provision in that sub-section.

61. The proposed s.50(2A) does not apply where the influence one body corporate is able to exert over another is insufficient to allow the former to make use of the latter's market power.

62. This would be so because the influence required for the application of sub-s.50(2A) must be a 'substantial' influence and related to market power.

63. Sub-s.50(2A) must be read in light of sub-ss.50(1) and 50(2). Sub-s.50(2A) provides a mechanism for determining, through the application of sub-s.50(2), whether an acquisition has resulted in dominance or increased dominance of a market for the purpose of sub-s.50(1). Thus any assessment whether one firm is in a position to exercise substantial influence over the activities of another firm, must have regard to the test of market dominance to which s.50 is directed.

64. In that context, the word 'substantial' in sub-s.50(2A) is intended to signify 'large or weighty' or 'considerable, solid or big', in the same way as for s.46. (In this respect see para. 41). To give 'substantial' in sub-s.50(2A) a lesser

meaning of merely 'real or of substance and not insubstantial or nominal' (see Tillmanns Butcherries Pty. Ltd. v. The Australian Meat Industry Employees' Union and Ors (1979) ATPR 40-138 at p. 18, 500) could lead to the result that market power held by one body corporate was not in reality available to an 'associated body corporate' within the meaning of sub-s.50(2A).

65. The new sub-s.50(2B) provides that for the purposes of sub-s.(2A) regard shall not be had to bodies corporate who exercise a substantial degree of influence on a body corporate by virtue only that they are competitors or that one supplies goods or services to the other.

66. The amendment to para.50(3)(a) recognises that substantial markets are possible within a territory.

Clause 19: Acquisitions outside Australia

67. Overseas mergers of foreign bodies corporate with subsidiaries in Australia are at present not subject to s.50. Cl.19 inserts a new provision (s.50A) to bring within the ambit of the Act any anti-competitive effects within Australia of such mergers. (Clause 57 provides for the possibility of authorization of such mergers or acquisitions.)

68. Sub-s.50A(1) provides that the Tribunal may, on the application of the Minister, the Commission or any other person, make a declaration that a person who, as a consequence of an acquisition outside Australia, obtains a controlling interest (defined by sub-s.50A(8)) in one or more corporations, would or would be likely to dominate a substantial market for goods or services in Australia, and that the acquisition will not result in a public benefit. The term 'substantial market for goods and services' is used to make it clear that the provision applies only to markets of a similar magnitude as those to which s.50 applies. An application must be made within 12 months of the date of acquisition (sub-s.50A(3)).

69. If the Tribunal makes a declaration under sub-s.50A(1), sub-s.50A(6) requires that the corporation or corporations subject to the declaration shall, after expiration of 6 months from the date of the declaration, cease operating in the market in respect of which the declaration applies. However, before the expiration of the 6 months the person who has the controlling interest may apply to a presidential member of the Tribunal for an extension of time (not exceeding 6 months).

70. If a corporation (i.e. the Australian subsidiary) carries on business contrary to the declaration the Court could, on application by the Minister or the Commission, then direct the corporation to dispose of certain assets or, on application by the Minister, the Commission, or the person who originally applied for the declaration, grant an injunction restraining the continued carrying on of the business activity the subject of the declaration (see Cls.49 and 51).

71. The Tribunal is empowered by sub-s.50A(4) to revoke a declaration on the application of the Minister, the Commission, or any other person, or on its own motion. By sub-s.50A(5), the Tribunal is required to give its reasons in writing for making, refusing to make or revoking a declaration.

72. Sub-s.50A(7) provides that where ss.50 and 50A can both be applied, only s.50 is to apply.

73. The nature of a controlling interest for the purposes of this provision is defined by sub-s.50A(8).

Clause 20: Exceptions

74. This clause will amend para.51(2)(a) to provide that acts done in relation to employment contracts include the making of any such contract. This amendment is necessary to overcome doubt created by the decision in Ausfield v Leyland Aust. (1977) ATPR 40-025 where the Full Federal Court found

that the words 'any act done' were inappropriate to refer to the complex operation of making a contract, arrangement or entering into an understanding (per Bowen CJ. at page 17,352).

Clause 21: Interpretation

75. Difficulties have occurred in relation to the ability of relevant provisions of Division 1 of Part V to deal with false or misleading statements, representations or predictions about future matters. The circumstances surrounding these representations are often matters within the knowledge of the person or corporation making the representation, and it has therefore been difficult to obtain conclusive proof of dishonesty or recklessness from the surrounding circumstances without an admission of guilt from the defendant.

76. These problems were highlighted in Thompson v Mastertouch TV Services Pty. Ltd. (1977) 15 A.L.R. 487, in which Franki J. held that:

.....'a prediction or statement as to the future is not false within the words of [s.59(1)] if it proves to be incorrect unless it is a false statement as to an existing or past fact which may include the state of mind of the person making the statement or of a person whose state of mind may be imputed to the person making the statement.' (Page 495)

77. Accordingly, a promoter's promise or prediction as to the performance or profitability of a business opportunity is not presently caught unless it is based on existing or past facts. Another problem identified in that case was that a promoter's promise or prediction is not caught by the Act unless it can be shown that the defendant 'did not believe that the forecast or prediction would be satisfied or was recklessly indifferent concerning the forecast or prediction.' (Ibid., page 495)

78. The new s.51A deems a prediction made by a corporation in relation to matters specified therein to be misleading for the purposes of Division 1 of Part V (including s.52) unless the corporation making the prediction has reasonable grounds for making the prediction. The onus is on the corporation to establish on the balance of probabilities that it had reasonable grounds for the belief.

Clause 22: Unconscionable conduct

79. The Trade Practices Act Review Committee (the 'Swanson Committee') in its report in August 1976 recommended that unconscionable conduct and practices in trade or commerce be prohibited on a civil basis to give the Act a greater ability to deal with the general disparity of bargaining power between buyers and sellers. The Act is being amended along the lines of this recommendation of the Swanson Committee, except that at this stage the prohibition is being limited to unconscionable conduct in relation to consumer-type transactions.

80. The Commission will be able to enforce the new section by seeking injunctions to restrain corporations engaging in unconscionable conduct. The remedies for breach of s.52A are contained in s.87.

81. Sub-s.52A(1) is drafted in a similar way to the existing sub-s.52(1), and prohibits a corporation, in trade or commerce, in connection with the supply or possible supply of goods or services, engaging in conduct that is unconscionable. The terms used, except for 'unconscionable', appear throughout Division 1 and their meanings are well established by judicial interpretation. Many of these terms are defined in s.4 of the Act. In particular, 'services' has a very wide definition and includes interests in land, hence s.52A applies to unconscionable conduct in relation to the sale of interests in land.

82. The word 'unconscionable' is not defined in the section although sub-s.52A(2) provides guidance as to matters to which the Court should have regard. It is envisaged that the section would at least cover conduct of the kind discussed in Commercial Bank of Australia Ltd v Amadio and Another (1983) 46 ALR 402. In that case, the Court set out general principles for use in determining whether conduct is unconscionable:

'Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued "the common characteristic of such adverse circumstances seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."' (Per Deane J at page 423).

83. Amadio concerned a relationship between a banker and a guarantor, and many other unconscionability cases involved some type of fiduciary relationship. There is no requirement under this section for a special relationship between the parties - if the conduct is unconscionable in the circumstances then it is prohibited, whether or not the parties are in a special relationship. The section could apply to a contract between a supplier and a purchaser where the contract imposes onerous obligations on the purchaser and he/she was not in a position reasonably to protect his/her own interests.

