

THE TRADE PRACTICES ACT
PROPOSALS FOR CHANGE

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TRADE PRACTICES ACT

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This publication sets out proposals under consideration by the Government for amending the Trade Practices Act 1974. It aims to be a catalyst for public discussion and to generate public comment from the widest range of parties - industry, business, unions, consumer organizations and interested individuals.

Many of the suggested changes were foreshadowed in a speech by the Attorney-General on 23 November 1983 and in a news release by the Minister for Home Affairs and Environment on the following day although not all the matters there canvassed are proceeded with in the present proposal. The Government has not committed itself finally or irrevocably on any of the matters in the accompanying papers, and will carefully consider all comments received in time. It is not intended to formally introduce any legislation until the beginning of the 1984 Budget Session.

The publication is divided into the following papers -

- Paper A - Explanation of Proposals (Pages 1-34)
This gives the background to the major legislative proposals as well as an explanation of how each proposal would operate.
- Paper B - Exposure Draft Bill (Pages 35-75)
This contains the legislative proposals in a detailed technical form, to allow consideration of their form and substance.
- Paper C - Discussion Paper: the Trade Practices Act and Trade Unions (Pages 77-115)
One major proposal would involve the repeal of s.45D and 45E, which extend the Trade Practices Act to trade union activity. This Discussion Paper canvasses possible issues arising from that proposal, and matters relating generally to the relationship between trade unions and the Trade Practices Act.

Ministerial responsibility for these proposals relating to the Trade Practices Act is shared between Senator the Hon. Gareth Evans Q.C., Attorney-General (amendments related to Part IV - the restrictive trade practices provisions - and the remaining parts of the Act, but excluding consumer protection) and the Hon. Barry Cohen, M.P., Minister for Home Affairs and Environment (amendments related to Part V - consumer protection provisions).

The Discussion Paper is produced jointly by the Attorney-General and the Hon. Ralph Willis, M.P., Minister for Employment and Industrial Relations.

Comments on the proposals are now sought. They should be in writing and forwarded to the Attorney-General, Parliament House, Canberra, A.C.T. 2600.

Comments received, together with submissions already made since the Government's announcements in November, will then be considered by the relevant Ministers and Departments.

It will be assumed that submissions are not confidential and will be available to others unless the contrary is made clear. They should reach the Attorney-General by 4 May 1984.

PAPER A

EXPLANATION OF PROPOSALS

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This document provides, in brief form, a summary of the substance of the proposals contained in the Exposure Draft Bill. It also contains background statements in the case of some of the more important or complex proposals. Readers should refer to the Exposure Draft Bill for the precise terms of any proposal.

For convenience this document has been prepared in the form of an Explanatory Memorandum, as though the proposals were a Bill for consideration by the Parliament, and as such it adopts usual citations.

Reference to a particular clause (or sub-clause) is a reference to the Exposure Draft Bill. Reference to a particular section (or sub-section or paragraph) is to the Trade Practices Act 1974 (Reprint No. 2 of the Act incorporates all amendments up to 30 June 1982.)

Paragraphs in the present document are cited as "para." to avoid confusion with references to paragraphs in the Act.

Clause 1 : Short title, &c.

1. When enacted the Bill will be known as the Trade Practices Amendment Act 1984 and references in the Bill to the "Principal Act" mean the Trade Practices Act 1974.

Clause 2 : Commencement

2. This is a normal machinery provision and is included in the exposure draft for the sake of completeness.

Clause 3 : Application of Act to the Commonwealth and Commonwealth authorities

3. Decisions relating to the sale of land in the Australian Capital Territory are frequently taken by reference to considerations of Government policy rather than commercial criteria. It is more appropriate that such decisions be reviewable, as they are at the moment, through the machinery of the Administrative Appeals Tribunal and the Administrative Decisions (Judicial Review) Act 1977, rather than through the application of legislation designed for commercial transactions.

4. Proposal Section 2A applies the Act to the Commonwealth insofar as it is carrying on business except that the provisions relating to restrictive business practices (Part IV) do not apply to Commonwealth development or disposal of land in the Australian Capital Territory. The effect of the proposed amendment is that in addition to Part IV, section 52A (the new provision relating to unconscionable conduct) would not apply to the Commonwealth's business of developing and disposing of land in the Australian Capital Territory.

Clause 4 : Consumers

5. Background The Government proposes that the Act should be amended to broaden the definition of "consumer". Assistance available to both consumers and small business covered by the Act has been limited by the existing monetary ceiling. As a result of inflation, the definition has become restrictive because the real value of the \$15,000 monetary limit has been reduced significantly. For example, the present definition does not provide protection for farmers who purchase expensive farm machinery.

6. Proposal Clause 4 would amend section 4B by widening the definition of "consumer". The monetary limit in consumer transactions for the price paid for goods or services would be raised from \$15,000 to \$200,000. The raising of the monetary limit would widen the operation of Division 2 of Part V (implied terms in consumer transactions) to the benefit of consumers, small business and farmers.

7. At present a transaction will be a consumer transaction even where the price exceeds the monetary limit unless the goods were acquired for certain specified purposes. One of those purposes is the acquisition for the purpose of using the goods in the process of production. Goods purchased for a farming business would ordinarily be so used and thus excluded from the protection accorded consumer transactions. The proposed amendment will enable farmers to have the benefits of the consumer protection provisions (Division 2 of Part V) in relation to the purchase of goods and, in particular, of machinery (a farming business is defined as meaning

agricultural, forestry, horticultural orcharding, viticultural, apicultural, animal husbandry or piscicultural business or any other business involving the cultivation of land or the rearing of livestock.

Clause 5 : Severability

8. If proposals to create new sections 82A (orders in respect of unconscionable contracts - refer paras 136-139) and 87A ("freezing" of assets - refer para 157) are adopted, the types of orders covered in section 4L would need to be consequentially extended.

Clause 6 : Additional operation of the Act

9. Background Section 6 of the Act has the effect of giving provisions of the Act an additional operation to that provided for in the provisions themselves set out in the circumstances therein.

10. Proposal The amendments proposed are largely consequential on other amendments, e.g. the repeal of sections 45D and 45E. The only amendment calling for explanation is sub-clause 6(e) which relates to the new proposed section 73 (liability for loss or damage from breach of certain contracts - refer paras 100 - 104).

11. Proposed sub-section 73(6) provides that proceedings under that section must be brought against the supplier as well as the credit provider unless the supplier corporation has been dissolved or is commenced to be wound up.

12. Sub-clause 6(e) makes similar provision in respect of natural person suppliers who have died or are the subject of certain bankruptcy action.

Clause 7 : Disclosure of interests by Commission members

13. Background Following the recommendations of the Bowen Committee, successive governments have been moving to ensure consistency of legislation dealing with the conflicts of duty and personal interests of statutory office holders.

14. Proposal Section 17 would be replaced by a new section 17, modelled on section 14 of the Administrative Appeals Tribunal Act 1975.

15. A member of the Commission would be required to make disclosures and disqualify himself from any matter before the Commission in which he has a pecuniary interest that may conflict with the proper performance of his functions. The Chairman would also be empowered to give a member a direction not to determine such a matter. Alternatively the Chairman

would be obliged to disclose any pecuniary interest of that member to other concerned persons where he decides not to make a direction. Associate members would also be covered by the provision.

16. Contrasted with the position of members, the Chairman would have to report to the Minister all pecuniary interests he has or acquires in any Australian business.

Clause 8 : Disclosure of interests by Tribunal members

17. For the same reasons as set out in para 13 a new section 40 is proposed to adopt essentially the same requirements for members of the Trade Practices Tribunal as the proposal for a new section 17 does for the Commission.

Clause 9 : Contracts, arrangements or understandings restricting dealings or affecting competition

18. Background In proceedings where the collective conduct of members of a trade association is relevant for the purpose of establishing a substantial lessening of competition, litigants are presently required to prove separately that each member of the association is engaging in that conduct.

19. Proposal Clause 9 would introduce a rebuttable presumption, to be sub-section 45(10), that corporations are parties to any contract, arrangement or understanding to which their trade associations are a party. This would apply only for the purpose of determining whether a provision of the contract etc. has the effect of substantially lessening competition. Because the presumption is rebuttable, this provision would not be as far reaching as section 92 of the earlier Trade Practices Act 1965.

20. Section 45(11) would introduce a similar rebuttable presumption for the same limited purpose in respect of any contract, arrangement or understanding between members of a trade association entered into by virtue of a decision of a trade association. Sub-section 45(12) would define "trade association".

Clause 10 : Covenants in relation to prices

21. Clause 10 would amend "a market" appearing in sub-section 45C(1) to "any market" to make it consistent with related provisions in section 45B.

Clause 11 : Repeal of sections 45D and 45E

22. Background The Government considers that general secondary boycott provisions, which are aimed primarily at the conduct of trade unions, should not be contained in the Trade Practices Act. Refer to Paper C - Discussion Paper - The Trade Practices Act and Trade Unions for more detail.

23. Proposal Clause 11 would repeal sections 45D and 45E in their entirety. (For consequential proposals see paras 9, 60, 130 and 159.)

Clause 12 : Monopolization

24. Background The existing monopolization provision (section 46) relates to corporations in a position substantially to control a market. Such corporations shall not take advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into the market they control or deterring or preventing persons from engaging in competitive conduct.

25. In its present form, section 46 does not prevent the predatory or anti-competitive conduct identified in paragraphs 46(1)(a)-(c) unless the corporation engaging in that conduct is in a position substantially to control the relevant market. It is widely acknowledged that this test is a most rigorous one if strictly applied and that, as a result, the section has no application except to a few very powerful corporations with the requisite market control. In TPC v Ansett Transport Industries (Operations) Pty Ltd. (1978) 20 ALR 31 (the Ansett-Avis Case), a case concerned with section 50, the Court ruled that: "the word 'dominate' is to be construed as something less than 'control'. [Dominate] is to be construed in its ordinary sense of having a commanding influence on" (emphasis added). By analogy, the control test in section 46 may require something more than commanding influence on the market before the section comes into operation.

26. It is also widely accepted that there are many corporations with a substantial degree of market power - but which could not be said to be in "substantial control" of the market - which engage in conduct falling into one or more of the three categories in paragraphs 46(1)(a)-(c). Each of these categories identifies conduct which runs counter to the fundamental principle of the Trade Practices Act, that of preserving and promoting competition. Given the fundamentally anti-competitive nature of such conduct, it is necessary that the threshold test in the section be lowered, so that corporations with a sufficient degree of market power to seriously harm or exclude competitors and which abuse their market power in that way will attract the operation of the section. Accordingly this Clause would amend the section to cover predatory conduct by a corporation which has a substantial degree of market power. This was an amendment

proposed by the Trade Practices Consultative Committee in 1979 and it should be emphasised, as it was by the TPCC, that the amended section would not catch legitimate competitive behaviour.

27. The TPCC's description of the section in its present form and its explanation of the proposed amendment are directly in point:

"In our view, unilateral predatory conduct should clearly be brought within the scope of section 46 if it is engaged in by any firm abusing any substantial degree of market power.

The present words "substantially to control a market for goods or services" have on one view of their definition as set out in sub-section 46(3) been written down so as effectively to lower the threshold of firms which are subject to scrutiny under Section 46 to include most firms in particular markets which do have substantial market power. However, we have the clear impression that many people, including some who seek to enforce the Act, tend to interpret the words and their definition as only proscribing purposive conduct by the market leader. If this interpretation were correct the section would not be effective to curtail the predatory actions of other powerful firms, in a market, which are directed at smaller firms. In any event we think that these doubts as to the limited class of firms to which section 46 has application are the main reason why the section has not been the subject of much litigation.

We think that if the words "in a position substantially to control a market for goods or services" were replaced by the words "that has a substantial degree of market power" the direction of the section's thrust would be clearer...." (TPCC Report - Small Business and the Trade Practices Act paras 9.23-9.24)

28. There have been difficulties arising from the term "purpose" in existing section 46. It has introduced a highly subjective element into the operation of the provision. This difficulty is especially the case where it is necessary to prove the mental state of a corporation. The nature of this difficulty has been highlighted by the recent decision in T.P.C. v Tubemakers of Australia & Ors. (1983) ATPR 40-358. There may be circumstances where a corporation "takes advantage" of its power in the market to produce immediate and severe anticompetitive consequences. It is thus necessary for the section to apply where those consequences can be established.

29. Proposal The test in sub-section 46(1) would be changed from one of "substantial control" to one of "substantial degree of market power" thereby lowering the threshold.

30. The words "or that has or is likely to have the effect" would be added to sub-section 46(1) to give litigants an alternative method of establishing a contravention by proving the effect or likely effect of the corporation's conduct rather than having to establish a predatory purpose.

Clause 13 : Resale price maintenance

31. Where the proposal in clause 60 (refer para 171) to extend the definition of "person" is adopted, a consequential amendment to section 48 would be required. The section provides the general proscription of resale price maintenance which is detailed in Part VIII of the Act (sections 96-100).

Clause 14 : Price discrimination

32. Background Section 49 was in part intended to enable small business to compete on reasonably equal terms with larger competitors whilst not adversely affecting competition. The effectiveness of this provision in achieving that objective has been widely debated. Whilst it has also been suggested that any kind of prohibition of price discrimination will in certain circumstances have deleterious effects on competition, Governments have continued to accept the need for some provision of this kind to maintain the economic and social importance of small business in the market place.

33. The small businesses most often adversely affected by price discrimination are those in competition with large corporations. Discrimination by suppliers against these small businesses will frequently not produce the substantial lessening of competition in the market required to establish a contravention of the section, but nevertheless will have significant effects on small business. As the Council of Small Business Organisations of Australia (COSBOA) said in its 1979 submission to the Trade Practices Consultative Committee:

"The discrimination may be of such magnitude in, for instance, a country town, that it seriously jeopardises the existence of a small trader. However, when the discrimination is related to the market place as a whole it becomes insignificant" (TPCC Report, Volume 2 p.239).

Again, a buyer may be charged more than another buyer and these buyers may be competing in the same market. That discrimination in price may greatly affect competition between those buyers whilst not having a substantial effect on competition in the market as a whole. Accordingly, the Government's proposals seek to sharpen the operation of the

provision while at the same time not inhibiting acceptable commercial behaviour.

34. Although a supplier may be engaging in price discrimination, if a purchaser can readily buy elsewhere at a price which overcomes that discrimination there will be little, if any, effect on competition. A price discrimination provision should not lead to undue price rigidity and a defence to reflect this is proposed to supplement the existing defences. The desirability of such a provision has been highlighted by the decision in O'Brien v Cool and Sons (1983) ATPR 40-376.

35. Proposal The present requirement that the lessening of competition be "substantial" would be deleted, that is, it would be necessary only to prove a lessening of competition.

36. Alternative An alternative approach, on which comment would be welcomed, is one which would focus the section more explicitly on the damage caused to particular businesses by price discrimination. This approach, which formed part of the 1979 COSBOA submission to the TPCC on sub-section 49(1), would involve the removal of the test based on the effect of particular price discrimination on competition in the relevant market, and its replacement with one based on the effect on the competitiveness of the business or businesses being discriminated against. Under such a test, the question would become, subject to the defences, whether the price discrimination is of such magnitude or of such a recurring or systematic character that:

"it has or is likely to have the effect of substantially lessening the competitiveness of the business or businesses being discriminated against in a market for goods ..."

37. In addition the reference to purchasers would be clarified to specifically include potential purchasers since a lessening of competition may also result where a potential purchaser is dissuaded from completing a purchase because of the effect of price discrimination. A consequential amendment would be made to paragraph 49(2)(a) to cover potential purchasers and "potential purchasers" would be defined.

38. Defences It is proposed that the existing defences of cost justification (paragraph 49(2)(a)) and meeting competition (paragraph 49(2)(b)) remain. Comment is, however, sought in relation to the operation of the cost justification defence in its present form. Some commentators have argued that its operation is narrower than it was intended to be, and in particular that the phrase "only reasonable allowance" may be taken to necessitate a mathematically demonstrable or otherwise economically exact relationship between, for example, the cost saving accruing to a supplier from a bulk order and the amount of the bulk discount allowed. The Government believes that the section should not inhibit

legitimate, commercially justifiable discounting, for quantity or otherwise, and that the cost justification defence should be tailored accordingly.

39. For the reasons given in para 34, a new defence is proposed which would apply where alternative supplies are available from another source on terms and conditions similar to those which are offered to the competitor of the customer who is the beneficiary of the alleged price discrimination. In other words, a supplier who is accused of discriminating in favour of, for example, a large retailer against a small retailer has a defence if he can establish that the small retailer could obtain equivalent goods from another source, on similar terms to those offered by the supplier to the large retailer.

Clause 15 : Mergers and other acquisitions

40. Background Section 50 currently prohibits acquisitions which result in, or strengthen, the power of the acquirer to control or dominate a market. This test relates to the structure of a market, not the conduct in that market. Under the existing provision some acquisitions, for example those which involve a "bare transfer" of monopoly power, do not reduce the level of competition at all but still fall within section 50. If the section were to be strictly applied in this way, it could have the effect of reducing business efficiency and performance by rendering entrenched managements immune from the threat - or stimulus - of possible takeover. It is noteworthy therefore that the Trade Practices Commission has publicly declined to intervene in cases of bare transfer of monopoly power, on the basis that competition is unaffected. Conversely, the reliance of the section on the "control or dominate" test, to the exclusion of any explicit reference to the effect of a merger on competition means that mergers which may substantially lessen competition and which may have no redeeming public benefit can nevertheless proceed unimpeded by the section if neither the merging nor the merged corporations are or would be in a position to control or dominate a market. This problem was accentuated by the interpretation of section 50 by the Court in the Ansett-Avis case (refer para 25). The appropriate test for mergers should be one based on the likely competitive effect of the merger in the market, rather than solely on market structure.

41. The recently released (1982) Merger Guidelines of the US Federal Trade Commission, the US competition policy enforcement agency, indicate that the FTC is similarly concentrating on mergers which facilitate the exercise of market power with the effect of lessening competition rather than simply examining the size of a merged body or the structure of the market.

42. Desirable industry rationalization will still be able to occur, as the Act will retain the present authorization procedure on grounds of public benefit. Under this procedure, the Commission has acknowledged the public benefit which may flow from rationalization. Examples include:

- . Monier/Wunderlich Acquisition (Monier Limited (1983) ATPR (Com) 50-062), in which the Commission authorized the purchase of a unprofitable market leader and took into account the impact on employment if the merger did not go ahead. The Commission said in its determination: "The Commission concludes that the continuity of employment resulting from the takeover does provide some public benefit to be considered in all the circumstances of this case, along with the public benefit of maintaining terracotta tiles as a product line in sufficient quantity to satisfy demand."
- . Electric Lamp Manufacturers (Australia) Pty Ltd Arrangements in which, under the analogous authorization provisions applicable under section 45, the Commission authorized the pooling of manufacturing capacity for competing marketers of lamps.
- . Whitegoods Industry Rationalization (Email and Simpson (1981) ATPR (COM) 55-201). The Commission authorized rationalization of whitegoods manufacturing to increase competitiveness with imports.

43. In line with the recommendation of the Swanson Committee, the Government does not propose to spell out specific grounds for authorization or specific matters to be taken into account when determining "public benefit". For example, proposals for a "failing company" defence or ground of authorization have been suggested from time to time. However, such a provision would be extremely difficult to draft in a way which would be meaningful or useful, given the changing nature of business over time and the diversity of industries and circumstances in which the provision might apply. From the Monier case and as a matter of principle, it seems preferable for the matter to be dealt with under the general heading of "public benefit". This allows the maximum flexibility so that the special features of each case can be considered. But further comment on this aspect of the matter would be welcome.

44. The existing merger provision is only directed against corporations. Accordingly, it is possible for natural persons and bodies corporate other than "corporations" to make an acquisition and not be subject to the operation of the provision.

45. Proposal The control or dominance test would be replaced by a test of a substantial lessening of competition. This would reintroduce the basic element of section 50 as it applied from its introduction in 1974 until 1977. The existing limitation that the market affected be a substantial market for goods and services, introduced in 1977, would remain. This means that only the more significant acquisitions would be subject to this provision. Moreover, the existing provision for authorization on public benefit grounds would also remain. A pre-merger clearance procedure is also proposed (refer paras 165-167).

46. Revised sub-sections 50(2) and 50(3) would introduce provisions applying to acquisitions by natural persons or bodies corporate other than corporations as defined in the Act.

Pre-Notification of Mergers

47. At present, if the Commission is not made aware of an acquisition that may contravene s.50 until after the acquisition has occurred, the only action the Commission can then take (apart from damages) is for divestiture which can be disruptive, particularly for employees involved, and can be ineffective.