84. While equity recognises that unconscionable conduct and undue influence are separate grounds of relief, it is

envisaged that this section will include conduct that would fall under either of these equitable grounds. In relation to the application of this section, the comments of Mason J. in Amadio (Ibid., at page 412) are relevant:

'Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.'

85. Sub-s.52A(2) is intended to give some guidance to the Court as to the matters to which it should have regard in considering whether the conduct in a particular case is unconscionable within the meaning of the section. The Court may have regard to the relative bargaining strengths of the parties (para.(a)); it may consider whether the consumer is being required to comply with conditions which are not reasonably necessary for the protection of the corporation's legitimate interests, e.g. whether the condition which may be causing the consumer some hardship is really necessary from the corporation's point of view (para.(b)). Under para.(c) the court may have regard to whether the consumer was able to understand relevant documents, regardless of whether his inability was due to an inherent disability (eg illiteracy, lack of understanding of English or other language) or the complexity of the document. For example, s.52A could cover a contract made with a mentally disabled person who did not understand the obligations imposed by the contract. Para.(d) draws attention to the use of unfair tactics, including whether any undue influence or pressure was used. It is intended that the court could consider all tactics including those which are commonly used in business but which may be considered unfair (eg the salesman 'putting his foot in the

door'), although if the conduct in question is relatively harmless and does not affect the fairness of the final transaction, the unfairness of those tactics may carry little weight. Under para.(e) the court may consider whether and on what terms the consumer was able to acquire equivalent goods or services elsewhere in the market-place. If the consumer was aware of the availability of those goods or services elsewhere, it will be difficult to establish that he was forced to enter into a transaction on unfavourable terms. Sub-s.(2) makes clear that the Court is not limited to considering the matters set out in the sub-section.

86. Sub-s.(3) makes clear that a corporation does not contravene the section merely by instituting legal proceedings or referring a dispute to arbitration. By virtue of sub-s.(4) the Court is entitled to consider circumstances existing or conduct engaged in before the commencement of the section, but it may not have regard to oppressiveness or injustice arising from circumstances that were not reasonably foreseeable at the time of the alleged unconscionable conduct. (Hence, conduct which is only unconscionable when viewed against subsequent circumstances which were not reasonably foreseeable does not contravene the section.)

87. The section is limited to unconscionable conduct in relation to consumer-type purchases by virtue of sub-ss.(5) and (6). Sub-s.(5) has the effect of limiting s.52A to conduct in relation to the supply or possible supply of goods or services which are of a kind ordinarily acquired for personal, domestic or household use or consumption. Sub-s.(6) provides that, even if the goods involved are of that kind, the section does not apply if the goods were acquired for the purpose of re-supply or for using them up or transforming them in trade or commerce.

Clause 23: False or misleading representations

88. The amendment to prohibit false representations that goods or services have been ordered when they have not (new para.(bb)) is directed at such practices as a person asserting a right to payment for goods or services that the person falsely asserts have been ordered by a recently deceased person. The new para.(ea), which prohibits false or misleading representations about spare parts or repair facilities, will provide additional protection for farmers and truck owner-operators, who have complained about the difficulty of obtaining spare parts or repairs for their expensive machinery even though they were promised at the time of purchase that these facilities would be available. The new para.(eb) is directed at traders falsely advertising that their goods have been made in a particular country, as often a consumer may be induced to buy or not buy a particular good depending on where it was made.

89. The amendment to replace the word 'statement' with 'representation' standardises the language used in Division 1 of Part V. Some sections refer to 'representations' and others to 'statements', hence throughout the Division 'statement' is being amended to read 'representation'. The word 'representation' has been widely interpreted, and certainly includes 'statement': see Barton v Croner Trading Pty. Ltd. (1984) ATPR 40-470.

Clause 24: False representations and other misleading or offensive conduct in relation to land

90. S.53A is being amended to replace the word 'statement' with 'representation'. (See above under cl.23.). Sub-s.(2) is being amended to remove the reference to the place of harassment or coercion. Harassment or coercion in connection with the supply of an interest in land is to be prohibited wherever it occurs, and not just at a place of residence as in

the current section. Sub-s.(2) is also being amended to remove the words 'cause or permit a servant or agent of the corporation to...', as corporate liability for the actions, conduct and intentions of staff and agents is imposed by s.84.

Clause 25

91. This clause repeals the current s.53B, and inserts the following:

(i) Section 53B: Misleading conduct in relation to employment

The current s.53B is limited in its operation to prohibiting only the publishing (or causing the publication) of employment advertisements which contain statements that are false or misleading. However, many representations made to people seeking employment are oral.

92. The current s.53B is being repealed and replaced with a section prohibiting a corporation engaging in conduct in relation to employment opportunities which is misleading as to the availability, nature, terms or conditions of or any matter relating to such employment. It is intended that this section cover all false or misleading conduct in relation to employment opportunities.

(ii) Section 53C: Cash price to be stated in certain circumstances

93. The new s.53C prohibits a corporation advertising part only of the consideration payable for goods or services without disclosing the total consideration for which the goods or services may be purchased outright. This provision is directed at a trader advertising that a consumer may buy a product for a low deposit without disclosing the total price payable.

Clause 26: Bait advertising

94. There have been problems encountered with the existing sub-s.56(1), centering on the fact that it is necessary to establish that at the time of advertising the goods the corporation did not intend to offer the goods as advertised and for a reasonable time. The problem lies in proving the corporation's intention not to supply as advertised, because even if circumstances at that time are such that it was highly unlikely that the corporation would be able to honour the advertisement, the corporation may still be able successfully to claim that it fully intended to supply. Sub-s.56(1) is therefore being amended to replace the notion of intention with an objective test, so that if the corporation had reasonable grounds, or ought to have been aware of reasonable grounds to expect that it would not be able to comply with the advertisement it would be guilty of an offence.

95. The current s.56 does not cover the situation where the attraction of the advertisement lies not in the special price at which goods are offered, but in the fact that particular goods are offered at all. For example, a corporation could expect to draw a large number of customers by advertising that it had stocks of a good that was in high demand but short supply at its normal price. S.56 is therefore being amended to replace the words 'special price' with 'specified price' to cover the case of advertising to supply goods whose attraction lies not in their special price but merely in their availability for purchase.

Clause 27: Accepting payment without intending or being able to supply as ordered

96. As with sub-s.56(1), there have been problems with the present s.58(a) where a company has accepted money for goods or services it was not then in a position to supply and had little prospect of supplying in the future. The essence of the problem lies in establishing that, in addition to these

circumstances, the corporation intended not to supply the goods or services when it accepted payment.

97. S.58 is being replaced with an expanded section so that where there are reasonable grounds of which the corporation is aware, or ought to be aware, at the time of accepting payment, to suggest that it will not be able to supply within the time specified in the contract, or if no time is specified a reasonable time, it will have contravened the Act. The offence presently created by s.58 (a) will be retained to cover the situation where the corporation actually has no intention to supply or intends to supply goods or services materially different from those paid for.

Clause 28: Misleading representations about certain business activities

98. S.59 is being amended to replace the word 'statement' with 'representation' (see above under cl.23.). The amendment to sub-s.(1) to include the words 'or from' after 'at' closes a loophole that attracted attention in Thompson v Mastertouch TV Services Pty. Ltd. (1977) 15 A.L.R. 487, in that the existing section only covers statements about business activities that can be carried on at a person's place of residence rather than those which can be carried on from a person's place of residence. This amendment makes it clear that sub-s.(1) covers false or misleading representations about all home-operated business activities, whether carried on at or from a person's place of residence.

99. While s.53B covers false representations in relation to an employment opportunity, and the current sub-s.59(2) covers false representations in relation to a business activity requiring the investment of funds and the performance of work by the persons concerned, the Act does not comprehensively cover commission arrangements, whereby a person acts as an agent (and is therefore not 'employed') and receives

commissions and bonuses, rather than set wages, for his/her work. Unless the commission arrangement also requires the investment of moneys by the agent it will not be covered by sub-s.59(2). Sub-s.59(2) is therefore being amended to prohibit a corporation, where it invites a person to participate in a business activity requiring the performance of work by that person, making false or misleading representations about any material aspect of the business activity.

Clause 29: Harassment and coercion

100. As with sub-s.53A(2), s.60 is being amended to delete the words 'cause or permit a servant or agent of the corporation to ...', as corporate liability for the conduct of servants and agents is imposed by s.84. S.60 is also being amended to remove the reference to the place of coercion. Harassment or coercion in connection with the supply of goods or services or the payment for goods or services is to be prohibited wherever it occurs, and not just at a place of residence as in the current section.

Clause 30: Pyramid selling

101. Under the current s.61, a scheme which for all intents and purposes is a pyramid selling scheme may escape the operation of the section by ensuring that all goods and services are purchased from the promoter. Paras.61(4)(b) and 61(5)(a) are therefore being amended to include within the scope of the section transactions arranged and effected by participants in the scheme, not all of whom are promoters. The section would then cover the case where the promoter is the supplier of the goods or services.

102. Currently, the section is limited to schemes under which goods or services are provided. Recently schemes have come to light which are pyramid in nature but only require the

transfer of moneys, and not the transfer of goods or services. The section is therefore being amended by inserting a new sub-s.(2A) to cover schemes under which only money is transferred.

Clause 31: Repeal of sections 62, 63 and 63AA

103. Ss.62, 63 and 63AA are being repealed and replaced with a new Division 1A of Part V dealing with product safety and information standards and product recall powers (see cl.35). Standards and banning orders prescribed under these sections up to the date of commencement of the new Division 1A will continue in force when the new Division comes into effect.

Clause 32: Unsolicited credit and debit cards

104. The s.63A prohibition on the unsolicited distribution of credit cards is being extended to debit cards. There is currently no legal barrier to the unsolicited issue of debit cards. The section is also being extended to cover cards that can be used both as credit and debit cards. It should be noted that only the unsolicited issue of the cards is being prohibited.

Clause 33: Assertion of right to payment for unsolicited goods or services or for making entry in directory

105. S.64 generally prohibits asserting a right to payment for unsolicited goods or services without reasonable belief that there is a right to payment. At present sub-ss.(2) and (2B) exempt from the prohibition claims in respect of unsolicited goods or services which are ordinarily used in carrying on business. A real problem is being faced by small business persons who are the target for fraudulent claims for payment for unsolicited advertising. Sub-ss.64(2) and 64(2B) are therefore being deleted. Thus, irrespective of who is supplied with unsolicited goods or services, a corporation

supplying goods or services would need to have reasonable cause to believe there is a right to payment.

Clause 34: Liability of recipient of unsolicited goods

106. Because s.65 is linked to s.64, sub-s.65(6) is being deleted to be consistent with the above amendments to s.64.

Clause 35: Division 1A - Product Safety and Product Information

107. Cl.35 inserts a new Division 1A in Part V of the Act to deal with product safety, product recall and product information. It comes into effect on 1 July 1986.

(i) Section 65B: Warning notice to the public

108. The new s.65B gives the Minister the power to publish in the Gazette a warning notice, stating that certain goods are under investigation as to their safety or to determine whether a product safety standard should be prescribed in relation to the goods under s.65C (see below). The notice may also warn the public of possible risks associated with using the goods.

109. Under sub-s.(2) where such a notice has been published advising of an investigation, as soon as practicable after the completion of the investigation the Minister is required to insert a notice in the Gazette advising of the outcome. This notice may contain an announcement of what future action is to be taken in relation to the goods. However, this second notice is not required if a notice in relation to the goods has been issued under s.65J or 65L, as a s.65J or 65L notice would supercede a warning notice issued under sub-s.65B(1).

(ii) Section 65C: Product safety standards and unsafe goods

110. The new s.65C basically reproduces in the new Division 1A the existing s.62, which is being repealed - see above under cl.31. However, s.65C contains some new features:-

- . sub-s.(2) allows for the prescription of safety standards consisting of requirements as to methods of manufacture or processing, and as to testing of the goods during or after manufacture, as are reasonably necessary to protect persons using the goods (this is in addition to the matters included in the existing sub-s.62(2));
- . sub-s.(3), consistent with the U.N. Guidelines on Consumer Policy to which Australia is a signatory, prohibits the export of goods which do not comply with consumer product safety standards or have been declared unsafe or made the subject of a permanent banning order under the section, unless the Minister has consented in writing to the export of the goods - this will allow the Minister to consent to the export of such goods in appropriate circumstances e.g. where a foreign government requests supply of a certain product;
- . sub-s.(7) provides that, if the Minister's declaration under sub-s.(5) expires and a prescribed consumer product safety standard in respect of the goods does not exist (it has been found very difficult to specify standards for certain goods under the existing sub-s.62(2) within the 18 months time limit for declarations), the Minister may impose a permanent ban on the goods.
- . sub-ss.(8) and (9) are amended to cover a good which is unsafe not because of a defect but because of its very nature (eg a slingshot).

111. Further, where the Minister proposes to issue a notice under sub-ss.(5) or (7), s.65J applies and provides an opportunity for a hearing in relation to the publication of the notice (see below).

(iii) Section 65D: Product information standards

112. The new s.65D reproduces in the new Division 1A the existing s.63 which is being repealed - see above under cl.31. Consistent with the new s.65C, sub-s.65D(2) permits the prescription of product information standards consisting of requirements as to methods of manufacture or processing as well as the other matters contained in the existing sub-s.63(2).

(iv) Section 65E: Power of Minister to declare product safety or information standards

113. The new s.65E reproduces in the new Division 1A the existing s.63AA which is being repealed - see above under cl.31. It should be noted that sub-s.(1) allows for the prescription of one standard as both a product safety standard and a product information standard if necessary.

(v) Section 65F: Compulsory product recall

114. The new s.65F provides the Minister with power to order a mandatory product recall in certain circumstances. The provision is proposed for use where voluntary recall measures do not exist or recall action taken by suppliers is unsatisfactory. Suppliers will be actively encouraged by the Commonwealth, State and Territory Governments to develop and (when needed) implement effective recall procedures.

115. Sub-s.(1) provides that, where a corporation supplies, on or after 1 July 1986, goods that:-

- . are of a kind likely to be used or intended to be used by a consumer;
- . do not comply with a prescribed product safety standard or have been declared unsafe or permanently banned under s.65C; or
- . are of a kind, in the opinion of the Minister, which will or may cause injury to a person;

and the Minister considers that the corporation has not taken satisfactory action to recall the goods, the Minister may require the supplier to take action to recall the goods or disclose to the public the nature of the defect and procedures for disposing of the goods. The Minister may also require the supplier to advertise that he undertakes to repair or replace the goods or refund the price. Where the supplier chooses to refund the price of goods, and a period of 12 months or more has elapsed since the acquisition of the goods from the supplier, sub-s.(2) provides that the Minister may specify in the notice that the amount of the refund may be reduced for past use, in accordance with a specified formula.

116. It should be noted that, under para.65F(1)(c), this mandatory recall power may only be exercised where the supplier has not taken satisfactory remedial action. It should also be noted that this power is exercisable subject to s.65J, which provides the supplier with certain rights to a hearing (see below).