48. This has recently come into focus with the Petersville/General Jones frozen food merger, where the Commission is seeking divestiture. Accordingly the Government is giving consideration to introducing a requirement to give the Commission a certain period of notice, for example 7 days, of all acquisitions involving more than a certain amount, say \$15 million. Such a provision would enable the Commission to move within that time to seek an injunction to restrain those acquisitions which the Commission considered contravened section 50, before they occurred, thus avoiding the problems associated with divestiture proceedings. Such a provision could also provide that if the Commission did not move against a notified acquisition within that period, that would operate as a clearance for the acquisition.

49. A pre-merger notification procedure (with a 30 day notification period and a possible 20 day extension) has applied in the US since 1976, following the enactment of the Hart-Scott-Rodino Act.

50. Comment on this possible procedure would be welcome.

Clause 16 : Acquisitions outside Australia

51. Background Overseas mergers of foreign bodies corporate with subsidiaries in Australia are at present not subject to section 50. A consequential effect of such mergers may be a substantial lessening of competition in Australia, by virtue of respective Australian subsidiaries of the merged parties

coming under the common control of the resultant merged parent. Consistent with the policy of section 50, these consequential effects should be subject to the Act.

52. Proposal Proposed new section 50A allows an interested person within 12 months of the overseas acquisition to apply for a Tribunal declaration that as a result of the acquisition, a substantial lessening of competition etc. has occurred or is likely to occur and that the acquisition has not resulted, or is not likely to result, in a benefit to the Australian public that outweighs the detriment constituted by that lessening of competition.

53. The Tribunal would be able to revoke a declaration e.g. where there has been a change in circumstances or where the original declaration was based on incorrect information. The declaration may be revoked on the grounds that at the time of revocation there is not a substantial lessening of competition etc. or the Tribunal is satisfied that in all circumstances the revocation is likely to result in a benefit to the Australian public.

54. The Tribunal would be required in all cases to give written reasons.

55. Since the provision would only apply to conduct in Australia, and be enforced only within Australia, inappropriate extra-territorial effects are avoided. The provision does not seek to prohibit overseas acquisitions or regulate overseas persons in relation to their overseas acts. Its effect is intentionally limited to operations in Australia.

56. If the corporation (i.e. the Australian subsidiary whose parent was acquired) carries on business contrary to the Tribunal's declaration, the Court could then direct the corporation to dispose of specific assets or grant an injunction restraining the continued carrying on of the business (refer para 133).

57. Foreign corporations proposing action which would bring their respective Australian subsidiaries under common control would be able to apply for a pre-merger clearance if there was no impact on competition, and authorization on the grounds of public benefit would also be available as for section 50 (refer paras 165-167).

Relationship with Foreign Investment Policy:

58. It is not intended to discriminate in any way against foreign holding companies or to alter the Government's foreign investment policies. It is appreciated that additional constraints would be imposed on overseas companies operating within Australia, but this would be for separate and independently justifiable reasons of competition policy. The Trade Practices Commission drew attention to the Australian competition policy implications of certain overseas mergers in

its Annual Report for 1982-83 (para 4.9.9). The proposal is merely designed to ensure equality of treatment with companies merging in Australia.

Clause 17 : Exceptions

59. Background Paragraph 51(2)(a) provides statutory exemptions from the Part IV (restrictive trade practices) prohibitions (except resale price maintenance) where conduct arises from "...any act done in relation to..." certain industrial matters. A majority of the Full Federal Court in Ausfield v Leyland Australia (1977) 30 F.L.R. 477 found that the words "any act done" were inappropriate to refer to the complex operation of making a contract or arrangement or entering into an understanding. This is discussed in detail in Paper C - Discussion Paper.

60. Proposal First sub-clause 17(a) would amend sub-section 51(2) if sections 45D and 45E were repealed (refer para 23).

61. Secondly, sub-clause 17(b) would create a new sub-section to clarify that the words "act" and "thing" in section 51 include the making of a contract or arrangement or entering into an understanding.

Clause 18: Interpretation (Section 51A)

62. Background Difficulties have occurred in relation to the ability of Division 1 of Part V to deal with false or misleading statements or representations and predictions about future matters.

63. The circumstances surrounding the representation or prediction are clearly matters peculiarly within the knowledge of the person or corporation making the representation or prediction 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.

64. These problems were highlighted in Thompson v. Mastertouch TV Services Pty Ltd [1977] 29 F.L.R. 270. In that case the Court held that:

..."a prediction or statement as to the future is not false within the words of section 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."

65. Accordingly, a promoter's promise or prediction as to the performance or profitability of a business opportunity is not presently caught by the Act unless it is based on existing or past facts.

66. Another problem identified in that case by the Court 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".

67. Proposal New section 51A would be created to deem a prediction made by a corporation in relation to matters specified therein to be misleading for the purposes of Division 1 of Part V unless the corporation making the prediction has reasonable grounds for making the prediction. The onus would be on the corporation to establish on the balance of probabilities that it had reasonable grounds for the belief.

Clause 19 : Misleading or deceptive conduct

68. Background There is uncertainty in the relationship between the Act and defamation laws. The Government considers the need to clarify the law concerning defamation to be an important matter. The relationship between the Act and the defamation laws was raised by the Federal Court's decision in Australian Ocean Line Pty Ltd v Western Australian Newspapers (1983) ATPR 40-349 where it was decided that a newspaper proprietor was liable under section 52 for the content of newspapers which were misleading or deceptive. The matter of section 52 applying in relation to television stations was raised in Universal Telecasters (Queensland) Ltd v. Ainsworth Consolidated Industries (1983) ATPR 40-384.

69. Proposal Clause 19 would amend section 52 to clarify the relationship between the Trade Practices Act and defamation laws. This proposal would prevent section 52 from applying to conduct which is misleading or deceptive by reason only that it is defamatory. Section 52, however, will continue to operate where more than defamation alone is involved.

70. More far reaching proposals have been made by major newspaper proprietors, that the media be wholly exempted from the operation of section 52 (and sections 53, 53A, 55, 55A and 59), except in respect of the publication of advertising (already covered by sub-section 85(3)) and certain promotional conduct. These proposals have not been accepted at this stage, but further comment would be welcome on this matter, which is a sensitive and difficult one.

Clause 20: Unconscionable conduct relating to contracts and proposed contracts

71. Background The Swanson Committee in 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 sellers and buyers. The Government considers that the Act should be amended along the lines of the recommendations of the Swanson Committee.

72. Proposal Clause 20 would insert a new provision - section 52A - prohibiting corporations, in trade or commerce, from engaging in unconscionable conduct in relation to contracts. This prohibition would not attract criminal sanctions or damages (including compensation orders under paragraph 87(2)(d)) because of the general nature of the prohibition. The remedies available on contravention of this section include injunction under section 80, and refusal to enforce contracts and variations to contracts under proposed section 82A (refer paras 136-139).

73. The proposed section would enumerate guidelines as to what constitutes unconscionable conduct. It would require the Court to have regard to all the circumstances of the case, including the principle of the need for certainty in commercial transactions in determining unconscionability.

74. The Court would also be able to have regard to the main contractual provisions of the contract and techniques used in the conduct of negotiations and the relative position of the parties to the contract or the proposed contract and may have regard to conduct before commencement of the proposed section.

75. It is also proposed that a corporation which institutes legal proceedings to enforce a contract or refers a dispute in relation to a contract to arbitration could not be taken to have engaged in unconscionable conduct by reason only of that fact.

76. The new section would not apply to particular contracts of employment or service to the extent that an employment or industrial award or agreement under any other Act or law of a State or Territory applied. Contracts of employment are covered more appropriately by conciliation and arbitration laws.

Clause 21 : False representations

77. Background A practice has come to notice which involves a person asserting a right to payment for goods that the person falsely asserts have been ordered by a recently deceased person. In such a case the goods are not supplied. The names of the deceased were obtained from newspapers and in many cases bereaved relatives had been deceived into paying for the goods.

78. Proposal Clause 21 would insert a new sub-section in section 53 prohibiting a corporation from falsely representing that goods or services have been ordered.

Clause 22 : False representations and other misleading or offensive conduct in relation to land

79. Clause 22 would amend sub-section 53A(2), among other things, to remove the words "cause or permit a servant or agent of the corporation to". Removal of these words would result in the corporation being liable under the section for the conduct of its servants or agents by virtue of section 84 (rather than by virtue of section 53A itself) unless it could rely on a defence under section 85. This proposal would overcome the anomalous exception to the usual position that corporate liability for the actions, conduct and intentions of staff and agents is imposed by section 84.

80. Sub-section 53A(2) would also extend to prohibit harassment occurring at a person's place of employment or business. This amendment would overcome the narrowness of the requirement that the prohibited harassment occur at a person's place of residence.

Clause 23: Misleading conduct in relation to employment

81. Background Section 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. False and misleading conduct in relation to employment opportunities in times of high unemployment preys upon those persons seeking work.

82. In Dawson v. Australian Consolidated Reserves Pty Ltd (1983) ATPR 40-374 the Court took into account when imposing the fines that the defendants had published a misleading advertisement at a time of high unemployment that was likely to attract "a section of the public particularly vulnerable by reason of the unemployment situation."

83. Proposal Section 53B would be repealed and replaced by a new section 53B prohibiting a corporation engaging in conduct in relation to employment opportunities, which is liable to mislead as to the availability, nature, terms or conditions of, or any matter relating to such employment.

Clause 24: Accepting payment without intending or being able to supply as ordered

84. Background There have been problems encountered with the present paragraph 58(a), particularly in respect of mail order businesses, where a company has accepted money for goods it

was not then in a position to supply and had little prospect of supplying in the future.

85. Proposal Clause 24 would repeal section 58 and replace it with an expanded section so that where a corporation has no reasonable grounds to believe at the time of acceptance of payment that supply will be possible within the time specified in the contract, or if no time is specified within a reasonable time, the Act will be contravened.

86. The offence presently created by paragraph 58(a) will be retained to cover situations where a corporation has no intention to supply or intends to supply goods or services materially different from those paid for.

Clause 25 : Misleading statements about certain business activities

87. Background In Thompson v Mastertouch TV Services Pty Ltd [1977] 29 F.L.R. 270 a distinction was drawn between business activities that can be carried on at a person's place of residence and those which can be carried on from a person's place of residence.

88. Proposal Clause 25 would extend sub-section 59(1) to prohibit the making of false or misleading statements about business activities that can be carried on from a person's place of residence.

Clause 26 : Coercion at place of residence, business or employment

89. Background An anomaly exists where sub-section 6(3) extends the operation of section 60 to create liability for conduct involving use of a telephone. Hence whilst a corporation is liable for its staff's undue harassment of persons by telephone, it is not liable for their harassment of people personally unless it caused or permitted it.

90. Proposal Section 60 would be amended to remove the words "cause or permit a servant or agent of the corporation to". Removal of these words would mean that a corporation would be liable under the section for the conduct of its servants or agent by virtue of section 84 (rather than by virtue of the section itself) unless it could rely on a defence under section 85. (refer para 79).

91. As with sub-section 53A(2), section 60 would also be extended to prohibit harassment occurring at a person's place of employment or business (refer para 80).

Clause 27 : Pyramid selling

92. Background A recent case has highlighted an anomaly which exists in section 61 enabling any scheme which, for all intents and purposes is a pyramid selling scheme, to escape the operation of the section by ensuring that all goods and services are purchased from the promoter.

93. Proposal Clause 27 would amend paragraphs 61(4)(b) and 61(5)(a) to cover pyramid selling schemes to include transactions arranged and effected by participants in the scheme, not all of whom are promoters. The Act would then cover the case where the promoter is the supplier of the goods or services.

Clause 28 : Product safety standards

94. Background Sub-sections 62 (2AA) to 62(2C) were inserted in the Act in 1977 to enable the export of goods which do not comply with an Australian consumer product safety standard or which have been declared unsafe goods under the Act. The Government considers that such goods should be denied exit as well as entry, otherwise hazardous products may be exported to developing countries which may not possess a capacity to effectively assess or control the entry of such hazardous products.

95. Proposal Section 62 would be amended by repealing those sub-sections. A new provision would then be inserted prohibiting the export of proscribed products by a corporation unless the written permission of the Minister had been obtained. It is desirable that there should be some discretion available to the Minister to cover special circumstances where export may be justifiable, for example, where a foreign government requests supply as a certain product.

Clause 29 : Unsolicited credit and debit cards

96. Clause 29 would extend the section 63A prohibition on the unsolicited issue of credit cards to debit cards. There is currently no legal barrier to the unsolicited issue of debit cards. The section would also be extended to cover cards which can be used as both credit and debit cards.

Clause 30 : Assertion of right to payment for unsolicited goods or services or for making entry in directory

97. Background Section 64 generally prohibits asserting a right to payment for unsolicited goods, without reasonable belief that there is a right to payment. The Trade Practices Commission has publicly highlighted a real problem being faced by small business persons who are the target for fraudulent claims for payment of unsolicited advertising. At present

sub-sections 64(2) and 64(2B) exempt from the prohibition claims in respect of unsolicited goods or services ordinarily used in carrying on business.

98. Proposal Clause 30 would delete sub-sections 64(2) and 64(2B). 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 31 : Liability of recipient of unsolicited goods

99. Because section 65 of the Act is linked to section 64, sub-section 65(6) would need to be deleted for consistency. A small business could otherwise be liable to pay for unsolicited goods although the corporation had no reasonable cause for believing there was a right to payment under section 64.

Clause 32 : Liability for loss or damage from breach of certain contracts

100. Background Section 73 currently absolves the finance company from all liability under the Act for the defective condition of the goods which 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 for the quality of goods supplied by way of hire - purchase or lease.

101. This section conflicts with provisions of the Victorian Credit Act 1981 and the NSW Consumer Credit Act 1981 which provide that where a credit provider who is linked to the supplier provides credit to a consumer, the credit provider and supplier will be jointly and severally liable for any breach of the contract of sale.

102. Proposal Clause 32 would repeal section 73 and substitute a new provision. This would provide that where a credit provider is linked to the supplier and a consumer enters into a contract with the related credit provider for the provision of credit for the supply of goods or services, the supplier and the related credit provider would be, subject to certain factors, jointly and severally liable to the consumer for any breach of a condition or warranty implied in the contract by virtue of sections 70, 71, 72 or 74 of the Act.

103. The consumer would be able to recover the loss or damage by action in a Court of competent jurisdiction (which in the case of section 73 is a State Court).

104. This proposal would alter the liability of financiers to bring it into line with the Victorian and NSW legislation. It is not proposed to proclaim this section until the previously mentioned State legislation has been proclaimed.

Clause 33 : Warranties in relation to supply of services

105. Background Section 74(1) implies in 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. Where a corporation supplies services to a consumer and the consumer makes known any particular purpose for which the services are required or the result that he desires the services to achieve, section 74(2) implies a warranty that the services and any materials supplied in connection with services will be reasonably fit for that purpose or are of such a nature that they might reasonably be expected to achieve that result. No implied warranty is imposed by section 74(2) where the consumer does not rely, or where it is unreasonable for him to rely on the corporation's skill or judgement. The word "services" is defined by section 74(3) for the purposes of section 74 to mean services by way of:

(a) the construction, maintenance, repair, treatment, processing, cleaning or alteration of goods or of fixtures on land;

(b) the alteration of the physical state of the land; or

(c) the transportation of goods otherwise than for the purposes of a business, trade, profession or occupation, carried on or engaged in by the person for whom the goods are transported."

Section 4(1) of the Act contains a wide and comprehensive definition of services which would expand considerably the operation of section 74(1) and (2) if it applied to these sub-sections. The present definition of "services" in sub-section 74(3) is considered unnecessarily limited since it excludes such things as services provided by the transport industry where goods are carried for the purpose of a business, trade, profession or occupation engaged in by the person for whom the goods are transported, the insurance and banking industries. It also excludes services provided by health studios and services relating to the use or enjoyment of facilities for amusement, entertainment, recreation, education or accommodation.

106. Proposal Sub-section 74(3) would be repealed so that the warranties implied by section 74 extend to all services

included in the definition of "services" in sub-section 4(1). Among the industries affected by this proposal are the transport, banking, finance, insurance, entertainment, and recreation industries and professions such as accounting.

Clause 34 : Interpretation (Section 74A)

107. Background Sections 74F and 74G make certain statutory provisions about repair facilities and parts, and provide a right of action where the manufacturer's express warranty over goods is not honoured. However the sections do not cover promises about services to be provided or spare parts to be supplied in the future, for example repairs under warranty, which are offered in addition to the statutory provisions. Existing sub-section 74A(1) only refers to claims by the manufacturer in relation to the quality, performance or characteristics of the goods, made in connection with their supply.

108. Proposal Clause 34 would repeal sub-section 74A(1) and substitute a new sub-section extending the definition of "express warranty" to include undertakings about the provision of services and the supply of parts that are or may be required.

109. For the purposes of Division 2A of Part V, the proposal would then define "acquire" (in relation to goods) to include acquisition by way of gift or by operation of law, define "consumer" to cover persons who derive title in the goods from the consumer or acquire by way of gift or operation of law and define "supply" to include supply by way of gift.

Clause 35 : Actions in respect of goods of unmerchantable quality

110. Background Section 74D currently provides that the manufacturer's liability with respect to merchantable quality arises not only in favour of the original consumer, but purports to follow title in the goods. It is considered anomalous that this section alone should afford rights against the manufacturer to persons who derive title - such persons should also be able to claim under sections 74B, 74C, 74E, 74F and 74G.

111. Proposal The words "or any person who derives title to the goods through or under the consumer" and "or person who so derives title to the goods" would be deleted from sub-section 74D(1) to make it clear that throughout sections 74A to 74G there is no requirement that the "consumer" mentioned therein must be the original retail purchaser.

Clause 36 : Actions in respect of failure to provide facilities for repairs or parts

112. Background Division 2A of Part V does not apply to goods supplied directly from manufacturer to consumer. Even though the manufacturer would normally be bound by the implied conditions in Division 2 in the case of direct supply, the actions against manufacturers provided by section 74F (repair facilities and spare parts) and section 74G (express warranties) are not imposed.

113. Proposal Section 74F would be amended to provide that, where a manufacturer supplies goods directly to a consumer, the manufacturer has the same responsibility in relation to facilities for repairs and spare parts as manufacturers who sell indirectly to consumers.

Clause 37 : Actions in respect of non-compliance with express warranty

114. For the same reasons stated in the background to the previous proposal Section 74G would be amended by deleting paragraphs 74G(1)(a), 74G(1)(b) and 74G(2)(a) and substituting new provisions to provide that where a manufacturer supplies goods directly to a consumer its obligations in relation to express warranties, including those for the provision of services and supply of parts that are or may be required for goods, are the same as manufacturers who sell indirectly to consumers.

Clause 38 : Interpretation (Section 75B)

115. If the proposal to create new section 52A (unconscionable conduct etc - refer paras 72-76) is adopted a new provision would need to be inserted in section 75B to exclude contraventions of the proposed provision from the operation of Part VI (Enforcement and remedies) other than from injunctions in section 80 and findings in proceedings to be evidence under section 83.

Clause 39 : Pecuniary penalties

116. Background Maximum pecuniary penalties for contraventions of the restrictive trade practices provisions have remained unaltered since 1974. In TPC v Massey Ferguson (Australia) Ltd. (1983) ATPR 40-369 the Court commented on the "unimpressive" nature of the maximum penalty given the environment in which offenders operated.

117. Proposal Maximum penalties would be doubled to \$100,000 and \$500,000 for natural persons and bodies corporate respectively. If the proposal to define additional acts amounting to resale price maintenance (refer para 170) is

adopted, the range of orders available to the Court would be restricted, but only in respect of contraventions arising under that new provision.

Clause 40 : Civil action for recovery of pecuniary penalties

118. Background Proceedings brought under section 76 for pecuniary penalties are conducted as civil proceedings with one important exception namely, that the Commission does not have a right to the important pre-trial procedures of interrogatories and discovery which are available to private litigants.

119. Proposal Clause 40 would remedy this imbalance by giving the Commission (or Minister) the same rights as private litigants.

Clause 41 : Offences against Part V

120. Background Like the position in relation to the restrictive trade practices provisions (refer para 116) maximum fines for contraventions of the consumer protection provisions have remained unaltered since 1974.

121. Proposal Clause 41 would amend section 79 to double the maximum level of fines for a contravention (other than sections 52 and 52A) to \$100,000 and \$20,000 for a corporation and natural person respectively.

122. Background The Federal Court Rules do not permit the joining of a criminal action with an action for a civil remedy (such as injunction or corrective advertising). An amendment would enable the Trade Practices Commission, in proceedings against a person for a contravention of Part V, to seek injunctions at the same time to prevent similar conduct in the future by the defendants without the need for separate injunction proceedings.

123. A new provision would be inserted to allow the Court to grant an injunction (under section 80) or make an order for corrective advertising (under section 80A) in addition to imposing a fine on the person in prosecution proceedings. The proposed new section 52A would be excluded from the operation of section 79. (refer para 115)

124. Background The current twelve month time limit on prosecutions which is imposed by section 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. Also, the 12 month limitation period in the Crimes Act generally relates to offences heard in magistrates courts rather than for summary offences in superior courts where large maximum fines are provided for.

125. Proposal Section 79 would also be amended to provide a three year time limit for the commencement of prosecution proceedings for a contravention of Part V.

Clause 42 (Enforcement of payment of certain fines)

126. Background The Act does not contain any provisions relating to the enforcement of fines imposed under section 79. As a result, difficulties have been experienced in enforcing fines, particularly those imposed on individuals.

127. Recent cases in the Federal Court have established that defaults in respect of fines imposed under section 79 are to be dealt with under section 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 section 18A, it is considered that the Crimes Act should no longer apply to the enforcement and recovery of fines under the Trade Practices Act.

128. Proposal Section 79A would be inserted to provide an effective and uniform system of enforcement of the criminal sanctions in Part V of the Act by measures including specified time for payment or payment by instalments, periodic detention, community service orders and registering fines imposed as a civil judgment debt with goal being the last resort.

129. In relation to the proposal that imprisonment be made a sentencing option, section 17A of the Crimes Act would apply. The Court would then not impose a sentence of imprisonment until all other options had been considered. There would be a scale of relativities between the level of fines and the periods of imprisonment to be served for default in payment of fine. Where a person was required to serve periods of imprisonment in respect of two or more fines, they would be served consecutively. However, a person will not serve a period of imprisonment exceeding 5 years in respect of an aggregate of 3 or more fines and where the fines were imposed for offences constituted by similar contraventions that occur within a period of 2 years.

Clause 43 : Repeal of section 80AA

130. If the proposal to repeal sections 45D and 45E is adopted section 80AA would be consequentially repealed as it is based upon those sections.

Clause 44 : Order to disclose information or publish advertisement

131. Background The existing monetary limits on orders under section 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.

132. Proposal Clause 44 would amend section 80A by deleting the monetary limitations (sub-sections 80A(2) to 80A(4)) and would thus give the Court a discretion in relation to the remedies in section 80A. This amendment would maintain consistency with the recent amendment of section 80 of the Act which provides a wider discretion to the Court in granting injunctions.

Clause 45 : Divestiture

133. If the proposal to extend the merger provisions to natural persons and to offshore mergers (refer paras 46 and 52) are adopted, section 81 would be amended to enable divestiture orders to be made accordingly.

Clause 46 : Actions for damages

134. If the proposal to define two additional acts amounting to resale price maintenance (refer para 170) is adopted new sub-section 82(3) would provide that a person whose conduct constitutes such an act is not liable in damages.

Clause 47: Orders in respect of unconscionable conduct relating to contracts

135. Background The principal remedy available to the Trade Practices Commission for a contravention of the proposed new section 52A (refer para 72) would be an injunction under section 80. However, the Act would require amendment to allow the Courts to grant appropriate consequential relief to those who have been adversely affected by a contravention of the proposed prohibition.

136. Proposal Clause 47 would insert a new provision (section 82A) providing for orders in respect of unconscionable conduct in relation to contracts. Where a party to a contract applied and the Court was satisfied that a corporation had contravened proposed section 52A, the Court could make certain orders.

137. The orders could include an order refusing to enforce one or more provisions of the contract, an order declaring the contract or any part to be void or void ab initio, an order varying the contract, or an order directing a party to vary an instrument transferring or creating an interest in land.

138. Proceedings under proposed sub-section 82A(1) in relation to the contract could be made where the application concerned the performance of any obligation or activity contemplated by the contract at any time not more than 3 months before the earliest time for that performance or occurrence, but not more than 2 years after the latest time for that performance or occurrence. In all other circumstances, it is proposed that proceedings for relief may be commenced within 2 years of the making of the contract.

139. Further, the Court would be able to have regard to the conduct of the parties in relation to the contract. Another proposal would permit the Court to make orders notwithstanding that a contract is fully performed.

Clause 48 : Finding in proceedings to be evidence

140. If the proposal to create new section 82A (orders in respect of unconscionable conduct relating to contracts - refer para 152) is adopted, section 83 will need to be consequentially amended.

Clause 49: Conduct by directors, servants or agents

141. Background The evidentiary provision in sub-section 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.

142. 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.

143. 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.

144. Similarly, in Universal Telecasters v Guthrie (1978) ATPR 40-062 the Full Federal Court held that sub-section 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.

145. Because of the limited scope of section 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 the Act.

146. Proposal Section 84 would be amended by deleting sub-section 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.

147. Sub-section 84(2) would be 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 actual or apparent authority to be also conduct engaged in by the body corporate.

148. The proposed amendment would also provide (in sub-sections 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 is possible under the Act.

149. The "state of mind" of a person would refer to the knowledge, intention, opinion, belief or purpose of the person and that person's reasons for those states of mind.

Clause 50 : Defences

150. To be consistent with the strict liability proposed for section 84, the defence in paragraph 85(1)(b) should be amended so that it is apparent that "another person" does not refer to a servant or agent of the defendant, or where the defendant is a body corporate, a director of the defendant. This would will clarify the position with respect to the proposal for a new sub-section 84(1).

Clause 51 : Other orders

151. Background At present when the Trade Practices Commission successfully brings injunction or prosecution proceedings an aggrieved person obtains no redress from those proceedings. The Government considers that the Courts should be able to simultaneously make compensation orders for the benefit of consumers.

152. Proposal Sub-sections 87(1A) and 87(1B) would confer power on the Trade Practices Commission to act on behalf of particular named persons who consent in writing to the Commission acting on their behalf for compensation orders where the Commission or the Minister has already commenced injunction or prosecution proceedings.

153. The Court could then make such orders as it thinks appropriate against the person who engaged in the conduct or who was involved in the contravention, if it considers that the order will compensate, reduce or prevent loss by the aggrieved person.

154. The proposal also sets out a further order which the Court could make in line with the proposed new section 82A (refer para 151). The order would direct the person who engaged in the conduct to vary, terminate or otherwise affect an instrument creating or transferring an interest in land by executing another instrument.

155. Sub-clause 51(a) would provide that an order under sub-section 87(1) would not apply to persons whose conduct constitutes an act specified in proposed sub-section 96(3A).

Clause 52: Power of Court to prohibit payment or transfer or moneys or other property

156. Background The Federal Court at present has no specific power to make interim and ancillary orders other than interim injunctions under sub-section 80(2) in proceedings under the Act. One consequence of this has enabled funds fraudulently 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.

157. Proposal A new provision - section 87A - would be inserted giving the Court power to prohibit payment or transfer of moneys or other property when proceedings have been instituted. Application to "freeze" the defendant's assets could only be made by the Minister or the Trade Practices Commission. This provision would be made subject to the Bankruptcy Act 1966.

Clause 53 : Heading to Part VII

158. The proposal to re-introduce a merger clearance procedure (refer para 167) would necessitate the renaming of the Part so as to include a reference to "clearance".

Clause 54 : Power of Commission to grant authorizations

159. If the proposal to repeal sections 45D and 45E (refer para 23) is adopted, sub-sections 88(7) and 88(7A) would be consequentially repealed. Likewise where the proposal in para 37, to extend section 50 (mergers) to cover natural persons is accepted, sub-sections 88(9) and 88(16) would require consequential change.

Clause 55 : Determination of applications for authorizations

160. Sub-paragraph 90(8)(a)(ii) would need to be repealed consequentially if sub-sections 88(7) and 88(7A) were repealed (refer previous para for that proposal).

161. Sub-section 90(9) would also need to be amended if the existing "control or dominance" test in section 50 was replaced with a "substantial lessening of competition" test (proposed in para 45) similar to the test in section 45 - it would be appropriate for section 50 to have an authorization test similar to section 45.

Clause 56 : Grant, revocation and variation of authorizations

162. Background The existing authorization provision is not specific as to when an authorization takes effect. The Federal Court has allowed a merger authorization to be acted upon immediately without regard to the "review period" (currently 21 days - refer Trade Practices Regulation 20(1)(b)) where the Commission did not impose any condition to postpone the commencement date of the authorization.

163. Proposal New sub-section 91(1A) would provide that an authorization does not commence before the "review period" expires or, where an application for review has been lodged, until a determination by the Tribunal. This proposal would not apply to deemed merger authorizations under sub-section 90(11) where the Commission does not act on an application within the review period. It is further proposed that the period may be abridged in the case of merger authorizations (refer para 173).

Clause 57: Heading to Division 2 of Part VII

164. The division heading would be changed if the proposal to re-introduce merger clearances was accepted for the same reason as proposed for the change to the Part heading (refer para 158).

Clause 58: Clearances relating to mergers and other acquisitions

165. Background Between 1974 and 1977 a clearance provision for mergers was operated by the Commission. Persons could apply to the Commission for clearance of a proposed merger and, where appropriate, the Commission could state that the proposal did not substantially lessen competition in contravention of section 50 (as the test then was). This procedure is to be contrasted with authorizations which are granted on public benefit grounds even though there may be a lessening of competition.

166. Informal arrangements have developed since 1977 under which parties to a proposed merger may discuss their position under section 50 with the Commission. It is now desirable that these informal arrangements be incorporated into the Act to enable greater certainty for all concerned parties.

167. Proposal Clause 58 would re-introduce a merger clearance provision. The proposal for Section 94 would provide that a person may give prior written notice of a merger to the Commission. Where the Commission is satisfied the proposed acquisition does not contravene section 50 it may then issue its own notice stating that fact. This notice by the Commission would operate to bar any subsequent proceedings alleging that the acquisition constitutes a contravention.

Clause 59 : Register

168. Background Where a merger clearance system is reintroduced, a register of merger notices received and given by the Commission needs to be created separate from other registers maintained by the Commission. New paragraph 95(1)(h) would provide for the Commission to keep a register of merger clearance notices.

Clause 60 : Acts constituting engaging in resale price maintenance

169. Background The existing acts specified as amounting to resale price maintenance prescribe suppliers of goods from obliging resellers not to sell below a specified price. However, persons other than suppliers may also oblige resellers not to sell below a specified price - this conduct is no less harmful to competition than the existing acts of resale price maintenance.

170. Proposal Two additional categories of resale price maintenance would be created by new sub-section 96(3A). First, where a person (referred to in the provision as a "relevant person") makes it known to a corporation that he proposes to hinder its supply or acquisition of goods unless it agrees not to sell those goods below the price he specifies. Secondly, where a person engages in conduct that actually hinders a corporation's supply or acquisition of goods for the purpose of inducing it not to sell those goods below the price he specifies.

171. These new provisions would operate where the hindering conduct is undertaken by the person alone or in concert with other persons and would also introduce a rebuttable presumption applying only to the two new categories of resale price maintenance. The new presumption would be that an act

done by a person who is a member or officer of an organization is presumed to be done on the organization's behalf. Sub-section 96(10) would then give an extended meaning to "person" for the purposes of section 96.

Clause 61 : Applications for review

172. Background Circumstances may occur where it is in the interest of parties for a merger authorization granted by the Commission, for that authorization to take effect before expiry of the 21 day review period (refer para 162).

173. Proposal New sub-section 101(1A) would empower a Presidential member of the Tribunal upon application to shorten the "review period" where special circumstances exist and it would not be unfair to do so.

Clause 62 : Power to obtain information, documents and evidence

174. Background The penalty provisions applying to section 155 do not distinguish between natural persons and corporate offenders. Moreover, as with sections 76 and 79, penalty amounts have not been altered since 1974.

175. Proposal New sub-section 155(6A) would distinguish between natural persons and corporations who contravene sub-sections 155(5) or 155(6) as well as providing for increased penalties (the same penalties as proposed for a similar provision, refer to the provisions of proposed clause 64).

Clause 63 : Disclosure of documents by Commission

176. If the proposal to create section 87A (power of the Court to prohibit payment or transfer of other property refer para 157) is adopted, a consequential amendment to section 157 will be required.

Clause 64: Intimidation

177. Background Whereas remedies exist to punish a person who interferes with a witness in Court proceedings, these remedies do not extend to protect a person who assists the Commission to perform its adjudication function or prior to the Commission bringing a case before the Court. Potential witnesses may therefore be unwilling to assist the Commission if there is a likelihood of retribution.

178. Proposal New section 162A would make it an offence to intimidate or harass a person who assists the Commission by providing information or documents and impose penalties similar to those provided for contravention of section 155.

Clause 65 : Prosecutions

179. Background Evidence of contraventions of Section 155 (the requirement to furnish documents and information demanded by the Commission) may not be ascertained until several years after the contravention occurs. One instance has occurred where a corporation disclosed that a contravention occurred in Court proceedings but a prosecution was then time barred.

180. Paragraph 21(1)(c) of the Crimes Act, 1914 limits the time in which a prosecution may be commenced to one year where punishment of the offence does not mention a term of imprisonment. The provision of different penalties for natural persons and corporations with the proposed amendment of section 155 will result in the Crimes Act provision having application in respect of corporations unless the Trade Practices Act provided otherwise.

181. Proposal Sub-section 163(5), which already permits prosecutions under section 118 to be commenced any time, would be amended so that prosecutions under section 155 may likewise be commenced at any time.

182. Paragraph 163(4)(a) which provides that proceedings before the Court may be instituted by summons upon information is deleted. As this matter is covered by Order 49(1) of the Federal Court Rules, it is no longer necessary to have a specific provision in the Act requiring prosecutions to be commenced by summons upon information.

Clause 66 : Inspection of, furnishing of copies of, and evidence of, documents

183. This clause would make machinery amendments where the proposal to have the Act cover the consequences of overseas mergers (refer paras 51-58) was adopted. First, persons would obtain the right to inspect a Tribunal declaration. Secondly, a certified copy of any such declaration would be made receivable as evidence in all Courts.

Clause 67 : Legal and financial assistance

184. It is proposed to extend section 170 to include applications for assistance by persons who have instituted proceedings in the Court seeking the making of a declaration, or an order by way of prohibition, certiorari or mandamus under section 163A.

PAPER B

EXPOSURE DRAFT BILL

EXPOSURE DRAFT

This draft has been prepared as a basis for discussion. It does not represent a final commitment by the Government to the proposals it contains.

TRADE PRACTICES AMENDMENT BILL 1984

TABLE OF PROVISIONS

Clause	Section affected	
1.		Short title, &c.
2.		Commencement
AMENDMENTS OF PART I—PRELIMINARY		
3.	2A.	Application of Act to Commonwealth and Commonwealth authorities
4.	4B.	Consumers
5.	4L.	Severability
6.	6.	Additional operation of Act
AMENDMENTS OF PARTS II AND III—TRADE PRACTICES COMMISSION AND TRADE PRACTICES TRIBUNAL		
7.	17.	Repeal of section 17 and substitution of new section— Disclosure of interests by members
8.	40.	Repeal of section 40 and substitution of new section— Disclosure of interests by members
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A BILL

FOR

An Act to amend the *Trade Practices Act 1974*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title, &c.

1. (1) This Act may be cited as the *Trade Practices Amendment Act 1984*.

5 (2) The *Trade Practices Act 1974*¹ is in this Act referred to as the Principal Act.

Commencement

2. (1) Sections 1 and 2 shall come into operation on the day on which this Act receives the Royal Assent.

10 (2) The remaining provisions of this Act shall come into operation on such date as is, or on such respective dates as are, fixed by Proclamation.

Application of Act to Commonwealth and Commonwealth authorities

3. Section 2A of the Principal Act is amended by omitting from sub-section (4) "does" and substituting "and section 52A do".

Consumers

4. Section 4B of the Principal Act is amended—

(a) by omitting paragraph (1) (a) and substituting the following paragraph:

“(a) a person shall be taken to have acquired particular goods as a consumer if, and only if— 5

(i) where the price of the goods did not exceed the prescribed amount—the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land, not being such a process carried out in the operation of a farming business; or 10 15

(ii) where the price of the goods exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and”; 20 25

(b) by omitting from paragraph (2) (a) “\$15,000” and substituting “\$200,000”; and

(c) by adding at the end thereof the following sub-section:

“(4) In sub-section (1), ‘farming business’ means an agricultural, forestry, horticultural, orcharding, viticultural, apicultural, animal husbandry or piscicultural business or any other business involving the cultivation of land or the rearing of livestock.”. 30

Severability

5. Section 4L of the Principal Act is amended by omitting “section 87” and substituting “section 82A, 87 or 87A”. 35

Additional operation of Act

6. Section 6 of the Principal Act is amended—

(a) by omitting from paragraph (2) (a) “in sub-section 45D (1A) or”;

(b) by omitting from paragraph (2) (b) “45D (other than sub-section (1A)), 45E,”; 40

(c) by omitting paragraphs (2) (ea), (eb), (f), (g) and (h) and substituting the following paragraphs:

“(f) sub-sections 96 (2) and (3A) were omitted; and

(g) subject to paragraphs (d), (e) and (f), a reference in this Act to a corporation, except a reference in section 4, 50 or 50A, sub-section 81 (1A) or section 94, included a reference to a person not being a corporation.”;

(d) by omitting paragraphs (3) (b) and (c) and substituting the following word and paragraph:

“; and (b) a reference in that Division to a corporation included a reference to a person not being a corporation.”; and

(e) by adding at the end thereof the following sub-section:

“(4) In the application of section 73 in relation to a supplier who is a natural person, that section has effect as if there were substituted for paragraph (6) (a) the following paragraph:

“(a) the supplier has died or is an undischarged bankrupt or a person whose affairs are being dealt with under Part X of the *Bankruptcy Act 1966*; or”.

7. Section 17 of the Principal Act is repealed and the following section is substituted:

Disclosure of interests by members

“17. (1) Where a member of the Commission other than the Chairman is taking part, or is to take part, in the determination of a matter before the Commission and he has or acquires any pecuniary interest that could conflict with the proper performance of his functions in relation to the determination of the matter—

(a) he shall disclose the interest to the persons concerned in the matter; and

(b) except with the consent of all the persons concerned in the matter, he shall not take part in, or exercise any powers in relation to, the determination of the matter.

“(2) Where the Chairman becomes aware that a member of the Commission is taking part, or is to take part, in the determination of a matter and that the member has in relation to the determination of the matter such an interest as is mentioned in sub-section (1)—

(a) if the Chairman considers that the member should not take part, or should not continue to take part, in the determination—he shall give a direction to the member accordingly; or

(b) in any other case—he shall cause the interest of the member to be disclosed to the persons concerned in the matter.

“(3) The Chairman shall give written notice to the Minister of all pecuniary interests that he has or acquires in any business carried on in Australia or in any body corporate carrying on any such business.

“(4) In this section, ‘member of the Commission’ includes an associate member of the Commission.”

8. Section 40 of the Principal Act is repealed and the following section is substituted:

Disclosure of interests by members

5

“40. (1) Where a member of the Tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and he has or acquires any pecuniary interest that could conflict with the proper performance of his functions in relation to the proceedings—

- (a) he shall disclose the interest to the persons concerned in the proceedings; and 10
- (b) except with the consent of all the persons concerned in the proceedings, he shall not take part in, or exercise any powers in relation to, the proceedings.

“(2) Where the President becomes aware that a member of the Tribunal is, or is to be, a member of a Division of the Tribunal in any proceedings and that the member has in relation to the proceedings such an interest as is mentioned in sub-section (1)— 15

- (a) if the President considers that the member should not take part, or should not continue to take part, in the proceedings—he shall give a direction to the member accordingly; or 20
- (b) in any other case—he shall cause the interest of the member to be disclosed to the persons concerned in the proceedings.

“(3) In this section—

- (a) a reference to proceedings shall be read as including a reference to proceedings by way of an inquiry by the Tribunal under this Act; and 25
- (b) a reference to a person concerned in proceedings, being an inquiry conducted by the Tribunal under section 132, shall be read as a reference to a person entitled, or granted leave, to be represented in the inquiry.” 30

Contracts, arrangements or understandings restricting dealings or affecting competition

9. Section 45 of the Principal Act is amended by adding at the end thereof the following sub-sections:

“(10) For the purpose only of determining whether a provision of a contract or arrangement made, or an understanding arrived at, by a trade association is a provision having the purpose, or having or likely to have the effect, of substantially lessening competition, it shall be presumed, unless the contrary is established— 35

- (a) that the trade association was authorized by its constitution to agree to each provision of the contract, arrangement or understanding; and 40

- (b) that all members of the trade association from time to time are parties to the contract, arrangement or understanding and agree to do all acts or things that, under the contract, arrangement or understanding, are to be done by them or the trade association is to cause, require or recommend them to do.

“(11) For the purpose only of determining whether a provision of a contract or arrangement made, or an understanding arrived at, by 2 or more members of a trade association by virtue of a decision made by the trade association, is a provision having the purpose, or having or likely to have the effect, of substantially lessening competition, it shall be presumed, unless the contrary is established—

- (a) that the trade association was authorized by its constitution to make that decision; and
- (b) that all members of the trade association from time to time are, by virtue of that decision, parties to the contract, arrangement or understanding.