117. Under sub-s.(3), the Minister may give directions in the recall notice or in another notice published in the Gazette as to the manner in which the supplier is to carry out the recall. Sub-s.(4) provides that where a supplier undertakes to repair the goods, they shall be repaired so as to remedy the defects or to comply with the relevant product safety standard

where such a standard has been prescribed. Sub-s.(5) makes similar provision where the supplier has undertaken to replace the goods. Where the supplier undertakes to repair or replace goods, sub-s.(6) makes it clear that the supplier bears the cost of the repairs or replacement, including transport costs.

118. Sub-s.(7) provides that, where goods which are being voluntarily recalled or are subject to a mandatory recall notice issued under sub-s.(1) have been exported, the exporter must notify the person overseas to whom he/she supplied the goods that they are subject to recall and the reason for their recall, and under sub-s.(8) provide the Minister with evidence of the notification. This prevents goods which are subject to recall action in Australia being dumped without notice of the recall on overseas markets.

(vi) Section 65G: Compliance with product recall order

119. The new s.65G requires suppliers to comply with the requirements of a recall notice issued under s.65F, and prohibits the supply by a corporation of goods to which the notice relates and, where the notice identifies a defect or dangerous characteristic, which carry the defect or dangerous characteristic identified in the notice.

(vii) Clause 65H: Loss or damage caused by contravention of product recall order

120. The new s.65H is a deeming provision similar to sub-ss.65C(8) and 65D(7). It provides that where a corporation contravenes s.65G, and a person suffers loss or damage by reason of a defect in the goods or of not having information about the unsafe characteristics of the goods, the person is deemed to have suffered the loss or damage because of the failure of the corporation to comply with s.65G. The person could then recover the amount of loss or damage under s.82 of the Act.

(viii) Section 65J: Opportunity for conference to be
afforded before certain powers exercised

121. The new s.65J provides an opportunity (subject to ss.65L and 65M - see below) for suppliers who would be affected by a notice issued by the Minister under ss.65C (product safety standards) and 65F (compulsory product recall) to seek a hearing before the notice is issued. Sub-s.(1) requires the Minister, when proposing to publish a notice under sub-ss.65C(5), (7) or 65F(1), to publish a notice in the Gazette setting out a copy of the draft notice and a summary of the reasons for the proposed publication of the notice. Persons who supply or propose to supply goods of the kind affected by the notice are then invited to inform the Trade Practices Commission within 10 days of a date specified in the Gazette if they wish the Commission to hold a conference in relation to the proposed publication.

122. Sub-s.(3) provides that if no supplier notifies the Commission, the Commission shall notify the Minister accordingly. Under sub-s.(4), where any supplier does notify the Commission, the Commission is required to appoint a day (within 14 days after the end of the relevant period), a time and a place for holding the conference. Sub-s.(5) sets out the persons who may be present at a conference and provides that the procedure to be followed shall be as determined by the Commission.

123. Under sub-s.(6), the Commission is required to keep a record of proceedings, and under sub-s.(7) it is required to ensure that all persons present are given a reasonable opportunity to present their case. However, it is not required to show the confidential material of one supplier to another supplier who is present or represented.

124. Through an amendment to s.95 (see cl.63), the Commission is required to place on a public register a record of proceedings of a conference held under s.65J.

(ix) Section 65K: Recommendation after conclusion of conference

125. The new s.65K requires the Commission, as soon as practicable after the conclusion of a conference held under s.65J, to recommend to the Minister whether, or with what modifications (if any), the Minister should publish the draft notice. The Commission is required by s.95 (see cl.63) to place on a public register particulars of recommendations made under s.65K.

(x) Section 65L: Exception in case of danger to public

126. The new s.65L provides that the Minister may issue a notice under sub-ss.65C(5) or 65F(1) notwithstanding that a notice under sub-s.65J(1) has not been gazetted or that a recommendation under s.65K has not been made. Under sub-s.(1), the Minister may certify that, because of an imminent risk of death, serious illness or serious injury to users of a particular good, a notice under sub-s.65C(5) or 65F(1) should be published without delay. The Minister would only take action under sub-s.(1) to by-pass the requirements of ss.65J and 65K in cases where a product is presenting an imminent hazard to public safety which necessitates urgent action.

(xi) Section 65M: Conference after goods banned

127. Where the Minister has declared goods to be unsafe goods pursuant to the new sub-s.65C(5), and certified that the notice should be published without delay because of an imminent risk of death, serious illness or serious injury pursuant to the new s.65L, then s.65M provides an opportunity for affected suppliers to seek an 'ex post' hearing. Sub-s.65M(1) requires the Minister to publish a notice in the Gazette inviting suppliers of the goods to notify the Commission whether they wish the Commission to hold a conference in relation to the notice.

128. Sub-s.(2) provides that if a supplier notifies the Commission in writing within the relevant period, the Commission is required to appoint a day, a time and a place for holding the conference. Sub-s.(3) provides that sub-ss.65J(5), (6) and (7) (see above) apply in relation to conferences held under the new s.65M.

129. The Commission is required by s.95 (see cl.63) to place on a public register records of proceedings of conferences held under s.65M.

(xii) Section 65N: Recommendation after conclusion of conference

130. The new s.65N requires the Commission, as soon as practicable after the conclusion of a conference held pursuant to s.65M, to recommend to the Minister whether the notice declaring the goods to be unsafe should remain in force, be varied or be revoked, and to serve a copy of the recommendation on the suppliers involved in the conference. The Commission is required by s.95 (see cl.63) to place on a public register particulars of recommendations made under s.65N.

(xiii) Section 65P: Minister to have regard to recommendation of Commission

131. The new s.65P provides that, where the Commission makes a recommendation to the Minister under s.65K or 65N, the Minister shall have regard to that recommendation. Where the Minister decides not to act in accordance with the Commission's recommendation, the Minister is required to publish in the Gazette the reasons for his decision.

(xiv) Section 65Q: Power to obtain information, documents and evidence

132. The new s.65Q provides the Minister with certain powers to obtain information, documents and evidence from a corporation, where the Minister or an officer authorised by the Minister has reason to believe that the corporation is supplying goods of a particular kind which may cause injury to a consumer and that it is capable of furnishing information relating to the goods (sub-s.(1)). However a person is only required to comply with the reasonable requirements of such a notice, and the times and places specified in such a notice must be reasonable. Further, under sub-s.(2), an authorised officer may enter premises in or from which the officer believes the corporation is supplying, in trade or commerce, hazardous goods, to inspect and take samples of the goods, inspect and take copies of documents relating to the goods, and inspect equipment used in manufacturing, processing or storing the goods. Where the officer takes samples of the goods, he/she is required to pay a reasonable price (sub-s.(8)).

133. In accordance with Article 17 of the International Covenant on Political and Civil Rights, which prohibits arbitrary or unlawful interferences with privacy, sub-ss.(3) to (7) require the authorised officer to be given a warrant before exercising the powers of entry and search under sub-s.65Q(2). Under sub-s.65Q(3) the authorised officer does not require a warrant where the exercise of those powers is required without delay in order to protect life or public safety. This conforms with Article 12 of the Australian Bill of Rights Bill 1985, which permits the search of premises without warrant where the search is necessary to protect life or public safety.

134. In those cases where a warrant is required, the authorised officer is required to submit an affidavit setting

out the grounds on which the warrant is sought (sub-s.6). Under sub-s.(7), the warrant must specify the purpose for which the warrant is issued, whether entry can be made at any time or only during specified hours, and a date of expiry of the warrant within 7 days of the issue of the warrant. The warrant must also include a description of the kind of goods authorised to be inspected or sampled.

135. Sub-s.(9) provides that it is an offence to refuse or fail to comply with a notice under the section, or to furnish information in purported compliance which is false or misleading. Under sub-s.(10), where an authorised officer exercises power under sub-s.(2), the corporation is required to give the officer all reasonable assistance.