“(12) In this section, ‘trade association’ means an association, body or organization (whether incorporated or not) formed, existing or conducted for the purpose of furthering, or for purposes that include or are conducive to the furthering of, the business or professional interests of all or any of its members, but does not include—

- (a) a partnership; or
- (b) an association, body or organization the only members of which are bodies corporate that are related to each other.”.

Covenants in relation to prices

10. Section 45C of the Principal Act is amended by omitting from sub-section (1) “a market” and substituting “any market”.

Repeal of sections 45D and 45E

11. Sections 45D and 45E of the Principal Act are repealed.

Monopolization

12. Section 46 of the Principal Act is amended—

- (a) by omitting from sub-section (1) all the words preceding paragraph (a) and substituting the following:

“A corporation that has a substantial degree of power in a market for goods or services shall not, by taking advantage of that power, engage in conduct for the purpose of, or that has or is likely to have the effect of”;

- (b) by omitting sub-section (2) and substituting the following sub-section:

“(2) If—

- (a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one

corporation together have, a substantial degree of power in a market for goods or services; or

- (b) a corporation, and a body corporate that is, or 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market for goods or services,

the corporation shall be deemed for the purposes of this section to have a substantial degree of power in that market.”;

- (c) by omitting from sub-section (3) “being in a position substantially to control” and substituting “having a substantial degree of power in”;
- (d) by omitting from sub-section (3) “to determine the prices, or” and substituting “substantially to affect the prices, or substantially to”;
- (e) by omitting sub-section (4) and substituting the following sub-section:

“(4) A reference in this section to having a substantial degree of power in a market for goods or services shall be construed as a reference to having a substantial degree of power in such a market either as a supplier or as an acquirer of goods or services in that market.”.

Resale price maintenance

13. Section 48 of the Principal Act is amended—

- (a) by omitting “corporation or other”; and
- (b) by adding at the end thereof the following sub-section:

“(2) In sub-section (1), ‘person’ includes every association, body or organization, whether incorporated or not.”.

Price discrimination

14. Section 49 of the Principal Act is amended—

- (a) by omitting sub-section (1) and substituting the following sub-section:

“(1) A corporation shall not, in trade or commerce, discriminate between purchasers or proposed purchasers of goods of like grade and quality in relation to—

- (a) the prices charged or to be charged for the goods;
- (b) any discounts, allowances, rebates or credits given or allowed or to be given or allowed in relation to the supply of the goods;
- (c) the provision or proposed provision of services in respect of the goods; or
- (d) the making of payments for services provided or to be provided in respect of the goods,

if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of lessening competition in a market for goods, being a market in which the corporation supplies, or those purchasers or proposed purchasers supply, goods.”;

(b) by omitting from paragraph (2) (a) "to the purchasers; or" and substituting "or are to be supplied to the purchasers or proposed purchasers;"

5 (c) by inserting after paragraph (2) (b) the following word and paragraph:

10 " ; or (c) the purchasers or proposed purchasers who do not or would not receive the benefit of the discrimination are or would be able to purchase goods of like grade and quality from a competitor of the supplier on terms in relation to the matters to which the discrimination relates no less favourable than the terms in relation to those matters available to the purchasers or proposed purchasers who receive or would receive the benefit of the discrimination." ; and

15 (d) by adding at the end thereof the following sub-section:

"(6) In this section, 'proposed purchaser', in relation to goods, means a person who has entered into negotiations with respect to the purchase of the goods."

Mergers and other acquisitions

20 15. Section 50 of the Principal Act is amended—

(a) by omitting sub-sections (1), (2) and (3) and substituting the following sub-sections:

25 "(1) A corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate if, as a result of the acquisition, there would be, or be likely to be, a substantial lessening of competition in a substantial market for goods or services in Australia or in a State.

30 "(2) A person other than a corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a corporation if, as a result of the acquisition, there would be, or be likely to be, a substantial lessening of competition in a substantial market in which the corporation acquires or supplies goods or services in Australia or in a State.

35 "(3) Without limiting or otherwise affecting the operation of sub-section (2), a person other than a corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate that holds shares in the capital of a corporation if, as a result of the acquisition, by virtue of the interest in the shares of the corporation indirectly obtained by the person by reason of the acquisition, there would be, or be likely to be, a substantial lessening of competition in a substantial market in which the corporation acquires or supplies goods or services in Australia or in a State." ; and

40 (b) by omitting from sub-section (4) "corporation" (wherever occurring) and substituting "person".

16. After section 50 of the Principal Act the following section is inserted:

Acquisitions outside Australia

“50A. (1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8) (b), a controlling interest in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8) (b) in relation to the acquisition of that controlling interest, acquires a controlling interest in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, make a declaration that the Tribunal— 5

(a) is satisfied that, as a result of the last-mentioned acquisition, a substantial lessening of competition in a substantial market for goods or services in Australia or in a State has occurred or is likely to occur; and 10

(b) is not satisfied in all the circumstances that that acquisition has resulted, or is likely to result, in a benefit to the Australian public that outweighs, or is likely to outweigh, the detriment to the Australian public constituted by the lessening of competition that has occurred, or is likely to occur, as the case may be. 15

“(2) A corporation to which an application under sub-section (1) relates shall be given notice of the application and may appear in the proceedings. 20

“(3) An application under sub-section (1) may be made at any time within 12 months after the date of the acquisition first referred to in that sub-section in relation to which the application is made.

“(4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under sub-section (1). 25

“(5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under sub-section (1).

“(6) After the expiration of 3 months after a declaration is made under sub-section (1) in relation to the acquisition of a controlling interest in a corporation or in 2 or more corporations, the corporation, or each of the corporations, as the case may be, shall not, while the declaration is in force, carry on business in the market to which the declaration relates. 30

“(7) Sub-section (1) does not apply in relation to an acquisition first referred to in that sub-section if sub-section 50 (1), (2) or (3) applies in relation to that acquisition. 35

“(8) For the purposes of this section—

(a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A (1) (b)); and 40

(b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate—

(i) controls the composition of the board of directors of another body corporate;

(ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or

(iii) holds shares in the capital of another body corporate,

the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.”.

Exceptions

17. Section 51 of the Principal Act is amended—

(a) by omitting from sub-section (2) “45D, 45E or”; and

(b) by adding at the end thereof the following sub-section:

“(5) Without limiting by implication the generality of a reference in this section to an act or a thing, such a reference includes a reference to a contract, arrangement or understanding or to any act or thing done in relation to a contract, arrangement or understanding or in relation to the making of a contract or arrangement or arriving at an understanding.”.

18. After section 51 of the Principal Act the following section is inserted in Division 1 of Part V:

Interpretation

“51A. (1) For the purposes of this Division (other than section 52), where a corporation makes a statement or representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the statement or representation, the statement or representation shall be taken to be misleading.

“(2) The onus of establishing that a corporation had reasonable grounds for making a statement or representation referred to in sub-section (1) is on the corporation.

“(3) Sub-section (1) shall not be taken to limit by implication the meaning of a reference in this Division to a misleading statement, a statement that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.”.

Misleading or deceptive conduct

19. Section 52 of the Principal Act is amended by inserting after sub-section (1) the following sub-section:

“(1A) For the purposes of sub-section (1), conduct shall not be taken to be misleading or deceptive or to be likely to mislead or deceive by reason only that it is defamatory.”

20. After section 52 of the Principal Act the following section is inserted:

Unconscionable conduct relating to contracts and proposed contracts

“52A. (1) A corporation shall not, in trade or commerce—

- (a) make a contract if the contract would be unconscionable in all the circumstances relating to the contract at the time when it is proposed to be made (in this section referred to as the “relevant time”);
- (b) vary a contract, including a contract in force at the commencement of this section, if the contract would, as a result of the variation, be unconscionable in all the circumstances relating to the contract at the time of the variation (in this section also referred to as the “relevant time”); or
- (c) otherwise engage in unconscionable conduct in relation to a contract (including a contract in force at the commencement of this section) or a proposed contract, whether or not the corporation is or is to be a party to the contract or the proposed contract.

“(2) For the purpose of determining whether a corporation has contravened sub-section (1) in relation to a contract or a proposed contract, the Court shall have regard to all the circumstances of the case, including the weight to be given in the case to the principle of the need for certainty in commercial transactions and such of the following matters as it considers relevant:

- (a) the relative strengths of the bargaining positions of the parties to the contract or the persons who would be parties if the proposed contract were entered into (in this section referred to as the “proposed parties”);
- (b) whether any provisions of the contract or the proposed contract are or would be unreasonably difficult to comply with or are not or would not be reasonably necessary for the protection of the legitimate interests of any party to the contract or proposed party to the proposed contract;
- (c) whether, in the case of a contract, prior to or at the relevant time, its provisions were the subject of negotiation and, if so, whether any party to the contract could have negotiated successfully for the addition, omission or variation of any provision;
- (d) in the case of a contract, the consequences reasonably foreseeable at the relevant time of compliance or non-compliance with, or contravention of, any or all of the provisions of the contract;
- (e) whether, in the case of a contract, any party to the contract, prior to the relevant time, failed to disclose information of a material kind to any other party to the contract;

- (f) whether any provisions of the contract limit or purport to limit or any provisions of the proposed contract would limit—
- (i) the liability of any party to the contract or proposed party to the proposed contract for a breach of a provision of the contract or proposed contract; or
 - (ii) the remedies available in the event of such a breach;
- (g) whether—
- (i) any party (other than a body corporate) to the contract or proposed party (other than a body corporate) to the proposed contract was not reasonably able to protect his interests; or
 - (ii) any person who represented any party to the contract or proposed party to the proposed contract was not reasonably able to protect the interests of the person whom he represented, because of his age or the state of his physical or mental capacity;
- (h) the relative economic circumstances, educational background and literacy of—
- (i) each party (other than a body corporate) to the contract or each proposed party (other than a body corporate) to the proposed contract; and
 - (ii) any person who represented a party to the contract or proposed party to the proposed contract;
- (j) where the contract or proposed contract is wholly or partly in writing—its form and intelligibility;
- (k) the extent (if any) to which the provisions of the contract or proposed contract and their legal and practical effect were accurately explained by any person to any party or proposed party and whether the party or proposed party understood the provisions and their effect;
- (m) whether any undue influence or unfair pressure was exerted on, or unfair tactics were used against, any party to the contract or proposed party to the proposed contract—
- (i) by any other party to the contract or proposed party to the proposed contract;
 - (ii) by any person acting or appearing or purporting to act for or on behalf of any such person;
 - (iii) in the case of a contract—by any person to the knowledge of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract; or
 - (iv) in the case of a proposed contract—by any person to the knowledge of any other proposed party to the proposed contract or of any person acting or appearing or purporting to act for or on behalf of any other proposed party to the proposed contract;
- (n) if, in the case of a contract for the acquisition of goods or services, at the relevant time a contract for the acquisition of identical or

equivalent goods or services could have been made with another supplier, the difference (if any) between the price of the identical or equivalent goods or services that would have been payable under the last-mentioned contract and the price of the goods or services payable under the first-mentioned contract;

- (p) whether, and if so to what extent, the contract or proposed contract as a whole favours any party to the contract or proposed party to the proposed contract even if no single provision of the contract or proposed contract is unreasonable;
- (q) the commercial or other setting, and the purpose and effect, of the contract or proposed contract; and
- (r) the conduct of the parties to the contract or proposed parties to the proposed contract in relation to any similar or related contract to which any of them is or was a party or proposed contract to which any of them is or was a proposed party.

“(3) Paragraphs (2) (a) to (r) are not intended to imply a limitation of the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened sub-section (1).

“(4) A corporation shall not be taken for the purposes of this Act to engage in unconscionable conduct in relation to a contract by reason only that the corporation institutes legal proceedings in relation to the contract or refers a dispute or claim arising out of, or in relation to, the contract to arbitration in accordance with the contract.

“(5) In determining for the purposes of this Act whether a contract is unconscionable, the Court shall not have regard to any oppressiveness or injustice arising from circumstances that were not reasonably foreseeable at the time when the contract was made or varied, as the case requires.

“(6) In determining for the purposes of this Act whether a corporation has contravened sub-section (1), the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

“(7) This section does not apply to a contract of employment or service to the extent that, under any other Act or any law of a State or Territory, an industrial award, industrial agreement or industrial determination applies to that contract.”

False representations

21. Section 53 of the Principal Act is amended by inserting after paragraph (b) the following paragraph:

“(bb) falsely represent that a particular person has agreed to acquire goods or services;”

**False representations and other misleading or offensive conduct
in relation to land**

5 22. Section 53A of the Principal Act is amended by omitting from
sub-section (2) "cause or permit a servant or agent of the corporation to use, at
a place of residence," and substituting "use, at a place of residence, business or
employment,".

23. Section 53B of the Principal Act is repealed and the following section is
substituted:

Misleading conduct in relation to employment

10 "53B. A corporation shall not, in relation to employment that is to be, or
may be, offered by the corporation or by another person, engage in conduct that
is liable to mislead persons seeking such employment as to the availability,
nature, terms or conditions of, or any other matter relating to, such
employment."

15 24. (1) Section 58 of the Principal Act is repealed and the following
section is substituted:

Accepting payment without intending or being able to supply as ordered

"58. A corporation shall not, in trade or commerce, accept payment or
other consideration for goods or services where, at the time of the acceptance—

(a) the corporation intends—

20 (i) not to supply the goods or services; or

(ii) to supply goods or services materially different from the goods
or services in respect of which the payment or other
consideration is accepted; or

25 (b) there are reasonable grounds to expect that the corporation will not be
able to supply the goods or services within such time as is specified in
the contract for the supply of those goods or services or, if no time is so
specified, within a reasonable time."

(2) The amendment made by sub-section (1) applies only in relation to
contracts made after the commencement of this section.

30 **Misleading statements about certain business activities**

25. Section 59 of the Principal Act is amended by inserting in sub-section
(1) "or from" after "at".

Coercion at place of residence, business or employment

35 26. Section 60 of the Principal Act is amended by omitting "cause or permit
a servant or agent of the corporation to use, at a place of residence," and
substituting "use, at a place of residence, business or employment,".

Pyramid selling

27. Section 61 of the Principal Act is amended—

(a) by omitting paragraph (4) (b) and substituting the following paragraph:

“(b) the goods or services so provided are to be supplied to or for other persons under transactions arranged or effected by persons who participate in the scheme (each of whom is in this section referred to as a ‘participant’), being persons not all of whom are promoters.”; and 5

(b) by omitting paragraph (5) (a) and substituting the following paragraph: 10

“(a) a scheme shall be taken to include the element referred to in paragraph (4) (b) whether a participant who is not a promoter acts in relation to a transaction referred to in that paragraph in the capacity of a servant or agent of the promoter or of one of the promoters or in any other capacity;” 15

Product safety standards

28. Section 62 of the Principal Act is amended by omitting sub-sections (2AA), (2A), (2B) and (2C) and substituting the following sub-section:

“(2A) A corporation shall not export goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind to which paragraph (1) (a) or (b) applies, unless the Minister has, by notice in writing given to the corporation, approved the export of those goods.” 20

Unsolicited credit and debit cards

29. Section 63A of the Principal Act is amended— 25

(a) by omitting from sub-section (1) “credit” (first occurring) and substituting “prescribed”;

(b) by omitting from paragraph (1) (b) “credit card” (wherever occurring) and substituting “prescribed card of the same kind”;

(c) by omitting from sub-section (2) “credit” and substituting “prescribed”; and 30

(d) by inserting after the definition of “credit card” in sub-section (3) the following definitions:

“‘debit card’ means any article of a kind commonly known as a debit card or any similar article intended for use in obtaining cash, goods or services; 35

‘prescribed card’ means a credit card, a debit card or a card that may be used as a credit card and a debit card.”

Assertion of right to payment for unsolicited goods or services or for making entry in directory 40

30. (1) Section 64 of the Principal Act is amended by omitting sub-sections (2) and (2B).

(2) The amendments made by sub-section (1) apply only in relation to the supply of goods or services after the commencement of this section.

Liability of recipient of unsolicited goods

31. (1) Section 65 of the Principal Act is amended by omitting sub-section (6).

(2) The amendment made by sub-section (1) applies only in relation to the supply of goods after the commencement of this section.

32. Section 73 of the Principal Act is repealed and the following section is substituted:

Liability for loss or damage from breach of certain contracts

“73. (1) Where—

- (a) a corporation (in this section referred to as the ‘supplier’) supplies goods, or causes goods to be supplied, to a related credit provider of the supplier and a consumer enters into a contract with the related credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer; or
- (b) a consumer enters into a contract with a related credit provider of a corporation (in this section also referred to as the ‘supplier’) for the provision of credit in respect of the supply by the supplier of services to the consumer,

and the consumer suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of section 70, 71 or 72 or of a warranty that is implied in the contract by virtue of section 74, the supplier and the related credit provider are, subject to this section, jointly and severally liable to the consumer for the amount of the loss or damage, and the consumer may recover that amount by action in accordance with this section in a court of competent jurisdiction.

“(2) Where—

- (a) a corporation (in this section also referred to as the ‘supplier’) supplies goods, or causes goods to be supplied, to a credit provider who is not a related credit provider of the supplier and a consumer enters into a contract with the credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hire-purchase of the goods to the consumer; or
- (b) a consumer enters into a contract with a credit provider for the provision of credit in respect of the supply of services to the consumer by a corporation (in this section also referred to as the ‘supplier’) of which the credit provider is not a related credit provider,

and the consumer suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of section 70, 71 or 72 or of a warranty that is implied in the contract by virtue of section 74, the credit provider is not under any liability to the consumer for the amount of the loss or damage, but

the consumer may recover that amount by action in a court of competent jurisdiction against the supplier.

“(3) A related credit provider of a particular supplier is not liable to a consumer by virtue of sub-section (1) in proceedings arising under that sub-section if the credit provider establishes—

(a) that the credit provided by him to the consumer was the result of an approach made to him by the consumer that was not induced by the supplier; or

(b) that—

(i) after due inquiry before becoming a related credit provider of the supplier, he was satisfied that the reputation of the supplier in respect of his financial standing and business conduct was good; and

(ii) after becoming a related credit provider of the supplier but before the contract to which the proceedings relate was entered into, he had not had cause to suspect, and had not suspected, that—

(A) the consumer might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of a breach of a condition or warranty referred to in sub-section (1); and

(B) the supplier might be unable to meet his liabilities as and when they fell due.

“(4) Subject to sub-section (5), in any proceedings in relation to a contract referred to in paragraph (1) (a) or (b) in which a credit provider claims damages or an amount of money from a consumer, the consumer may set up the liability of the credit provider under sub-section (1) in diminution or extinction of the consumer’s liability.

“(5) Subject to sub-section (6), a consumer may not, in respect of a liability for which, by reason of this section, a supplier and a related credit provider are jointly and severally liable—

(a) bring proceedings to recover an amount of loss or damage from the credit provider; or

(b) where proceedings are brought against the consumer by the credit provider, make a counter-claim or exercise the right conferred by sub-section (4) against the credit provider,

unless he brings the action against the supplier and the credit provider jointly or, in the case of a counter-claim or right conferred by sub-section (4), claims in the proceedings against the supplier in respect of the liability by third-party proceedings or otherwise.

“(6) Sub-section (5) does not apply in relation to proceedings where—

(a) the supplier has been dissolved or is commenced to be wound up; or

(b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would

be satisfied and the court has, on the application of the consumer, declared that sub-section (5) does not apply in relation to the proceedings.

“(7) Where, in proceedings arising under sub-section (1), judgment is given against a supplier and a related credit provider—

(a) the supplier is liable to the credit provider for the amount of the liability of the credit provider and, unless the court in which the proceedings are taken otherwise determines, for the amount of costs (if any) reasonably incurred by the credit provider in defending the proceedings; and

(b) the judgment—

(i) shall not be enforced against the credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and

(ii) may be so enforced only to the extent that the consumer has not received satisfaction of the judgment from the supplier.

“(8) Where, in proceedings arising under sub-section (1), judgment is given against a supplier and a related credit provider and a right conferred by sub-section (4) is established against the credit provider, the consumer—

(a) shall not receive the benefit of that right unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and

(b) may receive the benefit of that right only to the extent that the consumer has not received satisfaction of the judgment from the supplier.

“(9) Notwithstanding any other law, where, in proceedings arising under sub-section (1), judgment is given against a supplier and a related credit provider or against a related credit provider for an amount of loss or damage, the court in which the proceedings are taken shall, on the application of the consumer, unless good cause is shown to the contrary, award interest to the consumer against the supplier and credit provider or against the credit provider, as the case may be, upon the whole or a part of the amount, from the time when the consumer became entitled to recover the amount until the date on which the judgment is given, at whichever of the following rates is the greater:

(a) where the amount payable by the consumer to the credit provider for the obtaining of credit in connection with the goods or services to which the proceedings relate may be calculated at a percentage rate per annum—that rate or, if more than one such rate may be calculated, the lower or lowest of those rates;

(b) 8% or such other rate as is prescribed.

“(10) In determining whether good cause is shown against awarding interest under sub-section (9) on the whole or part of an amount of loss or

damage, the court shall take into account any payment made into court by the supplier or credit provider.

“(11) Where a judgment given in proceedings arising under sub-section (1) is enforced against a related credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgment so enforced to any rights that the consumer would have had but for the judgment against the supplier or any other person.

“(12) Sub-section (1) does not apply in relation to a contract between a consumer and a related credit provider of a supplier where the contract was entered into under an agreement by which the credit provider, in the course of a business carried on by him, agrees with the consumer—

- (a) to satisfy on behalf of the consumer liabilities of the consumer to another person in respect of payment for goods or services supplied by that other person to the consumer from time to time; and
- (b) to provide credit to the consumer in respect of payment by the consumer of amounts owing from time to time to the credit provider in respect of the satisfaction by the credit provider of those liabilities on behalf of the consumer.

“(13) In this section—

‘credit provider’ means a corporation providing, or proposing to provide, in the course of a business carried on by the corporation, credit to consumers in relation to the acquisition of goods or services;

‘related credit provider’, in relation to a supplier, means a credit provider—

- (a) with whom the supplier has a contract, arrangement or understanding relating to—
 - (i) the supply to the supplier of goods in which the supplier deals;
 - (ii) the business carried on by the supplier of supplying goods or services; or
 - (iii) the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services;
- (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit;
- (c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or
- (d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at premises of the supplier.”.

Warranties in relation to the supply of services

33. (1) Section 74 of the Principal Act is amended by omitting sub-section (3).

5 (2) The amendment made by sub-section (1) applies only in relation to contracts made after the commencement of this section.

Interpretation

34. Section 74A of the Principal Act is amended by omitting sub-section (1) and substituting the following sub-section:

“(1) In this Division—

10 ‘acquire’, in relation to goods or an interest in goods, includes acquire by way of gift or by operation of law;

15 ‘consumer’, in relation to goods, means a person taken to have acquired the goods as a consumer by virtue of section 4B or any other person who acquires the goods by acquiring from the first-mentioned or any other person the whole interest that was acquired by the first-mentioned person in the goods;

‘express warranty’, in relation to goods, means an undertaking, assertion or statement in relation to—

- 20 (a) the quality, performance or characteristics of the goods;
- (b) the provision of services that are or may at any time be required in respect of the goods; or
- (c) the supply of parts that are or may at any time be required for the goods,

25 given or made in connection with the supply of the goods or in connection with the promotion by any means of the supply or use of the goods, the natural tendency of which is to induce persons to acquire the goods;

‘manufactured’ includes grown, extracted, produced, processed and assembled;

30 ‘supply’, in relation to goods, includes supply by way of gift.”

Actions in respect of goods of unmerchantable quality

35. Section 74D of the Principal Act is amended—

- (a) by omitting from paragraph (1) (d) “or any person who derives title to the goods through or under the consumer”; and
- (b) by omitting from sub-section (1) “or person who so derives title to the goods” (wherever occurring).

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

36. Section 74F of the Principal Act is amended by omitting all the words preceding paragraph (1) (c) and substituting the following:

“(1) Where—

- (a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or 5
- (b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer, 10

and—”.

Actions in respect of non-compliance with express warranty

37. Section 74G of the Principal Act is amended— 15

- (a) by omitting all the words before paragraph (1) (c) and substituting the following:

“(1) Where—

- (a) a corporation, in trade or commerce, supplies goods (otherwise than by way of sale by auction) manufactured by the corporation to a consumer; or 20
- (b) a corporation, in trade or commerce, supplies goods manufactured by the corporation to another person who acquires the goods for re-supply and a person (whether or not the person who acquired the goods from the corporation) supplies the goods (otherwise than by way of sale by auction) to a consumer, 25

and—”; and

- (b) by omitting paragraph (2) (a) and substituting the following paragraph: 30

“(a) an undertaking, assertion or statement in relation to—

- (i) the quality, performance or characteristics of goods;
- (ii) the provision of services that are or may at any time be required in respect of goods; or
- (iii) the supply of parts that are or may at any time be required for goods, 35

was given or made in connection with the supply of the goods or in connection with the promotion by any means of the supply or use of the goods; and”.

Interpretation 40

38. Section 75B of the Principal Act is amended by adding at the end thereof the following sub-sections:

“(2) A reference in a provision of this Part, other than sections 78 and 80, to a contravention of, or of a provision of, Part IV does not include a reference to a contravention of sub-section 50A (6).

“(3) A reference in a provision of this Part, other than sections 80 and 83, to a contravention of, or of a provision of, Part V does not include a reference to a contravention of section 52A.”

Pecuniary penalties

39. (1) Section 76 of the Principal Act is amended—

- (a) by inserting in sub-section (1) “, subject to sub-section (2),” after “the Court may”;
- (b) by omitting from sub-section (1) “\$50,000” and “\$250,000” and substituting respectively “\$100,000” and “\$500,000”; and
- (c) by omitting sub-section (2) and substituting the following sub-section:

“(2) The Court may not make an order under sub-section (1) against a person who has, by reason of sub-section 96 (3A), contravened or attempted to contravene, or been involved in a contravention of, section 48.”

(2) Notwithstanding the amendments made by sub-section (1), the provisions of section 76 of the Principal Act continue to apply, after the commencement of this section, to and in relation to conduct engaged in before that commencement as if those amendments had not been made.

Civil action for recovery of pecuniary penalties

40. Section 77 of the Principal Act is amended by adding at the end thereof the following sub-section:

“(3) In proceedings referred to in sub-section (1), the Minister and the Commission have the same rights as a party in civil proceedings not being proceedings for the recovery of a pecuniary penalty.”

Offences against Part V

41. (1) Section 79 of the Principal Act is amended—

- (a) by omitting from paragraph (1) (a) “\$10,000” and substituting “\$20,000”;
- (b) by omitting from paragraph (1) (b) “\$50,000” and substituting “\$100,000”; and
- (c) by adding at the end thereof the following sub-sections:

“(4) In proceedings under this section against a person for contravening a provision of Part V, the Court may—

- (a) grant an injunction under section 80 against the person in relation to—
 - (i) the conduct that constitutes, or is alleged to constitute, the contravention; or
 - (ii) other conduct of that kind; or

(b) make an order under section 80A in relation to the contravention.

“(5) A prosecution for an offence against sub-section (1) may be commenced within 3 years after the commission of the offence.”

(2) Notwithstanding the amendments made by paragraphs (1) (a) and (b), the provisions of section 79 of the Principal Act continue to apply, after the commencement of this section, to and in relation to offences committed before that commencement as if those amendments had not been made.

42. (1) After section 79 of the Principal Act the following section is inserted:

Enforcement of payment of certain fines

“79A. (1) Where a person on whom a fine has been imposed for an offence against section 79, 87A, 155 or 162A defaults in payment of the fine, the Court may—

(a) in respect of the fine—

(i) make an order imposing a sentence of imprisonment on the person; or

(ii) where the law of the State or Territory in which the person was convicted permits the making of community service orders or periodic detention orders in default of payment of fines—make such an order against the person;

(b) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or

(c) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.

“(2) Where a person fails to comply with a community service order or a periodic detention order made against him under sub-section (1) in respect of a fine, the Court may, having regard to the extent (if any) of the person’s compliance with the order, make an order—

(a) reducing the fine;

(b) imposing a sentence of imprisonment on the person in respect of the fine; or

(c) reducing the fine and imposing a sentence of imprisonment on the person in respect of the fine as so reduced.

“(3) Where the Court makes an order under sub-section (1) or (2) imposing a sentence of imprisonment on a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to pay the fine or allow him to pay the fine by specified instalments, and, in that case—

(a) the order imposing the sentence of imprisonment in respect of the fine shall not be executed unless the person fails to pay the fine within that

time or fails to pay an instalment at or before the time when it becomes payable, as the case may be;

- (b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order shall be deemed to have been discharged in respect of the fine; and
- (c) if the person is imprisoned in respect of the fine in pursuance of the order but, before being so imprisoned, has paid part of the fine, sub-section (5) applies in relation to him as if the amount of the fine were the part of the fine remaining unpaid immediately before his being so imprisoned.

“(4) Where a person imprisoned by virtue of an order made under sub-section (1) or (2) in respect of a fine gives security for the payment of the fine, the Court shall cancel the order in respect of the fine.

“(5) Subject to sub-section (7), an order made under sub-section (1) or (2) in respect of a fine ceases to have effect in respect of the fine—

- (a) on payment of the fine; or
- (b) if the fine is not paid—according to the following table:

Amount of fine unpaid	Period after commencement of imprisonment on the expiration of which order ceases to have effect
\$1,500 and under	1 month
Over \$1,500 and not more than \$3,000	3 months
Over \$3,000 and not more than \$5,000	6 months
Over \$5,000 and not more than \$7,500	9 months
Over \$7,500 and not more than \$10,000	12 months
Over \$10,000 and not more than \$12,500	15 months
Over \$12,500 and not more than \$15,000	18 months
Over \$15,000 and not more than \$17,500	21 months
Over \$17,500	2 years

“(6) Subject to sub-section (7), where a person is required to serve periods of imprisonment by virtue of an order or orders made under sub-section (1) or (2) in respect of 2 or more fines, those periods of imprisonment shall be served consecutively.

“(7) Where—

- (a) a person would, but for this sub-section, be required by virtue of an order or orders made under sub-section (1) or (2) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 5 years; and
- (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature,

the Court shall, by order, declare that the order or orders shall cease to have effect in respect of those fines after the person has served an aggregate of 5 years' imprisonment in respect of those fines.

“(8) Section 18A of the *Crimes Act 1914* does not apply with respect to the enforcement and recovery of fines referred to in sub-section (1).

“(9) In this section—

‘community service order’, in relation to a person, means an order requiring the person to perform such community services as are specified in the order; 5

‘periodic detention order’, in relation to a person, means an order requiring the person to submit himself periodically to an authority specified in the order to be detained for such period as is so specified.”

(2) The amendment made by sub-section (1) applies only in relation to fines imposed for offences committed after the commencement of this section. 10

Repeal of section 80AA

43. Section 80AA of the Principal Act is repealed.

Order to disclose information or publish advertisement

44. (1) Section 80A of the Principal Act is amended by omitting sub-sections (2), (3) and (4). 15

(2) Notwithstanding the amendments made by sub-section (1), the provisions of section 80A of the Principal Act continue to apply, after the commencement of this section, to and in relation to conduct engaged in before that commencement as if those amendments had not been made. 20

Divestiture

45. Section 81 of the Principal Act is amended—

(a) by omitting from sub-section (1) “corporation” (wherever occurring) and substituting “person”;

(b) by inserting after sub-section (1) the following sub-section: 25

“(1A) Where a declaration has been made under sub-section 50A (1) in relation to the acquisition of a controlling interest in a corporation, or in each of 2 or more corporations, the Court may, on the application of the Minister, the Commission or any other person, if it finds, or has in a proceeding instituted under section 80 found, that that corporation, or any of those corporations, as the case may be (in this sub-section referred to as the “relevant corporation”), has contravened sub-section 50A (6), by order, for the purpose of ensuring that that acquisition ceases to have the result referred to in paragraph 50A (1) (a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.”; and 30

(c) by inserting in sub-section (2) “or (1A)” after “sub-section (1)”. 35

Actions for damages

46. Section 82 of the Principal Act is amended by adding at the end thereof the following sub-section:

“(3) Sub-section (1) does not apply in relation to loss or damage suffered by a person by conduct that was, by reason of sub-section 96 (3A), done in contravention of section 48.”

47. After section 82 of the Principal Act the following section is inserted:

Orders in respect of unconscionable conduct relating to contracts

“82A. (1) Where, on the application of a party to a contract, the Court is satisfied that a corporation has contravened section 52A in relation to the contract, the Court may, if it thinks fit, make one or more of the following orders:

- (a) an order refusing to enforce any or all of the provisions of the contract;
- (b) an order declaring the whole or any part of the contract to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date before the date on which the order is made as is specified in the order;
- (c) an order varying the contract in such a manner as is specified in the order and, if the Court thinks fit, declaring the contract to have had effect as so varied on and after such date before the date on which the order is made as is so specified;
- (d) an order, in relation to an instrument creating or transferring an interest in land, directing a party to the contract to execute an instrument that—
 - (i) varies, or has the effect of varying, the first-mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument;
- (e) an order containing such ancillary or consequential provisions as the Court thinks just.

“(2) An application under sub-section (1) in relation to a contract may be made—

- (a) where the application relates to the exercise of any power or the performance of any obligation under, or the occurrence of any activity contemplated by, the contract—at any time not more than 3 months before the earliest time for that exercise, performance or occurrence, as the case may be, and not more than 2 years after the latest time for that exercise, performance or occurrence, as the case may be; or
- (b) where paragraph (a) does not apply—at any time within 2 years after the alleged contravention occurred.

“(3) For the purpose of determining whether to make an order under this section, the Court may have regard to the conduct of the parties to the proceeding in relation to the contract since the contravention occurred.

“(4) The Court may make an order under this section notwithstanding that the contract has been fully performed. 5

“(5) Where a corporation contravenes section 52A in relation to a contract in force at the commencement of that section, the Court may not make an order under this section affecting the operation of the contract before the contravention occurred.

“(6) In sub-section (1), ‘interest’, in relation to land, has the same meaning as in section 53A.” 10

Finding in proceedings to be evidence

48. Section 83 of the Principal Act is amended by inserting “under section 82A for an order in relation to a person who is a party to a contract or” after “application”. 15

49. Section 84 of the Principal Act is repealed and the following section is inserted:

Conduct by directors, servants or agents

“84. (1) Where, in a proceeding under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which a provision of Part V applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of his actual or apparent authority, had that state of mind. 20

“(2) Any conduct engaged in on behalf of a body corporate— 25

- (a) by a director, servant or agent of the body corporate within the scope of his actual or apparent authority; or
- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of such direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent, 30

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

“(3) Where, in a proceeding under this Part in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of Part V applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of his actual or apparent authority, had that state of mind. 35 40

“(4) Any conduct engaged in on behalf of a person other than a body corporate—

(a) by a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the first-mentioned person, where the giving of such direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent,

shall be deemed, for the purposes of the Act, to have been engaged in also by the first-mentioned person.

“(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person’s reasons for his intention, opinion, belief or purpose.”.

Defences

50. Section 85 of the Principal Act is amended by inserting in paragraph (1) (b) “, other than a person who was, at the time when the contravention occurred, a servant or agent of the defendant or, in the case of a defendant being a body corporate, a director of the defendant” after “person”.

Other orders

51. Section 87 of the Principal Act is amended—

(a) by inserting in sub-section (1) “, other than conduct that, by virtue of sub-section 96 (3A), was engaged in in contravention of section 48” after “or V”;

(b) by omitting sub-section (1A) and substituting the following sub-sections:

“(1A) Without limiting the generality of section 80, the Court may, on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this sub-section) in contravention of a provision of Part V or on the application of the Commission in accordance with sub-section (1B) on behalf of such a person or 2 or more such persons, make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in sub-section (2)) if the Court considers that the order or orders concerned will compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage, or will prevent or reduce the loss or damage suffered, or likely to be suffered, by the person.

“(1B) Where, in a proceeding instituted for an offence against section 79 or instituted by the Commission or the Minister under section 80, a person is found to have engaged (whether before or after

the commencement of this sub-section) in conduct in contravention of a provision of Part V, the Commission may make an application under sub-section (1A) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by such conduct, but the Commission shall not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.”;

- (c) by inserting after paragraph (2) (b) the following paragraph: 5
“(ba) an order refusing to enforce any or all of the provisions of such a contract;” 10
- (d) by omitting from paragraph (2) (e) “and”;
- (e) by adding at the end of sub-section (2) the following word and paragraph: 15
“; and (g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that— 15
(i) varies, or has the effect of varying, the first-mentioned instrument; or 20
(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.”; and 25
- (f) by adding at the end thereof the following sub-section:
“(6) In sub-section (2), ‘interest’, in relation to land, has the same meaning as in section 53A.”.

52. After section 87 of the Principal Act the following section is inserted in Part VI: 30

Power of Court to prohibit payment or transfer of moneys or other property

“87A. (1) Where—

- (a) proceedings have been commenced against a person for an offence against section 79;
- (b) an application has been made under section 80 for an injunction against a person in relation to a contravention of a provision of Part V; 3
- (c) an action has been commenced under sub-section 82 (1) against a person in relation to a contravention of a provision of Part V; or
- (d) an order under section 87 has been or may be made against a person in relation to a contravention of a provision of Part V, 4

the Court may, on the application of the Minister or the Commission, make an order or orders mentioned in sub-section (2) if the Court is satisfied that—

5 (e) it is necessary or desirable to do so for the purpose of preserving money or other property held by or on behalf of a person referred to in paragraph (a), (b), (c) or (d), as the case may be (in this section referred to as the 'relevant person'), where the relevant person is liable or may be or become liable under this Act to pay moneys by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or refund other property; and

10 (f) it will not unduly prejudice the rights and interests of any other person.

“(2) The orders referred to in sub-section (1) are—

15 (a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;

20 (b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the relevant person or on behalf of an associate of the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of, the other property, to, or to another person at the direction or request of, the person on whose behalf the money or other property is held;

25 (c) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of moneys of the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the moneys are held;

30 (d) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the other property is located; and

35 (e) an order appointing, where the relevant person is a natural person, a receiver or trustee of the property or of part of the property of the relevant person with such powers as are specified in the order.

5 “(3) Subject to sub-section (4), an order under this section may be expressed to operate—

(a) for a period specified in the order; or

40 (b) until proceedings under any other provision of this Part in relation to which the order was made have been concluded.

0 “(4) An order under this section made on an application *ex parte* shall not be expressed to operate for a period exceeding 30 days.

“(5) A person who contravenes or fails to comply with an order by the Court under this section that is applicable to him is guilty of an offence punishable on conviction—

- (a) in the case of a person not being a body corporate—by a fine not exceeding \$20,000; or
- (b) in the case of a person being a body corporate—by a fine not exceeding \$100,000.

“(6) Nothing in this section affects the powers that the Court has apart from this section.

“(7) This section has effect subject to the *Bankruptcy Act 1966*.

“(8) A reference in this section to a person who is an associate of a relevant person is a reference to—

- (a) a person holding money or other property on behalf of the relevant person; or
- (b) if the relevant person is a body corporate—a wholly owned subsidiary of the relevant person.”.

Heading to Part VII

53. The heading to Part VII of the Principal Act is omitted and the following heading is substituted:

“PART VII —AUTHORIZATIONS, NOTIFICATIONS AND CLEARANCES IN RESPECT OF RESTRICTIVE TRADE PRACTICES”.

Power of Commission to grant authorizations

54. Section 88 of the Principal Act is amended—

- (a) by omitting sub-sections (7) and (7A);
- (b) by omitting from sub-section (9) “corporation” (wherever occurring) and substituting “person”; and
- (c) by omitting sub-section (16) and substituting the following sub-section:

“(16) A corporation that has made an application to the Commission for an authorization, or a person other than a corporation who has made an application to the Commission for an authorization under sub-section (9), may at any time, by notice in writing to the Commission, withdraw the application.”.

Determination of applications for authorizations

55. Section 90 of the Principal Act is amended—

- (a) by inserting at the end of sub-paragraph (8) (a) (i) “or”;
- (b) by omitting sub-paragraph (8) (a) (ii);
- (c) by omitting sub-section (9) and substituting the following sub-section:

“(9) The Commission shall not make a determination granting an authorization under sub-section 88 (9) in respect of a proposed

acquisition of shares in the capital, or of assets, of a body corporate unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed acquisition were allowed to take place.”; and

(d) by omitting from paragraph (10) (a) “, (7)”.

Grant, revocation and variation of authorizations

56. Section 91 of the Principal Act is amended by inserting after sub-section (1) the following sub-section:

“(1A) An authorization, other than an authorization deemed to have been granted under sub-section 90 (11), comes into force on such date as is specified in the authorization, not being a date earlier than—

- (a) where paragraph (b) does not apply—the expiration of the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorization; or
- (b) if an application is made to the Tribunal for such a review—the date of the making by the Tribunal of a determination on the review.”.

Heading to Division 2 of Part VII

57. The heading to Division 2 of Part VII is omitted and the following heading is substituted:

“Division 2—Notifications and Clearances”.

58. After section 93A of the Principal Act the following section is inserted:

Clearances relating to mergers and other acquisitions

“94. (1) Where a person proposes—

- (a) to acquire any shares in the capital, or any assets, of a body corporate; or
- (b) to acquire, outside Australia, a controlling interest in a body corporate where, as a result of the acquisition, the person would acquire a controlling interest in one or more corporations,

the person may give notice in writing to the Commission of the proposed acquisition.