136. Sub-s.(11) provides that the information collected by virtue of this section is not admissible as evidence in any proceedings against the person providing the information except proceedings for a contravention of s.65Q itself. Hence, the information cannot be used in proceedings relating to a contravention of s.65C or s.65G, for example. The information can only be used for the purpose of determining whether the goods involved are in fact unsafe, or to establish the legality of action taken under sub-ss.65C(5) or (7) or 65F(1).

(xv) Section 65R: Notification of voluntary recall

137. S.65R requires supplier corporations who undertake voluntary recalls of goods to inform the Minister of the recall within 2 days of taking that action. Suppliers need only notify the Minister of voluntary recalls of goods where the goods are recalled because they will or may cause injury, that is where they have a health or safety related defect. For example the section does not require a paint manufacturer to inform the Minister of a recall of paints that were wrongly tinted.

(xvi) Section 65S: Copies of certain notices to be given to suppliers or published in certain newspapers

138. S.65S provides that, where the Minister publishes a notice in the Gazette under ss.65B, 65J, 65L or 65M, the Minister is also required to send a copy of the notice to all suppliers who, to the knowledge of the Minister, supply goods of the kind to which the notice relates, or to have published a copy of the notice in a newspaper with appropriate circulation. Where the goods to which the notice relates are only supplied by a few suppliers, clearly it is practicable to send a copy of the notice to those suppliers. Where, however, the goods are sold in supermarkets throughout Australia, it would not be feasible to send a notice to each supplier, and the only practicable course would be to publish the notice in a national newspaper. This amendment seeks to ensure that suppliers are made aware that a notice has been published in the Gazette, so that they may take appropriate action.

(xvii) Section 65T: Certain action not to affect insurance contracts

139. The new s.65T provides that a supplier's claim under his product liability or product recall insurance will not be affected merely because the supplier provides information to the responsible authorities about goods supplied or proposed to be supplied by the supplier. This is intended to ensure that suppliers are not discouraged from voluntarily providing information to Government authorities about the safety of their goods.

Clause 36: Application of provisions not to be excluded or modified

140. S.68 is designed to ensure that, where Division 2 of Part V implies conditions and warranties into a contract for the supply of goods or services by a corporation to a

consumer, those conditions and warranties cannot be excluded or modified. However, s.68 does not presently cover the situation where the application of Division 2 is excluded by a term in a contract separate from the contract under which the goods or services are supplied, e.g. a blanket indemnity clause in a separate contract. To close this loop-hole s.68 is being amended, so that any term in any contract which seeks to exclude or modify the application of Division 2 to a contract to which it would otherwise apply, is deemed void.

Clause 37

141. This clause repeals the existing s.73 and inserts the following:-

(i) Section 73: Liability for loss or damage from breach of certain contracts

142. The existing s.73 absolves a finance company from all liability under the Act for the defective condition of goods it has provided in certain circumstances. The section ensures that the dealer who actually handles the goods, rather than a company that finances the transaction, is responsible under the conditions and warranties implied by Division 2 for the quality of goods supplied by way of hire-purchase or lease.

143. However, in some cases the credit provider must carry some fault. If he has an arrangement with the supplier to provide credit in respect of purchases from the supplier, he is aiding the supplier's business. He is then in a better position to know of the solvency of the supplier and depending on the connection he may be able to exercise some control over the supplier's business conduct.

144. Under the credit legislation recently introduced in New South Wales, Victoria, Western Australia and the Australian Capital Territory, where a credit provider who is linked to

the supplier provides credit to a consumer in respect of a purchase from the supplier, the credit provider and the supplier are liable jointly and severally for any breach of the contract of sale, misrepresentation or failure of consideration.

145. The existing s.73 is being repealed and replaced with a section modelled on and consistent with the linked credit provider provisions in the State Credit legislation (see e.g. s.24 Credit Act 1984 (NSW), s.24 Credit Act 1984 (Vic.)). Sub-s.(1) provides that a 'linked credit provider' (as defined in sub-s.(14)) is liable jointly and severally with the supplier for any misrepresentation, failure of consideration or breach of the contract of sale. However, where judgment is given against a supplier and a linked credit provider, the consumer must first demand payment from the supplier and may exercise his rights against the credit provider only to the extent that the judgment was not satisfied by the supplier. It is a defence if the credit provider establishes that the credit provided was not as a result of an approach from the consumer induced by the supplier, or that he was satisfied by due enquiry before becoming a linked credit provider of the supplier's financial standing and good business conduct and subsequently he had no reason to suspect that a consumer might be entitled to recover loss against the supplier (sub-s.(3)).

146. Where the credit provider is not linked to the supplier, sub-s.(2) makes clear that the credit provider is not liable for breaches of the conditions and warranties implied by Division 2. In these circumstances the consumer can seek redress from the supplier.

147. As with the rest of Division 2, the consumer will be able to recover his loss or damage by action in a State or Territory Court of competent jurisdiction.

(ii) Section 73A: Continuing credit contract

148. S.73A defines the term 'continuing credit contract' for the purposes of s.73, in particular sub-s.(14). It is in similar terms to the definition in the uniform State credit legislation (see eg. s.48 Credit Act (NSW), s.48 Credit Act (Vic)).

149. Under sub-s.(1), an 'agreement' includes an arrangement, understanding or course of dealing, and therefore need not involve a legally binding agreement for the purposes of the definition. Sub-s.(2) provides the broad definition of a 'continuing credit contract'. Sub-s.(3) provides that, where a creditor makes a payment to a third party in respect of the supply by that party of goods or services to a consumer, the creditor is deemed to have provided credit to the consumer.

(iii) Section 73B - Loan contract

150. S.73B defines the term 'loan contract' for the purposes of s.73, in particular sub-s.(14). It is in similar terms to the definition in the uniform State credit legislation (see e.g. s.5(1) Credit Act (NSW), s.5(1) Credit Act (Vic.)).

Clause 38: Warranties in relation to the supply of services

151. Sub-s.74(1) implies into contracts for the supply of services a warranty that the services will be rendered with due care and skill and a warranty that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. Under sub-s.74(2), where a consumer makes known a particular purpose for which the services are required there is an implied warranty that the services will be fit for that purpose. No warranty is implied by sub-s.74(2) if the consumer does not rely, or if it is unreasonable for the consumer to rely, on the corporation's skill or judgment.

152. Currently these warranties are restricted to contracts for the supply of services as defined by sub-s.74(3). However, this definition is unduly restrictive and the basic warranties implied by s.74 should apply, as far as possible, to all contracts for the supply of services. The sub-s.(3) definition of 'services' is therefore being repealed, so that the s.4(1) definition will be used in interpreting s.74.

153. However, a new sub-s.74(3) will provide that the section does not apply to contracts for the storage or transportation of goods for a commercial purpose, or contracts of insurance. Contracts of insurance are covered by the Insurance Contracts Act 1984 and there is no need for additional regulation in this area. In the area of transportation and storage of goods for the purpose of a business, business parties have well-established insurance arrangements which sometimes involve the limitation of liability in a way contrary to s.74. No useful purpose would be served in upsetting these arrangements, and for this reason contracts for the storage and transport of goods for a commercial purpose have been exempted from the application of the section.

Clause 39: Interpretation

154. Ss.74F and 74G make certain statutory provisions about repair facilities and spare parts and provide a right of action where the manufacturer's express warranty over goods is not honoured. The existing s.74A definition of 'express warranty' only refers to claims by the manufacturer in relation to the quality, performance or characteristics of the goods. This definition does not cover promises about services to be provided or spare parts to be supplied in the future in excess of the statutory requirements (eg repairs under warranties) or promises about the availability in the future of replacement components (e.g. replacement plates in a crockery set). The s.74A definition of 'express warranty' is therefore being amended to cover such promises.