“(2) Where a person gives notice to the Commission under sub-section (1) that the person proposes to acquire shares in the capital, or assets, of a body corporate, the Commission may, if the Commission is satisfied that the acquisition is not likely to result in a contravention by any person of section 50, give notice in writing to the person stating that the Commission is so satisfied, and, where such a notice has been given, proceedings for a contravention of that section shall not be instituted in respect of that acquisition.

“(3) Where a person gives notice to the Commission under sub-section (1) that the person proposes to acquire, outside Australia, a controlling interest in a body corporate and, as a result of the acquisition, will acquire a controlling interest in a corporation or corporations, the Commission may, if the Commission is satisfied that the last-mentioned acquisition is not likely to result in a substantial lessening of competition in any substantial market for goods or services in Australia or in a State, give notice in writing to the person stating that the Commission is so satisfied, and, where such a notice has been given, an application shall not be made to the Tribunal for a declaration under sub-section 50A (1) in relation to the acquisition.

“(4) A reference to the acquisition of a controlling interest in a body corporate has the same meaning in this section as in section 50A.”.

Register

59. Section 95 of the Principal Act is amended—

(a) by omitting from paragraph (1) (f) “and”; and

(b) by adding at the end thereof the following word and paragraph:

“; and (h) notices given to the Commission under sub-section 94 (1) and notices given by the Commission under sub-section 94 (2) or (3).”.

Acts constituting engaging in resale price maintenance

60. Section 96 of the Principal Act is amended—

(a) by inserting after sub-section (3) the following sub-sections:

“(3A) A person (in this section referred to as the ‘relevant person’) also engages in the practice of resale price maintenance if—

(a) the relevant person, or a person acting on behalf of the relevant person, makes it known to a corporation that the relevant person proposes to engage in conduct, whether alone or in concert with any other person, that will hinder or prevent the supply of goods by any person to, or the acquisition of goods by any person from, the corporation unless the corporation agrees not to sell those goods at a price less than a price specified by the relevant person; or

(b) the relevant person, or a person acting on behalf of the relevant person, engages in conduct, whether alone or in concert with any other person, that hinders or prevents the supply of goods by any person to, or the acquisition of goods by any person from, a corporation for the purpose of inducing the corporation not to sell goods at a price less than a price specified by the relevant person.

“(3B) For the purposes of sub-section (3A), it shall be presumed, unless the contrary is established, that any act or thing done by a person who is a member or officer of an association, body or organization within the scope of his actual or apparent authority as

such a member or officer, as the case may be, was done on behalf of the association, body or organization.”; and

(b) by adding at the end thereof the following sub-sections:

“(8) Sub-sections (4) and (6) apply in relation to sub-section (3A), and so apply as if—

(a) the references to sub-section (3) were references to sub-section (3A); and

(b) the references to a supplier were references to the relevant person.

“(9) Sub-section (7) applies in relation to sub-section (3A), and so applies as if—

(a) the reference to any of paragraphs (3) (a) to (e) were a reference to paragraph (3A) (a) or (b);

(b) the references to a supplier were references to the relevant person; and

(c) all the words after paragraph (7) (c) were omitted.

“(10) In this section, ‘person’ includes every association, body or organization, whether incorporated or not.”.

Applications for review

61. Section 101 of the Principal Act is amended—

(a) by inserting in sub-section (1) “or under sub-section (1A), as the case may be” after “regulations”; and

(b) by inserting after sub-section (1) the following sub-section:

“(1A) A presidential member may, on the application of a person concerned in an application for an authorization under sub-section 88 (9), shorten the time allowed by or under the regulations within which an application under sub-section (1) may be made for a review of the determination by the Commission of the application for the authorization if the member is satisfied that special circumstances exist and that in all the circumstances it would not be unfair to do so.”.

Power to obtain information, documents and evidence

62. (1) Section 155 of the Principal Act is amended—

(a) by omitting from sub-sections (5) and (6) “Penalty: \$1,000 or imprisonment for 3 months.”; and

(b) by inserting after sub-section (6) the following sub-section:

“(6A) A person who contravenes sub-section (5) or (6) is guilty of an offence punishable on conviction—

(a) in the case of a person not being a body corporate—by a fine not exceeding \$2,000 or imprisonment for 12 months; or

(b) in the case of a person being a body corporate—by a fine not exceeding \$10,000.”.

(2) Notwithstanding the amendments made by sub-section (1), the provisions of section 155 of the Principal Act continue to apply, after the

commencement of this section, to and in relation to offences committed before that commencement as if those amendments had not been made.

Disclosure of documents by Commission

63. Section 157 of the Principal Act is amended by inserting in paragraph (1) (d) "or 87A (1)" after "87 (1A)".

64. After section 162 of the Principal Act the following section is inserted:

Intimidation, &c.

"162A. A person who—

(a) threatens, intimidates or coerces a person; or

(b) causes or procures damage, loss or disadvantage to a person,

for or on account of his proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission is guilty of an offence punishable on conviction—

(c) in the case of a person not being a body corporate—by a fine not exceeding \$2,000 or imprisonment for 12 months; and

(d) in the case of a person being a body corporate—by a fine not exceeding \$10,000."

Prosecutions

65. Section 163 of the Principal Act is amended—

(a) by omitting sub-section (4) and substituting the following sub-section:

"(4) Proceedings before the Court in accordance with this section shall not be instituted except with the consent in writing of the Minister or of a person authorized by the Minister, by writing under his hand, to give such consents."; and

(b) by inserting in sub-section (5) "or 155" after "section 118".

Inspection of, furnishing of copies of, and evidence of, documents

66. Section 165 of the Principal Act is amended—

(a) by inserting in paragraph (2) (a) "a declaration under section 50A or" before "a determination"; and

(b) by omitting sub-section (6) and substituting the following sub-section:

"(6) A copy of a declaration under section 50A or a determination of, or undertaking given to, the Tribunal, certified to be a true copy under the hand of the Registrar or of a Deputy Registrar, shall be received in all courts as evidence of the declaration, determination or undertaking."

Legal and financial assistance

67. Section 170 of the Principal Act is amended—

(a) by inserting in paragraph (1) (a) "or section 163A" after "Part VI";

(b) by inserting in paragraph (1) (c) "or section 163A" after "Part VI"; and

- (c) by inserting in paragraph (3) (b) “a declaration under sub-section 50A (1) or for” after “for”.
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NOTE

1. No. 51, 1974, as amended. For previous amendments, see Nos. 56 and 63, 1975; Nos. 88 and 157, 1976; Nos. 81, 111 and 151, 1977; Nos. 206 and 207, 1978; No. 73, 1980; Nos. 61 and 176, 1981; No. 80, 1982; and No. 39, 1983.

PAPER C

DISCUSSION PAPER:

THE TRADE PRACTICES ACT AND TRADE UNIONS

DISCUSSION PAPER : THE TRADE PRACTICES ACT AND
TRADE UNIONS

1. INTRODUCTION

1.1 This discussion paper is issued with the Exposure Draft Bill of amendments to the Trade Practices Act. It is in four sections. Section 2 briefly describes, by way of background, the extent to which trade practices legislation has applied to trade unions. Section 3 deals with the Government's proposed repeal of sections 45D and 45E and discusses possible alternative arrangements for dealing with disputes involving secondary boycotts. Section 4 considers the appropriateness of other provisions of the Trade Practices Act applicable to the conduct of trade unions, and discusses possible alternative approaches for dealing with conflicts that may arise, or appear to arise, between trade practices and industrial relations principles.

1.2 The insertion of sections 45D and 45E in the Trade Practices Act have not, in the Government's view, enhanced in any way the competition policy objectives reflected in the Act, nor have they addressed the industrial relations issues which underlie virtually all secondary boycott activity involving trade unions. In implementing its policy to repeal those provisions, the Government is committed to developing an alternative mechanism to deal with those underlying issues in an effective and practical way and the discussion in Section 3 of the the paper emphasises that Commonwealth and State industrial tribunals have an important role here. The proposals discussed should in no way be regarded as reducing the Government's commitment to maintaining an effective and vigorous competition policy.

1.3 Section 4 of the paper addresses the problem of conflicts, other than in relation to secondary boycotts, which have arisen in the past and are likely to arise in the future, between unions pursuing their legitimate industrial aims, and the competition provisions of the Trade Practices Act. It is apparent that the existing exemption provisions do not adequately deal with this problem. Two kinds of solution, to some extent complementary, are canvassed: first, to broaden the legal area of exemption or 'zone of immunity' for trade unions, so that the potential areas of conflict between trade union aims and competition aims are minimised; and secondly, to provide machinery to facilitate the resolution of such conflicts as can and do arise.

1.4 Section 4 of the paper also canvasses the appropriateness of the existing remedies of damages and pecuniary penalties under the Trade Practices Act in relation to union activities, and the question whether the remedies should be confined to injunctive relief (perhaps further limited by being available only on application by the Trade Practices Commission or the Minister).

1.5 The discussion paper is not intended to be an exhaustive discussion of the issues it raises, but rather a stimulus to debate and comment by interested parties. Such comments, which need not be restricted to the matters covered in this paper, may be made to:

The Attorney-General,
Parliament House,
CANBERRA A.C.T. 2600.

They will then be considered by the Attorney-General and the Minister for Employment and Industrial Relations.

2: THE RELEVANT LEGISLATIVE PROVISIONS

2.1 Although the consumer protection provisions in Part V of the Trade Practices Act have some possible application to trade unions, as is mentioned in Section 4 of this paper, by far the most significant application - or potential application - of the Act comes from the provisions of Part IV, which prohibit various anti-competitive practices. The provisions which are most likely to have some application to trade unions are:

- Section 45, which prohibits corporations making or giving effect to a provision of a contract, arrangement or understanding which has the purpose or effect of substantially lessening competition in a market. It is not clear whether this provision, to the extent that it relies on the constitutional corporations power, applies directly to trade unions. However, trade unions would still be caught by the extended operation of the Act where they entered into agreements which relate to overseas or interstate trade or commerce. Section 45A, an associated provision, deems that any agreements relating to price substantially lessen competition: ie., no proof of substantial lessening of competition is required;
- Sections 45D and 45E, which prohibit secondary boycotts generally (although typically these are engaged in mainly by a trade union, its officials or its members), and agreements with a trade union and a third party to cease to deal with a company which that third party is normally accustomed to supplying or from which it is normally accustomed to acquiring. These and related provisions are described in greater detail in Section 3 of this paper;
- Section 48, which (when read in conjunction with Part VIII of the Act) prohibits resale price maintenance (RPM) by suppliers of goods. Broadly, RPM involves a supplier requiring a reseller not to sell at less than a price specified by the supplier. A trade union does not (in normal circumstances) supply goods and therefore cannot itself engage in RPM - other than by way of aiding and abetting it - but secondary boycott activity which results in price maintenance is subject to section 45D;

Sections 76-7, 80 and 82, which provide for pecuniary penalty, injunction or damages respectively in respect of breaches of the above provisions. Provision is made in section 76 for the imposition of a pecuniary penalty of up to \$250,000. Such a penalty may be only imposed on a body corporate. Under section 77 proceedings for the recovery of the penalty may be taken by the Minister or the Trade Practices Commission. Under section 80 an injunction may be granted on the application of the Minister, the Trade Practices Commission, or any other person. A contravention of Part IV which has caused loss or damage may, under section 82, also give rise to an action for damages by the person who has suffered that loss or damage;

Section 76 also provides that a trade union is caught by the Act if it counsels, procures, aids, abets, induces or is knowingly concerned in, a contravention by a supplier of Part IV. Trade unions could conceivably be caught by section 76 in relation to such involvement in contraventions of section 46 (monopolization) section 47 (exclusive dealing), section 48 (RPM) and section 49 (price discrimination).

2.2 There are also provisions under which relevant trade union conduct may be exempted or authorized, namely:

- Sub-section 51(1), which exempts any act or thing that is, or is of a kind specifically authorized or approved by, or by regulations under, a Federal Act (other than one relating to patents, trade marks, designs or copyrights) or a State Act (unless otherwise proscribed by regulation under the Trade Practices Act), or a Territory Ordinance;
- Sub-section 51(2)(a), which exempts conduct carried out in relation to the remuneration, conditions of employment, hours of work or working conditions of employees (there is no exemption, however, for RPM conduct prohibited under section 48). The operation of this exemption is given further consideration in Section 4. It should be noted that section 45D has its own exemption provision in similar terms; and
- Section 88 which enables parties to apply to the Trade Practices Commission for authorization of conduct (on public benefit grounds) which might otherwise breach the restrictive trade practices provisions (section 46 monopolization and section 48 RPM conduct cannot however be authorised).

2.3 When the Trade Practices Commission considers a contravention of the Trade Practices Act has occurred, it can institute an action in the Federal Court for a pecuniary penalty or for an injunction or both. In addition to action by the Trade Practices Commission, other persons may apply for an injunction and, where a person has suffered loss or damage as a result of a contravention, that person may take action under the Trade Practices Act for damages.

2.4. The Attorney-General is empowered by section 29 of the Trade Practices Act to give directions to the Trade Practices Commission in connexion with the exercise of its powers and as to matters to be given special consideration in determining applications for authorization. This however has rarely been used in relation to Part IV of the Trade Practices Act.

2.5 In 1980, at the same time as section 45E was inserted in the Trade Practices Act, the Australian Conciliation and Arbitration Commission was provided with a conciliation role in relation to secondary boycotts involving federally registered organizations or federal awards. The relevant provisions are section 80AA of the Trade Practices Act and Division 5A of Part III of the Conciliation and Arbitration Act. These are discussed in greater detail in Section 3 below.

3.: ALTERNATIVE ARRANGEMENTS FOR DEALING WITH SECONDARY
BOYCOTT DISPUTES AFTER THE REPEAL OF SECTIONS 45D
AND 45E OF THE TRADE PRACTICES ACT

3.1 The Government's policy is for the repeal of section 45D and 45E. Before considering why the Government believes this action should be taken and what possible alternative arrangements could then be established to resolve satisfactorily disputes involving secondary boycott action, it is necessary to examine the origins of these and related provisions. Sections 45D and 45E are reproduced in full at Appendix A.

3.2 Section 45D operates primarily to prohibit secondary boycotts. The most common "secondary boycott" situation which arises in a trade union context is where employees refuse to handle goods intended for a third party for the purpose of pressuring the third party to accede to certain demands.

3.3 The provision has its origins in a recommendation of the 1976 Trade Practices Act Review Committee (the Swanson Committee), one of whose terms of reference was "to give particular attention to the application of the Act to anti-competitive conduct by employees, and employee or employer organizations". The relevant paragraphs of the Swanson Committee Report (Parliamentary Paper No. 228/1976) are paragraphs 10.13 to 10.20, and these are reproduced at Appendix B.

3.4 The Swanson Committee in a wide-ranging Report only briefly discussed the problem of secondary boycotts. The Committee pointed to the examples of boycotts by bread delivery drivers against retail outlets which were selling cut-price bread and boycotts by petrol tanker drivers against service station advertising cut-price petrol. The Committee's discussion brings out the conflict between the employees' concern for job security and the need to maintain the competitive process.

3.5 The Committee made the following recommendation at paragraph 10.19:

"In these circumstances we recommend that the law provide an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body. That some procedures should be available was something on which submissions of interested parties were virtually unanimous."

The Committee's Report continued, at paragraph 10.20:

"We make no recommendation as to whether these procedures for recourse should be established under the Trade Practices Act or the Conciliation and Arbitration Act. The submissions were divided as to which approach was preferable. However, we believe the trader who is the object of the employees' action should not simply have the choice of toeing the line or suffering substantial damage or in some cases going out of business. He too is entitled to have his day in court."

3.6 Although section 45D is principally concerned with secondary boycotts, some primary boycotts affecting inter-State or overseas trade are within its scope. It provides that a person shall not, in concert with a second person (typically, union members), engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person, or their acquisition by a third person from a fourth person. Either the third or fourth person must be a corporation. In addition, the conduct must have, or be likely to have, the effect of causing "substantial loss or damage" to the target of the boycott or a "substantial lessening of competition" in a relevant market and be engaged in for that purpose.

3.7 There is an exemption under sub-section 45D(3), which, in broad terms, provides that the section does not apply where the dominant purpose of the secondary boycott is substantially related to remuneration, conditions of employment, hours of work or the termination of employment. However, the wording of the Act is such that this exemption has been narrowly interpreted by the courts, and in practice, trade unions find it difficult to rely on it (compare paras. 4.9 to 4.12). Conduct under section 45D may also be authorized by the Trade Practices Commission under section 88.

3.8 Section 45E was inserted into the Trade Practices Act by the then Liberal - National Party Government in 1980, also to deal with what might be loosely described as secondary boycott situations. Basically, it prohibits a contract, arrangement or understanding between a union and another person to prevent or hinder the supply of goods or services to a third person, or their acquisition from that third person. It applies where either the second person or third person is a corporation, and where the second person is accustomed or under an obligation to supply or to acquire the goods or services.

3.9. In section 45E, the relevant "purpose" relates to hindering or preventing the supply or acquisition of goods or services. Section 45E has no exemption provision relating to industrial issues but exempts arrangements etc. where the 'target' is a party or consents in writing. The Trade Practices Commission may also under section 88 authorize conduct covered by section 45E.

3.10 Contraventions of sections 45D and 45E may lead to the imposition of a pecuniary penalty under section 76, the granting of an injunction under section 80 or an action for damages under section 82. Experience has shown that generally parties only pursue the remedy of a section 80 injunction and, although a claim for damages may be made, that is not pursued if an injunction can be obtained. In virtually all cases the matter is settled without an interim injunction being made absolute.

3.11 When the Act was amended in 1980 by the insertion of section 45E, provision was also made to give the Conciliation and Arbitration Commission a formal role in the resolution of disputes involving secondary boycott activity. Such specific provision was necessary because, in the usual case, secondary boycotts do not involve a dispute between an employer and employees which could be brought before the Conciliation and Arbitration Commission under the other provisions of the Conciliation and Arbitration Act.

3.12 Division 5A (sections 88DA to 88DH) was inserted in Part III of the Conciliation and Arbitration Act by the Conciliation and Arbitration (Boycotts) Amendment Act 1980. Under section 88DA, the Division applies to a dispute relating to a contravention, or a threatened, impending or probable contravention of sections 45D or 45E, where the dispute relates, or may relate, to work under a federal award or in which a federally registered union, or an officer or member is involved. Under section 88DB, a dispute may be notified to the Conciliation and Arbitration Commission after there has been an application for an injunction under the Trade Practices Act to restrain a contravention of sections 45D and 45E. Either the applicant or the person to be restrained may notify the Commission. Provision is also made for a Minister to notify the Commission of the existence of a dispute to which Division 5A applies. In this case, there does not have to be a prior application for an injunction.

3.13 The Commission is empowered, under section 88DC, to settle the dispute by conciliation. It is expressly precluded from the exercise of any arbitral powers. Provision is made in section 88DE for the relevant federally registered union and employers' organisation to be parties, as well as the employer of the relevant employees and the third party affected by secondary boycott activity. A Minister may, by notification, be a party, as well as such other persons as the Commission specifies.

3.14 At the same time as Division 5A was inserted into the Conciliation and Arbitration Act, section 80AA was inserted into the Trade Practices Act. This permits, but does not require, the Federal Court to stay the operation of an injunction granted under the Trade Practices Act to restrain secondary boycott activity. A stay may be ordered where the

Court, on the application of a Minister or a party, considers the stay would be likely to facilitate the settlement of the dispute by conciliation in proceedings which are before the Conciliation and Arbitration Commission under Division 5A, or before a State or Territory tribunal under a 'prescribed provision' of a law of the State or Territory. It should be noted that no such law has been prescribed for the purposes of section 80AA. Under sub-section 80AA(4), this may only be done where the powers of the relevant tribunal are equivalent to the powers of the Conciliation and Arbitration Commission under Division 5A.

Deficiencies of the Existing Arrangements

3.15 Sections 45D and 45E have been the subject of considerable controversy since their introduction. They have never been accepted by the trade union movement, and they are not designed to resolve the underlying issues which give rise to the secondary boycott activity.

3.16 As enacted, section 45D went far wider than proscribing only those price maintenance activities that were of concern to the Swanson Committee. Unlike other provisions of Part IV of the Trade Practices Act, section 45D is not solely concerned with competition. It prohibits secondary boycotts engaged in for the purpose and with the effect of substantially damaging a business even where competition is not affected. In fact, because the alternative test of substantial lessening of competition is more difficult to establish, there is little recourse to it. The provision has not been widely accepted as a provision concerned with competition. It has become more a weapon to frustrate the bargaining power of trade unions in their industrial relations activities under the guise of competition policy. The Trade Practices Commission has itself stated (in its annual reports) that, as a competition authority, its policy in relation to the secondary boycott provisions is to leave their enforcement to private action unless the secondary boycotts substantially lessened competition.

3.17 The provisions of the Trade Practices Act which provide for the remedies of penalties and damages for contraventions of sections 45D and 45E are potentially highly disruptive to Australia's industrial relations. It should also be noted that pecuniary penalties have never been imposed and damages are not the principal objective of the parties where actions are taken for contraventions. There appears to be no justification for the retention of these remedies.