155. The substantive provisions of Division 2A are being amended (see below under cl.40) to provide that a person who derives title to the goods under a consumer (eg by way of gift) or who acquires the goods from a consumer, has the same rights against the manufacturer as does the original consumer. However, this would mean that a used car dealer who buys a car from a consumer for the purpose of re-selling it in the course of his business would also be given these rights. As it is intended that Division 2A confers rights only on consumers, a new para.(aa) is being inserted in sub-s.74A(2) so that Division 2A rights are not conferred on persons who acquire goods for the purpose of re-supply.

Clause 40: Actions in respect of unsuitable goods (Also includes material for cls.41-46)

156. Currently, the rights conferred by Division 2A, except for those conferred by s.74D, only apply to the original consumer purchaser. Under s.74D, the manufacturer's liability with respect to merchantable quality arises not only in favour of the original consumer but follows title in the goods. It is considered anomalous that this section alone should afford rights against the manufacturer to persons who derive title to the goods under, or acquire the goods from, the consumer - such persons should also be able to claim under ss.74B, 74C, 74E, 74F and 74G. s.74B is therefore being amended to provide that persons who acquire goods from a consumer or derive title to the goods under a consumer (eg by way of gift) may seek redress through Division 2A. (Note that persons who acquire the goods from the consumer for the purpose of resupply are not included - see above under cl.39.)

157. Equivalent amendments are being made to ss.74C (cl.41), 74D (cl.42), 74E (cl.43), 74F (cl.44) and 74G (cl.45), and a consequential amendment is being made to s.74J (cl.46).

Clause 44: Actions in respect of failure to provide facilities for repairs or parts

158. Division 2A of Part V does not apply to goods supplied directly from manufacturer to consumer. Although the manufacturer would normally be bound by the conditions and warranties implied by Division 2 in the case of direct supply, Division 2 does not confer rights equivalent to those conferred by ss.74F and 74G. These sections are therefore being amended to provide that where a manufacturer supplies goods directly to a consumer, the manufacturer has the same responsibility as manufacturers who sell indirectly to consumers.

Clause 45: Actions in respect of non-compliance with express warranty

159. As with s.74F above, s.74G is being amended to provide that where a manufacturer supplies goods directly to a consumer, he has the same responsibility in respect to complying with an express warranty as he would if he sold indirectly to a consumer. The word 'statement' in sub-s.(2) is being replaced with 'representation' to standardise language throughout the Act (see above under cl.23).

160. Sub-s.(2)(a) is being amended to cover undertakings as to the provision of services and supply of parts that are or may be required in the future. This amendment is consistent with the amendment to the s.74A definition of 'express warranty' (see above under cl.39).

Clause 47: Offences against Part V

161. S.79 is being amended to double the maximum level of fines for a contravention of Part V (other than ss.52 and 52A) to \$100,000 for a corporation and \$20,000 for a natural person.

162. At present, ss.5 and 7A of the Crimes Act 1914 provide that any person who aids, abets, counsels or procures, or is

in any way directly or indirectly knowingly concerned in, the commission of any offence against a law of the Commonwealth, or incites or urges a person to contravene a Commonwealth law, is deemed also to be guilty of an offence. So that all the offences under the Act are apparent on the face of the Act itself (rather than requiring reference to the Crimes Act), s.79 is being amended to cover the offences created by the Crimes Act. The relevant provisions of the Crimes Act are consequently being excluded by a new sub-s.(5).

163. There is no offence of 'attempting' to contravene the provisions of Division 1. As many of the sections refer to conduct in relation to the 'possible' supply of goods or services, it is considered that the offences are broad enough and there is no need to make it an offence to attempt to contravene Division 1.

164. The Federal Court Rules do not permit the joining of a criminal action with an action for a civil remedy (such as an injunction or corrective advertising order). At present, then, the Trade Practices Commission, in proceedings against a person for a contravention of Part V, cannot seek injunctions at the same time to restrain the person from engaging in the offending conduct. A new sub-s.(4) is therefore being inserted to allow the Court to grant an injunction or make a corrective advertising order in addition to imposing a fine on the person in prosecution proceedings.

165. The current 12 month time limit on prosecutions which is imposed by s.21 of the Crimes Act 1914 has proven unduly restrictive because any delay in an offence coming to light or in the investigative process because of, for example, the complexity of the matter, will normally be fatal to the institution of prosecution proceedings. Accordingly, s.79 is also being amended to provide a 3 year time limit for the commencement of prosecution proceedings for a contravention of Part V (see new sub-s.(6)).

Clause 48: Enforcement and recovery of certain fines

166. The Act does not contain any operative provisions relating to the enforcement of fines imposed under s.79. As a result, difficulties have been experienced in enforcing fines, particularly those imposed on individuals. Recent cases in the Federal Court and the High Court have established that defaults in respect of fines imposed under s.79 are to be dealt with under s.18A of the Crimes Act 1914 in accordance with the relevant State Act dealing with the imposition of fines in summary proceedings. However, because of the lack of uniformity in the relevant State and Territory provisions and the uncertainty of enforcement with the application of s.18A, it was considered that the Crimes Act should no longer apply to the enforcement and recovery of fines under the Act.

167. For this reason, a new s.79A was inserted in the Act through the Statute Law (Miscellaneous Provisions) Act (No.2) 1984 to provide a uniform system of enforcement of the criminal sanctions in Part V of the Act. The section was to come into effect on proclamation, following finalisation of arrangements with the States and Territories regarding the administration of community service orders.

168. These arrangements have not yet been finalised, and it is important that some enforcement provisions are now inserted in the Act. Accordingly, a new s.79A is being included in the Bill largely mirroring s.79A as it appeared in the Statute Law (Miscellaneous Provisions) Act (No.2) 1984, except that reliance is being placed on certain parts of s.18A of the Crimes Act 1914 (which is being amended by the Statute Law (Miscellaneous Provisions) Bill (No.2) 1985) in relation to imprisonment and non-custodial sentencing options in default of payment of fines. (The provision in the Statute Law (Miscellaneous Provisions) Act 1984 relating to s.79A is being repealed accordingly, see cls.74 to 76.) The section provides enforcement measures including specified time for payment or payment by instalments, and registering fines imposed as a civil judgment debt.

169. With respect to orders imposing sentences of imprisonment, s.17A of the Crimes Act would apply so that the Court would not impose such a sentence until all other options had been considered. Where a person was required to serve periods of imprisonment in respect of two or more fines they would be served consecutively. The term of the sentence would be calculated at one day's imprisonment for every \$25 of the fine that remains unpaid.

Clause 49: Injunctions

170. New sub-s.80 (1AA) enables the Court to grant injunctions, consented to by all the parties to the proceedings without the Court first having to satisfy itself that a person has engaged, or is proposing to engage, in conduct of the kind mentioned in sub-s.80(1). This makes it clear that, in the absence of an admission of liability, the Court can grant consent injunctions if the Court considers it to be appropriate, without holding a hearing of the matter. This amendment will also apply to pending proceedings.

171. The amendment to sub-s.80(1A) is consequential to the insertion of the new s.50A by providing that injunction proceedings for breach of s.50A may be brought by the Minister, the Commission, or the person who originally applied for the declaration.

Clause 50: Order to disclose information or publish advertisement

172. S.80A is being amended to make it clear that breaches of s.52A are not subject to corrective advertising orders or orders to disclose information. As noted above under cl.22, the remedies for breaches of s.52A are contained in s.87.

173. The existing monetary limits on orders under s.80A are unrealistic where a nationally operating corporation is involved as almost any order directing it to disclose information or publish corrective advertisements will necessarily involve an amount exceeding \$50,000. Hence, the monetary limitations (sub-ss.80A(2) to 80A(4)) are being deleted to give the Court a discretion in relation to the remedies in s.80A. This amendment maintains consistency with the 1983 amendments to s.80 which provided a wider discretion to the Court in granting injunctions.

Clause 51: Divestiture

174. The amendments to ss.50 and 50A necessitate consequential amendments to s.81. The provision is also being amended to improve the effectiveness of the divestiture remedy and its deterrent effect.

175. The replacement of 'corporation' with 'person' in sub-s.81(1) is consequential upon the amendment to s.50 extending that provision to acquisitions by natural persons.

176. New sub-s.81(1A) is being inserted to ensure that where a vendor is involved with the purchaser in a contravention of s.50 the court may, on the application of the Minister or the Commission, declare the acquisition void. If the court makes such a declaration the shares or assets in question are deemed never to have been disposed of by the vendor who shall refund any amount paid for the shares or assets. S.75B defines what constitutes a person's involvement in a contravention.

177. New sub-s.81(1B) provides that the divestiture remedy also is available where contraventions of the new s.50A occur. However, orders can only be directed against persons operating in Australia. New sub-s.81(1C) empowers the Court to consent to the sale of shares and assets not acquired by the purchaser in the acquisition or merger in question in lieu of an order being made under sub-ss.81(1) or (1A).

178. New sub-s.81(3) enables the Court to give directions or make a declaration by consent of all the parties to the proceedings without the Court first making the findings referred to in sub-ss.81(1) and 81(1A). This makes it clear that, in the absence of an admission of liability, the Court can give consent directions or make a consent declaration if the Court considers it to be appropriate without holding a hearing of the matter. This amendment will also apply to pending proceedings.

Clause 52: Actions for damages

179. S.82 is being amended to make it clear that actions for breach of s.52A should be instituted under s.87. As noted above under cl.22, all remedies for breach of s.52A are contained in s.87.

Clause 53: Conduct by directors, servants or agents

180. The evidentiary provision in sub-s.84(1) imputes to a corporation the intention of its directors, servants and agents, in circumstances where it is necessary to establish the corporation's intention. Recent judicial interpretation has shown that this provision has a narrow application and does not impute to the corporation admissions or certain states of mind relevant to establishing a contravention of Part V of the Act.

181. In Barton v Westpac Banking Corporation (1983) ATPR 40-388 the judge interpreted the reference to 'intention' to require a criminal standard of proof that the corporation through one or more of its servants or agents had the requisite intention. Similarly, in Universal Telecasters v Guthrie (1978) ATPR 40-062 the Full Federal Court held that sub-s.84(1) does not impute to the body corporate admissions or certain states of mind (such as knowledge) of its servants or agents, and that the knowledge of the corporation is that

held by its top management and that only a managing director has power to make admissions in relation to all aspects of a corporation's business.

182. Because of the limited scope of sub-s.84(1) large corporations with extensive management structures are able to avoid liability in situations where smaller companies and individuals would be held liable under Act.

183. S.84 is therefore being amended by deleting sub-s.84(1) and inserting a new provision providing that where it is necessary to establish the state of mind of a body corporate in relation to conduct engaged in by the body corporate, the state of mind of a director, servant or agent acting within the scope of his actual or apparent authority is sufficient. The new sub-s.(5) provides that the 'state of mind' of a person refers to the knowledge, intention, opinion, belief or purpose of the person and that person's reasons for those states of mind.

184. New sub-s.84(1) also applies to conduct to which s.46 applies (the current sub-section only applies to conduct to which Part V applies), as a contravention of s.46 requires it to be established that a corporation took advantage of its power in a market for one of the proscribed purposes in sub-s.46(1). This provision complements new sub-s.46(7) (see cl.17).

185. Sub-s.84(2) is being amended to deem conduct engaged in on behalf of a body corporate by a director, servant or agent acting within the scope of his actual or apparent authority or by any other person at the direction, or with the consent or agreement of a director, servant or agent given within the scope of his/her actual or apparent authority to be also conduct engaged in by the body corporate.

186. The amendment also provides (in sub-ss.84(3) and 84(4)) that the liability of individual employers under the Act for their servants and agents be made the same as that of corporate employers. This proposal ensures consistency in the legal position of all employers, whether natural persons or corporations, insofar as this is possible under the Act.

Clause 54: Defences

187. Under s.85, it is a defence to a prosecution in relation to a contravention of a provision of Part V if the defendant establishes that the contravention was due to reasonable reliance on information supplied by another person or to the act or default of another person. To be consistent with sub-s.84(1), the other person referred to here cannot include a servant, agent or director of the defendant. A new sub-s.(1A) is therefore being inserted in s.85 to clarify the operation of the defences relating to 'another person', by providing that the reference to 'another person' in paras.85(1)(b) and 85(1)(c) does not include a person who was a servant or agent of the defendant, or in the case of a defendant corporation, a director, servant or agent of the defendant.

Clause 55: Other orders

188. At present when the Commission successfully brings injunction or prosecution proceedings an aggrieved person obtains no redress from the proceedings. The person is left to pursue his/her own action. The Courts should be able to make compensation orders for the benefit of consumers once the Commission has successfully instituted proceedings in respect of a contravention against Part V. This would facilitate a better use of the court's time, and allow consumers easier access to the courts at a lower cost than at present.

189. Accordingly, sub-s.87(1A) is being amended and a new sub-s.87(1B) is being inserted, to confer power on the Commission to act on behalf of particular named persons (who consent in writing to the Commission acting on their behalf) in seeking redress, where the Court has found a contravention in proceedings brought by the Commission or the Minister. The Court could then make such orders as it thinks fit against the person who engaged in the offending conduct if it considers that the order will compensate, or reduce or prevent loss by the aggrieved persons.

190. The law has long recognised this type of representative action. Further, this representative action is not a so-called 'class action': the question of remedies for aggrieved consumers only arises once the Commission has established a contravention of Part V; those aggrieved consumers must be identified in the application and must have consented in writing to the Commission acting on their behalf; and the Court is not empowered to make awards of damages to a class of persons, but only to particular named persons. These persons would have to establish individually the amount of their loss caused by the contravention.

191. Sub-s.(2) is being amended to further specify the remedial powers of the Court, in regard to orders refusing to enforce any or all of the provisions of a contract, or orders directing the person who engaged in the offending conduct to vary, terminate or otherwise affect an instrument creating or transferring an interest in land by executing another instrument. The first order is being inserted because para.(2)(a) only refers to the Court's power to declare contracts or parts of contracts void, rather than just declaring the contract or parts of the contract unenforceable. The second order specifies that the Court has power to undo transactions involving land where it considers it appropriate to do so.

192. As noted above under cl.22, this section provides the remedies for breach of the new s.52A relating to unconscionable conduct. The new sub-s.(1C) provides that actions in respect of unconscionable conduct must be brought within 2 years after the alleged contravention occurred. Under sub-s.(1D) the Court can have regard to the conduct of the parties in relation to the alleged unconscionable transaction since the alleged contravention occurred, in determining whether there has been a breach of s.52A. However, s.87 does not empower the Court, in respect of contraventions of s.52A, to make orders varying, avoiding or terminating a contract of insurance to which the Insurance Contracts Act 1984 applies, because it is considered that the Insurance Contracts Act provides adequate protection in this area (see sub-s.(1E)).

Clause 56: Power of Court to prohibit payment or transfer of moneys or other property.

193. The Court at present has no specific power to make interim and ancillary orders other than interim injunctions under sub-s.80(2) in proceedings under the Act. This has enabled funds obtained from consumers to be dissipated in the often lengthy period during which investigations are pursued to completion, proceedings are instituted and judgment is given in the case.

194. A new s.87A is being inserted in the Act giving the Court power to prohibit the payment or transfer of moneys or other property when proceedings have been instituted. Applications to 'freeze' a defendant's assets could only be made by the Minister or the Trade Practices Commission. This provision is subject to the Bankruptcy Act 1966.

Clause 57: Power of Commission to grant authorizations

195. The amendments to section 89 are consequential to the amendment of section 50 and the introduction of section 50A.

196. The first amendment provides for the possibility of authorization by the Commission of the consequences in Australia of a proposed overseas acquisition. As is the case with authorization of mergers within Australia, an authorization for an overseas acquisition would be judged by the Commission on whether the acquisition would result in such a benefit to the public (in Australia) that it should be allowed to take place. If an authorization is granted, it effectively prevents proposed s.50A from applying to the anti-competitive effects of that acquisition within Australia.

197. As is the case with all authorizations, a decision by the Commission on a s.50A authorization application would be, on the application of a dissatisfied person, subject to review by the Tribunal under s.101 of the Act.

198. The second amendment makes merger authorizations available to natural persons as well as corporations. It is consequential to the amendments to s.50 which extend the application of that provision to acquisitions by natural persons.

Clause 58: Procedure for applications

199. S.89 requires, amongst other things, that certain documents be placed on the public register maintained by the Commission. There is however, a question whether these include documents relating to the revocation and/or substitution of a fresh authorization. This amendment clarifies that such documents are to be placed on the public register.

Clause 59: Determination of applications for authorizations

200. The first amendment to s.90 is consequential to the amendment of s.88 to provide authorization for s.50A conduct. Sub-s.90(9) provides the grounds on which authorization may be

given. By virtue of this amendment, the grounds for s.50A authorizations will be the same as that for authorization of s.50 mergers (mergers within Australia) viz: such a benefit to the public that the acquisition should be allowed.

201. Cl.59 also shortens the time period available to the Commission to consider applications for merger authorization. In future under sub-s.90(11) the Commission will have 45 days plus the time taken by the applicant to provide additional information pertaining to the application sought by the Commission. If the Commission has not determined the matter within that period, authorization is deemed to have been granted. This abridged period will apply only in respect of merger authorization applications made to the Commission after the commencement of this clause.

Clause 60: Commission to afford opportunity for conference before determining applications for authorization

202. Consequential to the proposed amendment to s.90, s.90A is amended so that pre-decision conferences will no longer be available in the determination of applications for authorization of mergers.

Clause 61: Grant, revocation and variation of authorizations

203. Existing s.91 does not specify when an authorization takes effect. The Court has held that a merger authorization may be acted upon immediately without regard to the review period where the Commission did not impose any condition to postpone the date of the authorization (Broken Hill Pty. Co. Ltd. v Trade Practices Tribunal & Ors (1980) ATPR 40-173). The effect of that decision was to preclude any appeal to the Tribunal.

204. New sub-s.91(1A) provides that an authorization (other than a deemed authorization) takes effect when the review period expires or on any later date specified in the

authorization. Where an application for review has been lodged, the authorization does not take effect until the review is determined by the Tribunal. If the application for review is made and subsequently withdrawn the authorization takes effect on the day on which the review period expires. Deemed authorizations under sub-s.90(10) or 90(11) come into effect on the expiration of the review period, unless an application for review is made in which case the authorization comes into effect when the Tribunal makes its determination. If an application for review is made and then subsequently withdrawn, the authorization comes into effect on the day on which the application is withdrawn.

Clause 62: Notification of exclusive dealing

205. This clause amends para.93(7)(b) to refer to purpose and likely effect as well as the effect of substantially lessening competition. The amendment provides consistency with the terminology in sub-s.47(10). S.47 creates offences pertaining to exclusive dealing.

Clause 63: Public register

206. S.95 is being amended to require the Commission to place on a public register records of proceedings of conferences held under the new ss.65J or 65M, and particulars of recommendations made to the Minister under the new ss.65K or 65N. Sub-s.(2) is being amended so that the Commission can withhold from the register information furnished by a supplier at a conference held under ss.65J and 65M which is of a confidential nature. Sub-s.(5) is being amended consequential on the insertion of the new s.65Q.

Clause 64: Applications for review

207. New sub-s.101(1A) enables the Tribunal to make a determination by consent of the applicant, the Commission and

all persons permitted to intervene in the review proceedings without the Tribunal first reaching a conclusion as to the requisite degree of public benefit. This makes it clear that the Tribunal can make consent determinations if the Tribunal considers it to be appropriate without holding a hearing of the matter. This amendment will also apply to pending proceedings.

208. The amendment to s.91 (see cl.61) in essence provides that authorizations do not take effect until a Tribunal review has been completed or the time for making an application for review has expired. This may have adverse effects in the case of certain merger authorizations granted under sub-s.88(9). To alleviate the possible deleterious effects of such a delay this amendment inserts new sub-s.101(1B) which empowers a Presidential member of the Tribunal to abridge the time period within which an application for a review of a Commission determination under sub-s.101(1) must be lodged. The Presidential member will need to be satisfied that special circumstances exist and that it would not be unfair to abridge the time.

Clause 65: Power to obtain information, documents and evidence

209. Unlike other penalty provisions in the Act, the penalty provisions applying to s.155 do not distinguish between natural persons and corporate offenders. New sub-s.155(6A) is therefore being inserted to distinguish between natural persons and corporations who contravene s.155, as well as providing increased penalties. (The same level of penalties is being prescribed elsewhere in the Act - see cls.67 to 70).

Clause 66: Disclosure of documents by Commission

210. This amendment is consequential on the insertion of a new s.87A in the Act (see above under cl.56).

Clauses 67-69

211. The level of penalties under ss.160, 161 and 162 is being amended to be consistent with the new level of penalties prescribed under s.155 (see cl.65 above).

Clause 70: Intimidation

212. New s.162A makes it an offence to intimidate or harass a person who provides information or documents to the Commission or the Tribunal or who appears as a witness before the Tribunal.

Clause 71: Prosecutions

213. S.163 is being amended first by removing the specific provision providing for the commencement of prosecutions by summons upon information (existing para.163(4)(a) of the Act). As this procedural matter is now covered by Order 49 Rule (1) of the Federal Court Rules, it is no longer necessary to have a specific provision in the Act.

214. Secondly, sub-s.(4) is being amended to remove the requirement for the Commission to seek the consent of the Minister before instituting proceedings in respect of a contravention of a provision of Part V of the Act.

215. Thirdly, sub-s.(5) is being amended to provide that prosecutions for contraventions of s.155 may be brought at any time. At present para.21(1)(b) of the Crimes Act 1914 operates to impose a 12 month limitation on institution of penalty proceedings.

Clause 72: Inspection of, furnishing copies of, and evidence of, documents

216. Cl.72 makes amendments to s.165 consequential to the insertion of s.50A (cl.19). Persons will have the right to inspect a Tribunal declaration and a certified copy of any such declaration would be received as evidence in all Courts.

Clause 73: Legal and financial assistance

217. S.170 is being extended to include applications for assistance by persons who have instituted proceedings in the court seeking a declaration or an order by way of prohibition, certiorari or mandamus under s.163A. Para.170(3)(b) is being amended to extend the provision to include declarations granted under sub-s.50A(1).

Clauses 74-76

218. These amendments are consequential on the insertion by Clause 48 of a new s.79A in the Act.