3.18 The main remedy sought in practice, however, has been the injunction, and the question remains whether this form of redress should be retained. The Government's view is that while it does not condone the industrial tactic of secondary boycotts, it does not believe that it is so different in

nature to other forms of union and employee action in support of their industrial claims that it should be singled out to be dealt with under the Trade Practices Act. There is no reason why this form of industrial action could not be dealt with under the longstanding and accepted arrangements for dealing with industrial disputes generally. In the federal jurisdiction, the Conciliation and Arbitration Commission has this responsibility and this was recognised by the 1980 amendments to the Trade Practices Act and the Conciliation and Arbitration Act.

3.19 The principal objective of any regulation in this area must be the speedy, fair and effective resolution of the underlying dispute. The Government believes that this will not be achieved by the prohibition of secondary boycott activity; indeed, provisions such as sections 45D and 45E may only serve to exacerbate a dispute and resort to them may result in a worsened industrial relations climate not only between the parties, but in the relevant industry as a whole. Accordingly, the Government's view is that it is in the interests of good industrial relations, and the community as a whole, that sections 45D and 45E be repealed, and that more relevant and effective means for dispute resolution be developed.

The Need for New Dispute Resolution Machinery

3.20 Upon the repeal of sections 45D and 45E, the provisions of Division 5A of Part III of the Conciliation and Arbitration Act would cease to operate. This would mean that there would be some serious obstacles to the parties to a 'secondary boycott dispute' bringing the matter before the Conciliation and Arbitration Commission for resolution.

3.21 These difficulties arise, for example, where there is no relationship of employer and employee between the members of an organisation who are engaging in the boycott and the 'target', or because the boycott action is not being taken in relation to an 'industrial matter', as defined in the Conciliation and Arbitration Act. The consequence could be that no industrial tribunal would be able to deal with the matter. The parties would then have to settle the matter between them, or, if a legal remedy was required, before a court by way of common law proceedings (see paragraph 3.38 below).

3.22 If negotiations between the parties fail, there should be available a more satisfactory and effective mechanism than common law proceedings. The Government takes the view, therefore, that secondary boycott activity in the industrial field should be dealt with by industrial tribunals (special arrangements may need to be made, however, in relation to price maintenance activities, which are discussed more fully

in Section 4 of this paper). This would entail legislation going beyond the conciliation and arbitration power under the Constitution, and could involve relying on other constitutional heads of power, for example, the corporations power, the trade and commerce power, the Territories power and the Commonwealth's power to legislate with respect to the supply of goods or services to it or its authorities and instrumentalities.

3.23 However, a number of questions have to be addressed, and these are considered in the paragraphs which follow:

- . Should the Conciliation and Arbitration Commission have jurisdiction over all matters involving trade unions which presently come within sections 45D and 45E of the Trade Practices Act? (see paras 3.24-3.31)
- . Should the Conciliation and Arbitration Commission be empowered to exercise powers of arbitration, or, as under the present Division 5A of the Conciliation and Arbitration Act, merely powers of conciliation? (See paras 3.32-3.36)
- . What consequences, if any, should there be if the Conciliation and Arbitration Commission is unable to resolve the matter in dispute? (see paras 3.37-3.38)
- . What role should State industrial tribunals have? (see para 3.39)

Extent of Commission's Jurisdiction

3.24 Under the present arrangements (Division 5A of Part III), the Conciliation and Arbitration Commission does not have jurisdiction over all disputes involving secondary boycott activity which come within sections 45D and 45E. Its jurisdiction is limited by section 88DA of the Conciliation and Arbitration Act, to disputes which relate, or may relate, to work done or to be done under an award, or involving a federally registered trade union (or a member or officer thereof). It might be noted that the term 'dispute' in Division 5A is not defined, either in the Conciliation and Arbitration Act or the Trade Practices Act. In other words, the Conciliation and Arbitration Commission's jurisdiction in relation to secondary boycotts is not presently limited to disputes over 'industrial matters' as defined in section 4 of the Conciliation and Arbitration Act. It is also not limited to dealing with disputes which are interstate in nature, or which are threatened, impending or probable interstate disputes, as it would be under the constitutional conciliation and arbitration power.

3.25 However, it does not necessarily follow that, on the repeal of sections 45D and 45E, if the Commission is to have a role in dealing with secondary boycott disputes, it should have the same jurisdiction and powers as apply under Division 5A. The operation of Division 5A is predicated on the existence of proceedings under section 45D or 45E, and is framed in a way which complements the relevant provisions of the Trade Practices Act. Without these provisions, Division 5A not only becomes inoperative, but the rationale for the jurisdiction it vests on the Conciliation and Arbitration Commission largely disappears.

3.26 There are three underlying questions here: whether the Conciliation and Arbitration Commission should have any jurisdiction over:

- (a) secondary boycott disputes which do not involve federal awards or federally registered trade unions?
- (b) non-industrial secondary boycott disputes?
- (c) intra-State secondary boycott disputes?

3.27 As to the question in (a), broadly speaking, it would not be consistent with the existing demarcation of Commonwealth and State jurisdiction over industrial disputes for the Conciliation and Arbitration Commission to be given jurisdiction in this area over disputes which did not involve federal awards or federally registered trade unions. This approach receives further support if the Conciliation and Arbitration Commission is to be empowered to deal with such disputes where they are intra-State in character. Accordingly, it may be preferable if a limitation similar to that contained in section 88DA were retained.

3.28 Question (b) is whether the Conciliation and Arbitration Commission should continue to be able to deal with 'non-industrial' disputes involving secondary boycott actions? This raises the issue of what should be regarded as a 'non-industrial' matter. Clearly disputes over remuneration or conditions of work are properly regarded as 'industrial' in character. Indeed, where there is secondary boycott activity associated with a dispute over an industrial matter, that dispute may well be within the Commission's jurisdiction under the Conciliation and Arbitration Act. However, certain other action taken by unions over various matters of concern to them, such as work stoppages in protest against a Government policy or a ban on the handling of goods which are to be sent to a third country in protest against policies of that country, could not be described as disputes of an industrial character, even though they may involve a federal award or federally registered trade unions.

3.29 This does not mean that there should be no mechanism for bringing the parties together to seek a settlement of a dispute involving a non-industrial matter. However, if the Commission is to deal under the proposed arrangements with non-industrial as well as industrial matters involving secondary boycott action, consideration could be given to some restriction on the notification of disputes involving non-industrial matters or on the circumstances in which the Commission was to deal with them. For example, provision could be made that such a matter was to come before the Commission only upon notification by the Minister. Alternatively, the Commission could be required to deal with such a matter only where it was satisfied that its involvement was likely to bring about the cessation of the secondary boycott action.

3.30 In terms of identifying what is an 'industrial' issue involving secondary boycott action, it might be appropriate to adopt the definition of 'industrial matters' in section 4 of the Conciliation and Arbitration Act (see Appendix C). However, for the purposes of its application to disputes involving secondary boycott action, it would be necessary to provide that the definition was not confined to 'relations between employers and employees' as provided in section 4. There is, however, a question whether the range of matters enumerated in the definition of 'industrial matters' is sufficiently wide for these purposes. For example, issues like those which were highlighted by the Swanson Committee and which relate to the long term security of employment of employees may not be included.

3.31 The third question to be considered - paragraph 3.27(c) above - is whether the Commission should continue to be able to deal with intra-State secondary boycott disputes involving federal awards or federally registered unions. It would not appear to be appropriate to terminate this arrangement, since to do so could mean in some cases that no tribunal other than a court hearing a common law action would have the capacity to deal with the matter.

Conciliation or Arbitration

3.32 As noted, the Commission at present only has powers of conciliation under Division 5A in respect of secondary boycott disputes. Sub-section 88DC(3) and section 88DF expressly exclude arbitral powers in respect of matters coming within Division 5A. There are several factors to be considered in determining whether, under any new arrangements for dealing with such disputes, the Commission should have arbitral powers.

3.33 In the first place, a general question arises as to whether the Commission should make awards which are binding on parties between whom there is no direct employment relationship. For example, this could arise in a situation

where a third party in competition with the employer of members of a federally registered union will have secondary boycott action taken against him if he does not cease his competitive activity (involving the use by him of non-unionists) which is regarded by the union as undermining the employment of its members. The Commission could, if required to arbitrate, cause the cessation of that competitive activity, with consequent adverse effects on the employment of employees or contractors engaged by the third party.

3.34 This could result in the Commission making orders which do not relate directly to remuneration or conditions of employment but which do relate directly to the marketing arrangements in an industry. There may be wider public interest requirements which are such that the Commission should refrain from making an award in settlement of the dispute, but the possibility of an award being made might encourage the union to maintain its industrial pressure to achieve that objective. This may also be an area in respect of which the Commission is not qualified to make a final determination whether by award or otherwise.

3.35 In other words, there may be secondary boycott situations where the availability and exercise of arbitral powers by the Commission is inappropriate. It may be preferable in certain cases simply to permit the relevant parties to be brought together in conciliation proceedings with a view to a negotiated settlement between all of them under the auspices of the Commission.

3.36 If arbitral powers were to be available in secondary boycott disputes, it may be appropriate to restrict them to such disputes relating to industrial matters where an employer-employee relationship exists. Arbitral powers may be both inappropriate and irrelevant in respect of secondary boycott disputes over non-industrial matters which could well involve claims which cannot be granted in an award (for example, a dispute involving political demands as described in paragraph 3.28).

Consequences of non-resolution of a secondary boycott dispute

3.37 Three possibilities could be considered. The first is that the same remedies could be available in respect of these disputes as apply under the Conciliation and Arbitration Act where industrial disputes cannot be resolved. However, this may only be relevant where and if the Commission has arbitral powers in respect of secondary boycott disputes. The second possibility is that injunctive relief could be made available in proceedings before the Federal Court if the Commission could not resolve the dispute. This, however, may be less acceptable since it maintains most of the deficiencies of the existing arrangements. A third possibility is that no special provision be made and the parties be left to pursue their rights at common law.

3.38 There would appear to be some basis in practice for the view that resort to common law remedies can upset conciliation proceedings before the Conciliation and Arbitration Commission and make it extremely difficult to resolve a dispute. Consideration could be given, therefore, to the Conciliation and Arbitration Act containing a prohibition, subject to constitutional considerations, on the taking of common law proceedings while a dispute involving secondary boycott activity was before the Commission.

Role of State industrial tribunals

3.39 As mentioned, it may not be appropriate for the Conciliation and Arbitration Commission to be given jurisdiction over disputes involving secondary boycott activity other than where a federally registered union or a federal award is involved. In these circumstances, intra-State disputes involving State unions or State awards would be the subject of State jurisdiction. On the other hand, where a dispute involves both Federal and State jurisdictions, consideration could be given to appropriate joint sitting arrangements or the exercise of powers available in one jurisdiction by a tribunal in the other.

4: THE APPLICATION OF OTHER PROVISIONS OF THE TRADE PRACTICES ACT TO THE CONDUCT OF TRADE UNIONS

4.1 This Section of the Paper addresses the appropriateness of the application to the conduct of trade unions of those provisions of the Trade Practices Act other than sections 45D and 45E, and considers whether there is any trade union conduct which has such serious anti-competitive consequences that it should continue to be proscribed under the Act notwithstanding the industrial relations problems to which this proscription may give rise. This question is important also for the effectiveness of the arrangements discussed in Section 3 of this paper: the settlement by an industrial tribunal of disputes involving secondary boycott activity by conciliation may be affected by the extent to which other provisions of the Trade Practices Act apply.

4.2 The problem of balancing the public interest in preventing and settling industrial disruption, in preserving the legitimate rights of trade unions to make industrial claims on behalf of their members, and that of maintaining the advantages of competition, has traditionally been dealt with by exempting, to a greater or lesser extent, trade union activity from the scope of the Trade Practices Act. The question that has to be addressed is whether it is preferable to continue focussing on exemptions as such (i.e. the creation of 'zones of immunity' within which union action cannot be challenged under the Trade Practices Act) or whether it is preferable to acknowledge the inevitability of competing interests and to concentrate on creating machinery for resolving and balancing the conflicting interests in such matters.

The Problem: Anticompetitive Conduct by Trade Unions

4.3 There are a number of provisions in Part IV of the Trade Practices Act, apart from sections 45D and 45E, which could give rise to trade union contraventions in the context of the pursuit of traditional trade union objectives. The most significant of these would appear to be section 45, under which trade unions which enter into contracts, arrangements or understandings which restrict dealings or substantially lessen competition are caught unless the conduct comes within the exemption in section 51(2)(a). There has been one major instance, in 1983, where the Trade Practices Commission took action against a union alleging breaches of section 45. In that case, the Commission instituted proceedings against the Transport Workers Union, alleging it had entered into restrictive arrangements with the Australian Petroleum Agents and Distributors Association, and the major oil companies, with a view to re-structuring the petroleum distribution market. Those proceedings (which were settled in late 1983) highlighted the potential for conflict between industrial activities and the Trade Practices Act, and the possible serious consequences of such conflict.

4.4. Similar problems can arise, in particular, under sections 46 (monopolization), 47 (exclusive dealing) and 49 (price discrimination). Although these have produced virtually no problems arising from trade union action, it is possible - especially with the repeal of sections 45D and 45E - that conflicts could arise in those areas in the future.

4.5 Further potential problems may arise in relation to the resale price maintenance (RPM) provisions of the Act (section 48 and Part VIII). The present exemption for trade union activity contained in section 51(2)(a) does not extend to resale price maintenance activities. While under the current RPM provision a trade union which is not itself a supplier cannot itself engage in RPM as defined by the Act, because RPM relates to the supply of goods, it can however be guilty of the offence under section 76 of aiding, abetting, counselling, procuring, inducing or being knowingly concerned in, a contravention by a supplier. This is because price maintenance activities by non-suppliers are no less harmful to competition than RPM by suppliers (the latter is currently prohibited by section 48).

4.6 There does not appear to have been any real problem of conflict between union activity and Part V of the Trade Practices Act, relating to Consumer Protection, although union activities could clearly come within the scope of Part V to the extent that the union itself, as a body corporate, engages in trade or commerce, as many do. To the extent that the union was so acting, however, it would not appear to be likely to seriously raise industrial relations principles as a justification for breach of the Act.

The "Exemption" Solution: Identifying Areas of Union Immunity from the Operations of the Act

4.7 The basic issue here is the extent to which particular union activity should be exempted from the provisions of the Trade Practices Act. Defensible interests on the part of the unions and competing legitimate economic interests for preserving competition create potential for conflict between trade union activities and trade practices policy, and the simplest way of resolving at least some of that conflict has been always expressly to exempt certain trade union activity from the legislation.

4.8 In doing this, it has been recognised that unions form combinations to enable their members to take concerted economic action to achieve their legitimate industrial objectives, and that economic action may, to a greater or lesser extent, detract from competition, particularly where industrial action is taken against some but not all competitors in an industry. The difficulty for policy makers

has been to decide what constitutes 'legitimate' industrial objectives, or disputes of an industrial character - which should not be subject to competition law - and other union activities, for which such an exemption cannot be justified. The endeavours which have been made since the first Trade Practices Act in 1965 to solve this problem are discussed below.

4.9 The Trade Practices Act 1965 provided that in determining whether an agreement was examinable under that Act regard was not to be had -

"to any provision of the agreement relating to the remuneration, conditions of employment, hours of work or working conditions of employees."

This exception applied equally to employees and employers and their organisations. A similar exemption was continued in later enactments until the enactment of the Trade Practices Act 1974. That Act, in section 51(2)(a), continued the exception of the 1965 Act but also provided an exception which went further, in relation to employees and their organisations only, by excepting:

- any act done by employees not being an act done in the course of the carrying on of a business of the employer of these employees; and
- any act done by an organisation of employees not being done in the course of the carrying on of a business of that organisation

4.10 The terms of that exemption seemed to be sufficiently broad to exempt all union activity, whether in pursuance of an industrial dispute, strictly so called, or otherwise, excepting only that union activity which related to businesses carried on by the union. However, this exemption did not prove to be as wide as was originally thought: in Ausfield Pty Ltd v Leyland Motor Corporation of Australia Ltd (1977) 30 FLR 477 a majority of the Full Federal Court held that the words "any act done" in the exemption (as it then was) did not include the making of a contract or arrangement or entering into an understanding. In other words, the making of an arrangement, for example, between a trade union and an employer may not have been exempted even though it related to one of the matters specified in section 51(2)(a). In addition, it was held that there must be a "direct and immediate" connexion between the act done and the matter enumerated in the exemption (e.g. remuneration). The arrangement in Ausfield was not considered to have a "direct and immediate" connexion to remuneration, even though it was acknowledged that improved remuneration was the objective of the union in entering into the arrangement.

4.11 In 1977, following the report of the Swanson Committee, the exemption was amended to its present form. It is now confined to:

"any act done in relation to, or to any provision of a contract, arrangement or understanding to the extent that the provision relates to the remuneration, conditions of employment, hours of work or working conditions of employees."

4.12 The interpretation given to the exemption in the Ausfield case applies equally to the current exemption. When considered in the light of the narrower post 1977 provision, the exemption would appear now to be of little benefit to trade unions except when they are pursuing the narrowest industrial goals of their members.

4.13 Unless one adopts the extreme approach that there is no justification in principle for any threshold exemption for union activity, conflict between union activities and the Trade Practices Act being inevitable, and that the way to solve such problems is not by fixing legal boundaries but by creating better dispute resolution machinery, then an exemption of some kind in relation to trade union action would appear to be necessary. The question is how widely that exemption should be drawn.

4.14 Whilst the proposition that "genuine" industrial disputes should not be affected by the Trade Practices Act is clearly reasonable, there is considerable conceptual difficulty in determining what is or should be regarded as such an industrial dispute for the purposes of the Trade Practices Act:

- . Many disputes are 'industrial' from any point of view, being clearly related to wages or conditions. These clearly come within the present exemption in section 51(2) (a).
- . Some disputes may have a clearly 'industrial' end or purpose, such as concern over wages, conditions or security of employment, but the means of achieving those objectives may be through anti-competitive arrangements which, on the face of them, do not involve employer-employee disputation of the traditional industrial kind: the recent Transport Workers' Union case, referred to above, falls within this category.

Other disputes which may or may not involve an anti-competitive purpose or effect, may be engaged in by unions but not be related in any direct way to economic demands of a union and its members. Such disputes typically involve social or political issues - eg. boycotts on the handling of goods from a particular country.

4.15 The appropriateness of an exemption as broad as that which applied from 1974 to 1977 depends on a judgment as to whether all activity by a trade union regardless of its objectives, its effects on competition, and the likelihood of its protecting or advancing the interests of its members, should be outside the application of the Trade Practices Act. A very broad exemption provision is clearly the simplest way of avoiding disputes about the application of the Trade Practices Act to trade union activity, but regard must also be had to the potential for such an exemption to undermine the goals of the Trade Practices Act.

4.16 Given the possible problems associated with an across-the-board exemption, an alternative approach would be to seek to overcome the problems of balancing the conflicting policy considerations involved in the application of the Act to trade unions by rewriting specific aspects of the present exemption to meet specific concerns. There are three particular reforms which may be worth considering in this respect.

4.17 First, there could be an express provision that the reference in the existing exemption provision to "any act done", includes entering into a contract arrangement or understanding relating to specified industrial matters. This would overcome the present difficulty arising from the Ausfield decision which involves a very narrow interpretation of the present exemption provision.

4.18 Secondly, a "purpose" test could be included in section 51(2) (a) of the Trade Practices Act, which would result in the exemption could applying where any act was done for the purpose of effecting one of the specified industrial matters. It is to be noted that 'purpose' is presently defined in section 4F of the Trade Practices Act such that the relevant purpose may be one of a number of purposes provided that it is a substantial purpose: this avoids the type of problems encountered with the special definition of "purpose" in the section 45D (3) defence, which requires that the purpose be dominant.

4.19 Thirdly, the list of industrial matters currently enumerated in the exemption could be expanded by the addition of other specific references to matters which would ordinarily be regarded as legitimate industrial concerns of unions. A useful starting point here would be all those matters defined as "industrial matters" in the Conciliation and Arbitration Act (see Appendix C), including matters relating to wages, allowances, terms and conditions of employment, hours of work, piece work, rights of dismissal and demarcation disputes amongst others.

4.20 Without broadening the exemption to such an extent that it becomes in effect merely a general exemption, it may nevertheless be possible to draft a specific exemption which largely removes the potential for conflict between legitimate industrial activities and the Trade Practices Act (thereby removing - to that extent - the need for any additional mechanism to resolve conflicts). An exemption for conduct directed at maintaining security of employment in an industry may provide the key to this problem.

4.21 The major conflicts between union activities and the Trade Practices Act, apart from section 45D and 45E actions, have arisen because the unions involved have been concerned about job security in the industry, rather than terms and conditions of employment or other familiar matters of industrial disputation. If union activities of this sort relating to "security of employment" were specifically exempted from the Act, much of the potential for conflict would avoidingly disappear.

4.22 Attention would need to be given to the width of such a specific exemption. If "security of employment" were to include security of employment within a particular firm or sector in an industry, rather than security of employment within an industry as a whole, the way might be left open for a union, either on its own account or at the behest of a particular employer, to engage in discriminatory anti-competitive behaviour against one or more particular competitors in an industry, in the guise of protecting the jobs of employees of the initial firm. Such a result would clearly run counter to existing government competition policy, which has had broad continuing support.

4.23 On the other hand, many would regard industrial action to seek to preserve job security with a particular employer to be just as legitimate an industrial objective as efforts to secure employment in an industry as a whole; certainly the employees whose jobs with a particular employer were threatened, would feel that way, even if overall employment in the industry was not reduced. This was the kind of problem which arose in the TWU/APADA petrol distribution case in 1983.

4.24 While it will be by no means easy to resolve these definitional difficulties, a clear statement of the precise extent of exemption for union conduct should be able to provide a sound basis for ensuring that action taken by unions in pursuit of their legitimate industrial objectives does not infringe the Trade Practices Act, and that other conduct by unions is not excluded from the application of the Act merely because it is engaged in by unions, without considering the reasons for the conduct.

4.25 Whatever the width of the union exemption ultimately accepted, there is one area in which the Government considers that the policy of no exemption for the conduct of any party should be maintained. This concerns price maintenance activities. The Exposure Draft released with this paper contains a proposal to supplement the current resale price maintenance (RPM) provisions of the Act by continuing to proscribe price maintenance activities by any person (clause 60). The provision will cover such activities by all non-suppliers including trade associations and trade unions.

4.26 The seriousness with which the Trade Practices Act treats RPM is illustrated by the fact that, unlike most provisions of Part IV of the Act, RPM is a per se offence (it does not require proof of lessening of competition). It cannot be authorized. In addition, the exemptions to the Act contained in section 51(2)(a) have never applied to a contravention of the RPM provisions. This is because RPM has always been regarded as having such a serious and immediate effect on competition and prices that it cannot be justified in any circumstances. The Government believes that the policy of an across-the-board prohibition of price maintenance activities by suppliers and non-suppliers should be maintained.

"Machinery" Solutions : Reconciling Competing Interests in Practice

4.27 Any system of exemptions for trade union activities falling short of an absolute and across-the-board exemption will mean that conflicts between those activities and the Trade Practices Act has the potential to arise. It is therefore desirable to focus on what machinery can be used to resolve such conflicts.

4.28 In relation to the proposed repeal of sections 45D and 45E, the options for creating an alternative machinery to deal with secondary boycott disputes (in the absence of 45D and 45E) were canvassed in Section 3 of this paper. There should be opportunity for both arbitration and conciliation before the Conciliation and Arbitration Commission and other State industrial tribunals to endeavour to resolve underlying conflicts. This Section deals with the issues concerning the problems associated with creating machinery to resolve conflicts arising from other than secondary boycotts.

4.29 In relation to union activity not exempted from the Trade Practices Act, the central question is how the industrial relations implications of activity proscribed by the Act might be taken into account in proceedings brought under it. Apart from simply providing for legislative recognition that the industrial relations aspects, if any, of the relevant union activity, be taken into account by bodies responsible for enforcing the Trade Practices Act, there are a number of specific machinery options which deserve consideration.

4.30 First, in its adjudicative role, the Trade Practices Commission could, when considering applications for authorization of agreements involving trade unions which substantially lessen competition, be empowered or required to take into account the views of the Conciliation and Arbitration Commission (or a State industrial tribunal) on the industrial relations background and implications of the proposed agreement.

4.31 Secondly, and similarly, before initiating action under the Trade Practices Act against a trade union, the Trade Practices Commission could be required to consult with the Australian Conciliation and Arbitration Commission or a relevant State industrial relations tribunal to determine what the general industrial relations implications of such conduct might be.

4.32 A difficulty with such an approach is that the Trade Practices Commission would be placed in the position of reconciling competing and not necessarily compatible policy considerations (competition versus industrial harmony). However the Trade Practices Commission is not unfamiliar with the difficulties (experienced in other authorization applications) of assessing the relative merits of factors which are not strictly comparable.

4.33 There is also a question whether the Conciliation and Arbitration Commission or any other tribunal would be able to give adequate advice on the particular question without an analysis of matter, including hearing the parties. This might unnecessarily prolong the proceedings and place the Conciliation and Arbitration Commission (or other tribunal) in a situation where, if its views were not accepted by the Trade Practices Commission, it may to some extent be discredited.

4.34 Thirdly, the Conciliation and Arbitration Commission (or a State industrial tribunal, where the matter did not involve a federally registered union or a federal award) could play a mediation role in relation to non-exempted union conduct which had some relation to industrial issues: bringing the parties together on the application of the Trade Practices Commission,

a party, or another person, to discuss the possible resolution of the underlying industrial issues by conciliation processes. If injunction proceedings had been taken by the Trade Practices Commission, they could be stayed while the matter was being discussed before the relevant industrial tribunal. This is similar to the proposals discussed above in relation to secondary boycott activity involving "non-industrial" issues. If the Conciliation and Arbitration Commission or State industrial tribunal was unsuccessful in resolving the matter, or determined that there was no role for it in the dispute in question, the issue would then have to proceed in the normal way under the Trade Practices Act.

4.35 Fourthly, there might be established a special tribunal on which legally qualified Presidential Members of the Conciliation and Arbitration Commission and Judges of the Federal Court could sit to deal with matters relating to non-exempted union industrial activity under the Trade Practices Act. The tribunal could be required to seek first to resolve the matter by conciliation, and for that purpose be given the powers available to the Conciliation and Arbitration Commission under the Conciliation and Arbitration Act. The tribunal or, possibly, the Federal Court, would only deal with the matter under the Trade Practices Act where conciliation failed. For those matters which did not involve a federally registered union or a federal award, the Tribunal might be comprised of a Federal Court Judge and legally qualified member of the relevant State industrial tribunal.

4.36 Finally, suitably qualified Presidential Members of the Conciliation and Arbitration Commission could be appointed to the Federal Court, or Members of that Commission could be appointed Associate Members of the Trade Practices Commission, for the specific purpose of assisting the Court or the Trade Practices Commission in dealing with Trade Practices Act matters involving trade unions. The Chairman of the Trade Practices Commission could call on such an Associate Member to attend meetings of the Commission where the possibility of the Commission taking action against a trade union was being considered, or where other industrial relations matters were under consideration.

4.37 Remedies and penalties A final problem that remains to be considered is whether existing remedies and penalties should apply to non-exempted trade union activity. The Government believes that it can be strongly argued that the approach taken in the Trade Practices Act would be more productive in preventing and facilitating the resolution of disputes of an industrial character if it was directive rather than punitive. As a consequence, the Exposure Draft proposal relating to price maintenance activities by non-suppliers (clause 60) provides only for the legal remedy of injunction.

4.38 It could also be argued that, to the extent that the other existing prohibitions under the Act apply to trade unions, they should similarly be subject only to the remedy of injunction. Such a remedy could be more likely to provide a basis for a dispassionate consideration of the competition and industrial relations issues involved. As an extension of this approach, the availability of this remedy could be restricted to the Trade Practices Commission or the Minister to prevent its vexatious use.

45D. (1) Subject to this section, a person shall not, in concert with a second person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a fourth person (not being an employer of the first-mentioned person), or the acquisition of goods or services by a third person from a fourth person (not being an employer of the first-mentioned person), where—

Boycotts
 Inserted by
 No. 81, 1977,
 s. 25
 Sub-section (1)
 substituted by
 No. 73, 1980, s. 4;
 amended by
 No. 176, 1981,
 s. 68

- (a) the third person is, and the fourth person is not, a corporation and—
 - (i) the conduct would have or be likely to have the effect of causing—
 - (A) substantial loss or damage to the business of the third person or of a body corporate that is related to that person; or
 - (B) a substantial lessening of competition in any market in which the third person or a body corporate that is related to that person supplies or acquires goods or services; and
 - (ii) the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—
 - (A) substantial loss or damage to the business of the fourth person; or
 - (B) a substantial lessening of competition in any market in which the fourth person acquires goods or services; or
- (b) the fourth person is a corporation and the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—
 - (i) substantial loss or damage to the business of the fourth person or of a body corporate that is related to that person; or
 - (ii) a substantial lessening of competition in any market in which the fourth person or a body corporate that is related to that person supplies or acquires goods or services.

(1A) Subject to this section, a person shall not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person

Inserted by
 No. 207, 1978,
 s. 4

(not being an employer of the first-mentioned person) from engaging in trade or commerce—

- (a) between Australia and places outside Australia;
- (b) among the States; or
- (c) within a Territory, between a State and a Territory or between two Territories.

Inserted by
No. 207, 1978,
s. 4

(1B) In a proceeding under this Act in relation to a contravention of sub-section (1A), it is a defence if the defendant proves—

- (a) that the conduct concerned is the subject of an authorization in force under section 88;
- (b) that a notice in respect of the conduct has been duly given to the Commission under sub-section 93 (1) and the Commission has not given a notice in respect of the conduct under sub-section 93 (3); or
- (c) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him.

Inserted by
No. 207, 1978,
s. 4

(1C) The application of sub-section (1A) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that the other person proves any of the matters mentioned in sub-section (1B) in respect of that conduct.

Amended by
No. 207, 1978,
s. 4

(2) Paragraph 4F (b) does not apply in relation to sub-section (1) or (1A) of this section but a person shall be deemed to engage in conduct for a purpose mentioned in that sub-section if he engages in that conduct for purposes that include that purpose.

Amended by
No. 207, 1978,
s. 4

(3) A person shall not be taken to contravene, or to be involved in a contravention of, sub-section (1) or (1A) by engaging in conduct where—

- (a) the dominant purpose for which the conduct is engaged in is substantially related to—
 - (i) the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person; or
 - (ii) an employer of that person having terminated, or taken action to terminate, the employment of that person or of another person employed by that employer; or
- (b) in the case of conduct engaged in by the following persons in concert with each other (and not in concert with any other person), that is to say—
 - (i) an organization or organizations of employees, or an officer or officers of such an organization, or both such an organization or organizations and such an officer or officers; and

- (ii) an employee, or 2 or more employees who are employed by the one employer,

the dominant purpose for which the conduct is engaged in is substantially related to—

- (iii) the remuneration, conditions of employment, hours of work or working conditions of the employee, or of any of the employees, referred to in sub-paragraph (ii); or
- (iv) the employer of the employee, or of the employees, referred to in sub-paragraph (ii) having terminated, or taken action to terminate, the employment of any of his employees.

(4) The application of sub-section (1) or (1A) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that sub-section (3) operates to preclude the other person from being taken to contravene, or to be involved in a contravention of, sub-section (1) or (1A) in respect of that conduct.

Amended by
No. 207, 1978.
s. 4

(5) If two or more persons (in this sub-section referred to as the “participants”) each of whom is a member or officer of the same organization of employees (being an organization that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment) engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with other persons, the organization shall be deemed for the purposes of this Act to engage in that conduct in concert with the participants, and so to engage in that conduct for the purpose or purposes for which that conduct is engaged in by the participants, unless the organization establishes that it took all reasonable steps to prevent the participants from engaging in that conduct.

(6) Where an organization of employees engages, or is deemed by sub-section (5) to engage, in conduct in concert with members or officers of the organization in contravention of sub-section (1) or (1A)—

Amended by
No. 207, 1978.
s. 4

- (a) any loss or damage suffered by a person as a result of the conduct shall be deemed to have been caused by the conduct of the organization;
- (b) if the organization is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organization; and
- (c) if the organization is not a body corporate—
 - (i) a proceeding in respect of the conduct may be instituted under section 77, 80 or 82 against an officer or officers of the organization as a representative or representatives of the members of the organization and a proceeding so instituted shall be deemed to be a proceeding against all the

persons who were members of the organization at the time when the conduct was engaged in;

- (ii) sub-section 76 (2) does not prevent an order being made in a proceeding mentioned in sub-paragraph (i) that was instituted under section 77;
- (iii) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in sub-paragraph (ii) is the penalty applicable under section 76 in relation to a body corporate;
- (iv) except as provided by sub-paragraph (i), a proceeding in respect of the conduct shall not be instituted under section 77 or 82 against any of the members or officers of the organization; and
- (v) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in sub-paragraph (i) that is instituted under section 77 or 82, process may be issued and executed against any property of the organization or of any branch or part of the organization, or any property in which the organization or any branch or part of the organization has, or any members of the organization or of a branch or part of the organization have in their capacity as such members, a beneficial interest, whether vested in trustees or however otherwise held, as if the organization were a body corporate and the absolute owner of the property or interest but no process shall be issued or executed against any other property of members, or against any property of officers, of the organization or of a branch or part of the organization.

(7) Nothing in this section affects the operation of any other provision of this Part.

Prohibition
of contracts,
arrangements
or understandings
affecting
supply or
acquisition of
goods or
services

Inserted by
No. 73, 1980, s. 5

45E. (1) Subject to this section, a person who has been accustomed, or is under an obligation, to supply goods or services to, or to acquire goods or services from, a second person shall not make a contract or arrangement, or arrive at an understanding, with a third person (being an organization of employees, an officer of such an organization; or another person acting for or on behalf of such an organization or officer) if the proposed contract, arrangement or understanding contains a provision that—

- (a) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person or, as the case may be, from acquiring or continuing to acquire any such goods or services from the second person;

- (b) has the purpose of preventing or hindering the first-mentioned person from supplying or continuing to supply any such goods or services to the second person except subject to a condition (not being a condition to which the supply of such goods or services by the first-mentioned person to the second person has previously been subject by reason of a provision of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services; or
- (c) has the purpose of preventing or hindering the first-mentioned person from acquiring or continuing to acquire any such goods or services from the second person except subject to a condition (not being a condition to which the acquisition of such goods or services by the first-mentioned person from the second person has previously been subject by reason of a contract existing between those persons) as to the persons to whom, as to the manner in which, or as to the terms on which, the second person may supply any goods or services.

(2) Sub-section (1) does not apply in relation to a contract, arrangement or understanding that is in writing if the second person mentioned in that sub-section is a party to the contract, arrangement or understanding or has consented in writing to the contract or arrangement being made or the understanding being arrived at.

(3) In a case where the person first mentioned in sub-section (1) is not a corporation, that sub-section applies only if the second person mentioned in that sub-section is a corporation.

(4) Paragraph 4F (a) applies in relation to sub-section (1) of this section as if sub-paragraph 4F (a) (ii) were omitted.

(5) Subject to sub-section (6), a reference in this section to a person who has been accustomed to supply goods or services to a second person shall be construed as including a reference to—

- (a) a regular supplier of any such goods or services to the second person;
- (b) the latest supplier of any such goods or services to the second person; and
- (c) a person who at any time during the immediately preceding period of 3 months supplied any such goods or services to the second person.

(6) Where—

- (a) goods or services have been supplied by a person to a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to supply such goods or services;

- (b) that period has expired; and
- (c) after the expiration of that period the second person has been supplied with such goods or services by another person or other persons and has not been supplied with such goods or services by the first-mentioned person,

then, for the purposes of the application of this section in relation to anything done after the second person has been supplied with goods or services as mentioned in paragraph (c), the first-mentioned person shall be deemed not to be a person who has been accustomed to supply such goods or services to the second person.

(7) Subject to sub-section (8), a reference in this section to a person who has been accustomed to acquire goods or services from a second person shall be construed as including a reference to—

- (a) a regular acquirer of any such goods or services from the second person;
- (b) a person who, when he last acquired such goods or services, acquired them from the second person; and
- (c) a person who at any time during the immediately preceding period of 3 months acquired any such goods or services from the second person.

(8) Where—

- (a) goods or services have been acquired by a person from a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to acquire such goods or services;
- (b) that period has expired; and
- (c) after the expiration of that period the second person has refused to supply such goods or services to the first-mentioned person,

then, for the purposes of the application of this section in relation to anything done after the second person has refused to supply goods or services as mentioned in paragraph (c), the first-mentioned person shall be deemed not to be a person who has been accustomed to acquire such goods or services from the second person.

(9) If—

- (a) a person has, whether before or after the commencement of this section, made a contract or arrangement, or arrived at an understanding, with another person; and
- (b) by reason of a provision included in the contract, arrangement or understanding, the making of the contract or arrangement, or the

arriving at the understanding, by the first-mentioned person contravened sub-section (1) or would have contravened that sub-section if this section had been in force at the time when the contract or arrangement was made, or the understanding was arrived at,

a person shall not give effect to that provision of the contract, arrangement or understanding.

(10) In determining for the purposes of paragraph (9) (b) whether a contract or arrangement made, or understanding arrived at, before the commencement of this section would have contravened sub-section (1) if this section had been in force at the time when the contract or arrangement was made, or the understanding was arrived at, sub-section (2) shall be read as if the words "that is in writing" and the words "in writing" were omitted.

(11) Nothing in this section affects the operation of any other provision of this Part.

APPENDIX B - Extract from Trade Practices Act Review Committee
- Report to the Minister for Business and Consumer
Affairs, August 1976 - (The Swanson Report).

10.13 However, there remains some conduct which presently falls outside the operation of the Trade Practices Act, the Conciliation and Arbitration Act and most State industrial legislation.

10.14 The situation which has been the subject of most concern is the secondary boycott, where employees of one employer place a boycott upon the dealings of that employer with another person. Numerous examples were mentioned in submissions to us, but the examples most frequently cited were boycotts by bread delivery drivers against retail outlets which were selling cut-price bread and boycotts by petrol tanker drivers against service stations advertising cut-price petrol.

10.15 The Committee understands that, in those cases, employees decided among themselves to boycott one or more traders or potential traders because the employees claim if they do not do so the operation of the competitive process usually through price competition, will place their jobs in jeopardy. They seek to implement that boycott without having to justify it to anyone as being in the public interest.

10.16 In this regard, we have elsewhere stated our view that no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute. If that independent body finds those reasons inadequate, the community is entitled to require that the position be remedied.

10.17 In the usual case, secondary boycotts do not involve a dispute between an employer and employees which could be brought by either party before the Australian Conciliation and Arbitration Commission under the Conciliation and Arbitration Act. In any event the employer may not choose to bring the matter before the relevant body, even if he wished to do so, for fear of widening the "dispute" and having his whole operations shut down. Moreover, without any collusion at all with his employees, he may himself find his own position in sympathy with his employees because their actions relieve him from the pressures of his customers for him to make concessions to them on price. Thus it is quite unrealistic to expect that the employer will, as a matter of course, bring secondary boycotts before the body.

10.18 But the trader at whom the employees' actions are aimed is deprived of his ability or his liberty to trade in such manner as he sees fit, and the community suffers, without anyone (the trader himself or consumers) being able to raise the matter in a forum impartial as between all the persons involved or affected. There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.

10.19 In these circumstances we recommend that the law provide an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body. That some procedures for solving the matter should be available was something on which submissions of interested parties were virtually unanimous.

10.20 We make no recommendation as to whether these procedures for recourse should be established under the Trade Practices Act or the Conciliation and Arbitration Act. The submissions were divided as to which approach was preferable. However, we believe the trader who is the object of the employees' action should not simply have the choice of toeing the line or suffering substantial damage or in some cases going out of business. He too is entitled to have his "day in court".

APPENDIX C - Extract from Section 4 of the Conciliation and Arbitration Act 1904

“Industrial matters” means all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes—

- (a) all matters or things affecting or relating to work done or to be done;
- (b) the privileges, rights and duties of employers and employees;
- (c) the wages, allowances and remuneration of persons employed or to be employed;
- (d) the piece-work, contract or other reward paid or to be paid in respect of employment;
- (e) the question whether piece-work or contract work or any other system of payment by results shall be allowed, forbidden or exclusively prescribed;
- (f) the question whether monetary allowances shall be made by employers in respect of any time when an employee is not actually working;
- (g) the hours of employment, sex, age, qualifications and status of employees;
- (h) the mode, terms and conditions of employment;
- (i) the employment of children or young persons, or of any persons or class of persons;
- (j) the preferential employment or the non-employment of any particular person or class of persons or of persons being or not being members of an organization;
- (k) the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons;
- (l) any custom or usage in an industry, whether general or in a particular locality;
- (m) any shop, factory or industry dispute, including any matter which may be a contributory cause of such a dispute;
- (n) any question arising between two or more organizations or within an organization as to the rights, status or functions of the members of those organizations or of that organization or otherwise, in relation to the employment of those members;
- (p) any question as to the demarcation of functions of employees or classes of employees, whether as between employers and employees or between members of different organizations; and
- (q) the provision of first-aid equipment, medical attendance, ambulance facilities, rest rooms, sanitary and washing facilities, canteens, cafeterias, dining rooms and other amenities for employees,

and includes all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole: