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SENATE ECONOMICS LEGISLATION COMMITTEE

CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE

A New Tax System (Trade Practices Amendment) Bill 2000

May 2000

Commonwealth of Australia

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Senate Economics Legislation Committee

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REPORT

Background to the inquiry

1.1 A New Tax System (Trade Practices Amendment) Bill 2000 was introduced into the House of Representatives on 16 March 2000. Following a report by the Selection of Bills Committee, the Senate referred the Bill to this Committee on 12 April 2000 for examination and report by 9 May 2000. [1]

1.2 In particular, the Committee was asked to examine:

- the extent of behaviour to which proposed powers and penalties could apply;
- the necessity for proposed powers and penalties;
- the adequacy of ACCC's resources to exercise powers; and
- the constitutional foundation of the legislation.

1.3 The committee secretariat contacted a number of interested parties and received one written submission on the Bill from Price Waterhouse. However, the Committee did not receive this submission until Friday 5 May and accordingly the Committee was unable to consider it in any detail. A copy of the submission appears at Appendix 2.

1.4 The Committee also agreed that a letter to Senator Stephen Conroy from the Law Council of Australia be tabled during the public hearing. This letter and an attached paper by Dr Warren Pengilley appear at Appendix 3.

1.5 The Committee held a public hearing on the Bill in Canberra on 1 May 2000. A list of witnesses who gave evidence at the hearing appears in Appendix 1, and the full transcript of the hearing is available at the Internet address of http://www.aph.gov.au/hansard.

The Bill

1.6 The Bill proposes to insert a new provision, section 75AYA, into the *Trade Practices Act 1974* (TPA) that will prohibit conduct in connection with the supply of goods or services, that falsely represents, or misleads or deceives a person about the effect of the new tax system changes.

1.7 Contravention of the new provision in new section 75AYA will attract penalties of up to $10 million for a body corporate and up to $500 000 for a person other than a body corporate.

1.8 The proposed provisions also provide a defence to an alleged contravention of new section 75AYA.

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1 Selection of Bills Committee Report No. 6 of 2000, dated 12 May 2000.

1.9 The proposed provision is also inserted into the schedule version of Part VB to achieve economy wide coverage of the bill over incorporated and unincorporated suppliers. The amendment to the schedule may apply as legislation across Australia with little or no action required by the states and territories and with effect in most jurisdictions from two months from the start of this amendment. Each jurisdiction retains the discretion to declare that the amendment take effect at an earlier date or not take effect at all.[2]

1.10 The Second Reading speech also notes that all states except Queensland have accepted the role of the ACCC to take action against ANTS related misrepresentations by unincorporated entities operating within one state.

1.11 The Bill also proposes to amend Part IIIA of the Trade Practices Act to ensure that access undertakings are within the Commonwealth's constitutional power and to clarify that the ACCC has the ability to perform functions and exercise powers in relation to access undertakings. These amendments are not related to the new tax system.

Issues raised in Evidence

ACCC's power to enforce limits on price rises

1.12 The issue of whether the ACCC has the power to enforce limits on price rises following the implementation of the new tax system occupied a large proportion of the Committee's time during the public hearing.

1.13 Opposition Senators questioned the ACCC about the basis for their directive that no price should increase by more than 10 per cent as a result of the new tax changes. They sought responses from the ACCC as to whether a firm would be prosecuted if they increased prices by more than 10 per cent.

1.14 ACCC representatives questioned the relevance of this line of inquiry, arguing that the bill was essentially about misleading conduct, not the price exploitation provisions.

1.15 The ACCC would not be drawn on hypothetical questions about whether a firm would or would not be prosecuted in these circumstances, repeating that they would have to look at each situation on a case by case basis.

The necessity for proposed powers and penalties

1.16 In a paper prepared by Dr Warren Pengilley and tabled during the hearing, Dr Pengilley stated that proposed penalties of $10 million for corporations and $500 000 for individuals for misleading or deceptive conduct, are 'totally out of line with everything else in the Act'. He noted that 'in no other part of the Trade Practices Act does the penalty for false representations exceed $200 000'. [3]

1.17 Witnesses were asked about the justification for imposing a penalty of up to $10 million for GST related misleading and deceptive conduct. It was noted that no such penalty

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2 Mr Hockey , Second Reading Speech, 16 March 2000, p.14434.

3 Pengilley, Dr Warren *The New Tax System (Trade Practices Amendment) Bill introduced on 16 March 2000 should be scuttled. It is unconscionable, p.2.*

applied for conduct caught under section 52 and much smaller penalties apply for section 53(e) conduct and conduct caught under state legislation.

1.18 Mr Jepsen, Department of the Treasury, told the Committee that:

> The penalties which are included in the bill in relation to the considerations in 75AYA are consistent with the penalties which have been applied under the price exploitation code. It is a matter of consistency. I think the government has said that the penalties in the bill are substantial and that they demonstrate a commitment to address community concerns regarding the possibility of consumer exploitation.[4]

1.19 Noting the disparity between the penalty levels, Committee members pursued the issue of whether GST related misleading and deceptive conduct is worse than other misleading and deceptive conduct. In response, Mr Spier of the ACCC commented that the ACCC has 'always argued that the current penalties are too low and should be increased, in any case'.[5]

1.20 Mr Jepsen of the Treasury conceded that there may be an issue in respect of the consistency of the penalty levels. He advised that 'Perhaps the issue is that the [section] 53 penalties need a review or have not been reviewed for some time'.[6]

The adequacy of ACCC's resources to exercise powers

1.21 The financial impact statement section of the Explanatory Memorandum to the Bill notes that:

> The Government will consider, in the context of the 2000-01 Budget process, the resourcing implications for the ACCC to carry out the functions and exercise the powers it is given under the amendments to Part VB contained in the Bill.[7]

1.22 When questioned about his satisfaction with ACCC resources, Professor Fels stated that he was 'satisfied with the resources at present'.[8] He agreed that he had had ongoing discussions with the Treasurer about resource concerns but could not comment about possible additional resources being allocated in the budget process.[9]

The constitutional foundation of the legislation

1.23 Schedule 2 of the Bill inserts a new subsection 44ZZA(3)(3A). The intention of the amendment is to make certain that section 44ZZA falls within the Commonwealth's legislative power.

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4 Evidence, p. E45.

5 Evidence, p. E45.

6 Evidence, p. E45.

7 Explanatory Memorandum, p.3.

8 Evidence, p.E6.

9 Evidence, p.E6.

1.24 When questioned by the Committee on the necessity for the proposed amendment in schedule 2 of the Bill, Mr Jepsen, from the Department of the Treasury, stated:

> … it is basically to put something beyond doubt. It is a technical amendment to ensure that powers which the ACCC always intended to have are in fact there. I gather some lawyers have asked questions abut the ACCC's ability to act on conditions it accepts under Part IIIA. The purpose of this amendment is simply to restate clearly that the ACCC does have those powers and that the implementation of Part III of the act can proceed as it was intended to do.[10]

Recommendation

1.25 The Committee recommends that the Bill be passed.

Senator the Hon Brian Gibson
Chairman

10 Evidence, p.E27.

LABOR SENATORS' MINORITY REPORT

SENATE ECONOMICS LEGISLATION COMMITTEE
A NEW TAX SYSTEM (TRADE PRACTICES AMENDMENT) BILL 2000

Labor Senators are very concerned at the Government's attempts in the *A New Tax System (Trade Practices Amendment) Bill 2000* ("the Bill") to introduce into the *Trade Practices Act 1974* ("the Act") new penalties of up to $10 million specifically in relation to GST-related statements by businesses. This compares with the current situation where no specific pecuniary penalty arises under the general misleading and deceptive statement provisions contained in section 52 of the Act and only relatively very small penalties under other provisions in the Act and comparable State laws.

This means that the Government appears to regard a GST-related statement as a much more important matter than other misleading or deceptive utterances.

Labor Senators note that the Law Council of Australia has indicated that it "is strongly opposed to this Bill which represents a radical departure from Competition Policy".[11]

Professor Warren Pengilley, Sparke Helmore Professor of Commercial Law at the University of Newcastle and a former Commissioner of the Australian Trade Practices Commission, prepared a very persuasive paper raising serious doubts about the Bill, including the following:

- "The cynic might well believe that the legislation is aimed to strike fear into the hearts of suppliers more than anything else and to prevent the, under pain of huge penalty if wrong, making even genuine assessments of the effects of the Goods and Services Tax";

- "There is no inherent difference between misleading conduct generally and misleading conduct in relation to the New Tax system. The consumer is the beneficiary of each prohibition. Equity demands that all be put on the same basis insofar as penalties are concerned"; and

- "[T]he ACCC Guidelines say that no price may increase more than 10 per cent. This conclusion resulted from an embarrassing public debate in which Minister Hockey eventually was forced, politically, to give this assurance. But it is not the law and the ACCC is misleading in its Guideline in saying that it is. If a corporation's increased tax, purchase and compliance costs exceed 10 per cent, there is no reason at all, as the writer sees it, why prices cannot increase to cover these".[12]

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[11] Correspondence from Peter Levy, Secretary-General, Law Council of Australia, to Senator Conroy, dated 18 April 2000 and tabled at the public hearing of the Committee on 1 May 2000.

[12] Professor Warren Pengilley, *"The New Tax System (Trade Practices Amendment) Bill Introduced on 16 March 2000 Should be Scuttled. It is Unconscionable"*, tabled at the public hearing of the Committee on 1 May 2000.

We note, however, that only one submission was received from a business group about the proposed prohibition and penalties.[13] This is not surprising given that Labor has been told for some time that businesses are getting a different message from the ACCC than it is espousing publicly. Interestingly, the Financial Review[14] reported as such last week, as follows:

"The Federal Government has been caught out trying to tell two different stories about the GST: one to business and one to consumers. To consumers it says the competition watchdog will be directed to prosecute any business which increases its prices above 10 per cent. But business is being told that if you are careful, the guidelines will be a little more flexible. Flexible enough to let you spread out any increased labour, compliance or other costs over time, provided you avoid any excessive price rises in the all-important changeover time."

The Government is expecting the ACCC to deliver its political rhetoric but without real power, as Labor exposed in the Senate. Former chairman of the Trade Practices Commission, Mr Bob Baxt[15], said that the ACCC had been put in an invidious position trying to defend a political tax. *"They may be able to deliver a prosecution on a few specific cases, but it will be virtually impossible to stop price increases across the board."*

There were a number of concerning revelations during the public hearing into the Bill, including:

- That Minister Hockey had engaged in misleading and deceptive conduct when he issued press release FSR/003 on 15 January 2000 falsely stating that he had directed the ACCC to impose a ten percent price cap. Under Labor Senators' questioning, the ACCC admitted during the hearing that they had received no such direction; and

- That the Chairman of the ACCC admitted that the ten percent GST price cap has no legislative backing.

Labor has always been opposed to the GST. But we wish to ensure that consumers are protected from exploitation as far as possible. On that basis Labor did not oppose the original price exploitation powers.

And, on balance, although Labor Senators consider the Bill to be nothing more than a crude attempt to intimidate and silence Australian small businesses from speaking about the true effects of the GST, the risk to Australian consumers of not gaining these protections outweighs the disadvantages and we therefore will not oppose the Bill. Notwithstanding

---

[13] Labor Senators note the concerns expressed in a late submission (received 8 May 2000) from Price Waterhouse Coopers on behalf of the Australian Industry Group, which points out:

"Exposure to high penalties, fines and worse, for industry associations which are engaged, in one sense, as agents for the government in the education process, who conduct themselves with integrity, honesty and reasonableness, is an unacceptable aspect of the proposals, and which could backfire by unnecessarily restraining industry associations and making them reluctant to help members in promoting the [New Tax System]" (Price Waterhouse Coopers submission on behalf of the Australian Industry Group, p 5)

[14] Wednesday 3 May 2000 page 8 *Canberra changes its story on GST rises*

[15] Wednesday 3 May 2000 Financial Review page 8 *Shaky outlook for tax ceiling*

this, we remain gravely concerned that the Bill will not ensure effective protection for consumers from the effects of the GST, which itself is unfair, regressive, bad for families, bad for jobs and bad for the economy.

We are also concerned at its departure from the existing misleading and deceptive conduct prohibitions in the *Trade Practices Act* and state fair trading legislation, in particular, the introduction of penalties far in excess of the existing penalties applicable to non-GST related misleading and deceptive conduct.

Professor Pengilley's paper was extremely well-argued and persuasive. The attempts by some ACCC witnesses, both at the hearing and in the media the next day, to cast doubt on the eminence of Professor Pengilley and of his arguments should be disregarded entirely. Labor Senators note also that while the paper was the work of Professor Pengilley alone, it was endorsed by the Law Council of Australia, a body filled with academic and commercial lawyers of the highest order.

Labor Senators consider it to be unconscionable that the Government's rushed timetable for the Bill meant the Australian Industry Group had no time to appear before the Committee to discuss its submission and that Professor Pengilley was unable to appear before the Committee following the comments by ACCC witnesses.

Finally, Labor Senators are seriously concerned over whether the ACCC price exploitation scheme as a whole is constitutional. Graeme Hill's article in the *Federal Law Review* was raised during the second reading debate and also during the hearing. Two days after the hearing, the High Court handed down its decision in *Hughes*, in which it left explicitly open the extent of the incidental power, contained in s 51(xxxix) of the Constitution, which underpins some co-operative schemes, stating:

> "It is plain enough that s 51(xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power. However, it would be another matter to conclude that this means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern...
>
> [T]he scope of the executive power, and of s 51(xxxix) in aid of it, remains open to some debate and this is not a suitable occasion to continue it. This is because it is unnecessary to do so…" (*paragraph 39*)

Labor Senators note the judgment and remain concerned that the constitutional basis for the ACCC's price exploitation role remains unclear.

Senator Shayne Murphy
Deputy Chair

Senator George Campbell

Senator Stephen Conroy

Senator the Hon. Nick Sherry

APPENDIX 1

LIST OF WITNESSES

Canberra, 1 May 2000

Australian Competition and Consumer Commission

Professor Alan Fels, Chairman
Dr David Cousins, Commissioner, Special Responsibility for GST
Mr Hank Spier, Chief Executive Officer
Mr John Grant, General Manager, GST Branch

Department of the Treasury

Mr John Jepsen, General Manager, Structural Reform Division
Mr Adam McKissack, Manager, Trade Practices Unit,

Attorney-General's Department

Mr James Faulkner, Assistant Secretary, Constitutional Policy Unit

APPENDIX 2

SUBMISSION FROM

PricewaterhouseCoopers for The Australian Industry Group

PricewaterhouseCoopers
215 Spring Street
MELBOURNE VIC 3000
GPO Box 1331L
MELBOURNE VIC 3001
DX 77 Melbourne
Australia

Mr Peter Hallahan
Secretary
Senate Economics Legislation Committee
SG.64
Parliament House
CANBERRA ACT 2600

5 May 2000

Dear Mr Hallahan

Trade Practices Act Amendment

On behalf of The Australian Industry Group (AIG), we provide a short public submission on the Committee's review of the *A New Tax System (Trade Practices Amendment) Bill 2000*.

A copy of AiG's submission is attached for your perusal.

We were informed by your office earlier this week that although the due date for written submissions has passed, a short submission by the end of this week would still be able to be taken into account in the Committee's Report to the Senate.

Please do not hesitate to telephone me on (03) 8603 3664 if there are any queries.

Yours sincerely

L A Gainsford
Partner
Pricing and Competition Policy

SENATE ECONOMICS LEGISLATION COMMITTEE

SUBMISSION ON
A NEW TAX SYSTEM (TRADE PRACTICES AMENDMENT) BILL 2000
BY
THE AUSTRALIAN INDUSTRY GROUP

MAY 2000

Introduction

The Australian Industry Group (Ai Group) is one of Australia's largest industry associations, being the organisation formed from the merger of The Australian Chamber of Manufactures and the Metal Trades Industry Association of Australia.

Ai Group is concerned that the *A New Tax System (Trade Practices Amendment) Bill 2000 (the Bill)* in its present form may unintentionally adversely impact on information and educational "advice" given by Ai Group to its members and others in the wider business community relating to the effect or likely effect of *A New Tax System* (*NTS*).

The *Bill*, if passed in its present form, could have a serious and deleterious consequences for Ai Group in pursuing its general education program on the GST and the other *NTS* matters. Ai Group is only one of a large number of industry associations and organisations that has received funding and advisory support from the GST Start Up Assistance Office (a Commonwealth body responsible for education and training in relation to the GST which recently announced that it had disbursed over $300 million to organisations like Ai Group for the purpose) to ensure that timely and relevant information and advice is available to small to medium sized businesses throughout Australia.

The bulk of the information providing the foundation of the advisory program has been drawn from advice provided by Government authorities such as the Australian Taxation Office (ATO), the Australian Competition and Consumer Commission (ACCC), and the GST Start – Up Office itself as well as from private sources of expert professionals in law or finance/accounting services such as PricewaterhouseCoopers.

The width and scope of the new provisions of the Bill relating to misleading and deceptive conduct and misrepresentations about the effect of the *NTS* raise serious concerns for industry organisations committed to assisting the business community in a proper and professional manner without risk of penalty or liability in an environment where the actions of the organisations are designed to help in a practical way, the transition to a new tax system.

In this short submission, as requested, we focus on the first two issues in the Committee's Terms of Reference, being the extent of behaviour to which proposed powers and penalties could apply and the necessity for proposed powers and penalties. We then make some recommendations and suggestions for the *Bill's* amendment and adoption.

Submission

The Ai Group submits to the Senate that upon further investigation into the *Bill's* impact, the Committee should:

1. reject the inclusion of the words "or likely effect" in paragraphs (c) and (d) of the proposed new section 75AYA of the *Trade Practices Act 1974 ("the Act");*

2. reject the inclusion of the words "all or any of" in paragraphs (c) and (d) of the proposed new section 75AYA of the *Act;*

3. re-consider whether the provisions correctly and properly belong in Part VB (Price Exploitation) of the *Act* when it is apparent that adequate protection is afforded the consumer in Part V (Consumer Protection) of the *Act* for the same mischief;

4. allow for the possibility of additional defences (to those proscribed under the proposed section 76A) in any proceedings brought under Part VB of the *Act*. More particularly, it is submitted that more flexibility should be given to the Court to consider "any other relevant matter" which may give rise to a defence to the ACCC action;

5. recommend the expansion of the definition of "another person" in the proposed section 76A (3) so as to exclude a director, servant or agent of an industry association or organisation or other non-profit organisation of which the respondent in the proceedings is a member or associate at the time the alleged offence was committed.

Reasons

The Ai Group is seriously concerned about the implications of the proposed amendments on industry organisations which have been given the role of assisting their members in becoming familiar with and aware of the *NTS* and the likely consequences for their businesses, their operations and administration. The extension of the prohibited conduct to cover representations about the "likely effect of all or any of the New Tax System changes" may place unrealistic expectations on Ai Group and the type of advice it offers members when there are significant legislative changes in process. These concerns do not exist to the same extent when the existing Part V Consumer Protection provisions are considered.

The membership of Ai Group is remarkably diverse, covering the full spectrum of industries at different points on the supply chain dealing with a broad range of products and services. In its advisory role, Ai Group runs the risk under the proposed changes of innocently misrepresenting to its members, collectively and individually, the impact or likely impact of the *NTS* on their pricing structures and levels.

It must be stressed from the outset, that unlike lawyers, accountants and other like professional bodies, the Ai Group does not hold itself out to be financial legal or tax advisers, and nor is it expected to produce an anything other than an homogeneous service for the general breadth of its membership – it is not practical, nor desirable for a non profit organisation to become business managers and experts for the individual business. Ai Group serves an important function in the business community in educating and advising in a general sense especially in matters relating to employer obligations, new statutory requirements for employers, and all the incidental legislative impacts on an employer's continuing business operations and the workplace. Taxation and pricing strategies resulting from changes to the fiscal system are important aspects.

Given the diversity of Ai Group's membership, it would be wholly unreasonable to expect Ai Group to be ever in a position where it could adequately anticipate the likely effect of the *NTS* on each and every member's business. Even if a member is fairly certain on what their *NTS* impacts should be, any assistance or advice that Ai Group might be in a position to offer that member would necessarily be generalised or based on publicly available material from experts' best estimates of likely interpretation of the known facts. To do otherwise would mean that Ai Group would be acting as a business or financial manager for the member and this is not within the scope of its expertise, skills or competency or in accordance with its

Rules and objects. Most particularly, it would mean that Ai Group would need to embark upon a rigorous investigation of the business activities of EACH of its members (presently in excess of 10,000), an interrogation of its officers and a careful examination of its suppliers, customers, contractors and contracts. None of these services is contemplated as arising by virtue of membership in Ai Group.

Further issues which complicate Ai Group's position include the special relationships which exist between Ai Group and other associations (such as the Federation of Automotive Parts Manufacturers). Ai Group provides secretariat and management assistance and services to these other associations and there is often a sharing of knowledge and information in respect of new regulations or provisions which impact on the common membership. Broadening the definition of "another person" (as suggested) should remedy any foreseeable problem arising from this community of conduct.

Because of the generality of the advice and the perception of members that such advice could be therefore uniformly applicable, Ai Group runs the real risk of having its advice applied up and down the supply chain in circumstances where the same or similar advice from specialist professionals engaged within the member company would never be made available to external parties or, indeed, relied upon by other parties. This should never expose Ai Group, or any other industry association, acting both reasonably and properly in the discharge of its public educative duties, to the risk of fines or liability. This is especially so where the law itself and its interpretation is in constant evolution and development, as is the case with the *NTS.*

Conclusions

The Australian Industry Group has significant concerns about what may be unintentional consequences from the *A New Tax System (Trade Practices Amendment) Bill 2000.*

The changes suggested and recommended in this submission should remove some of the undesirable consequences of the *Bill's* coverage, where the clear intention of industry association advisers is not to falsely represent nor mislead nor to knowingly deceive or be a party to any misrepresentation or deception, innocent or otherwise. It is Ai Group's reasonable submission that the remainder of the *Act* adequately deals with the intentional or grossly negligent statement representation or conduct by suppliers or others in the course of dealing with consumers. Exposure to high penalties, fines and worse, for industry associations which are engaged, in one sense, as agents for the government in the education process, who conduct themselves with integrity, honesty and reasonableness, is an unacceptable aspect of the proposals, and which could backfire by unnecessarily restraining industry associations and making them reluctant to help members in promoting the *NTS.*

APPENDIX 3

DOCUMENT TABLED AT THE PUBLIC HEARING ON 1 MAY 2000

Correspondence from the Law Council of Australia
and attached paper:
The New Tax System (Trade Practices Amendment) Bill
introduced on 16 March 2000 should be scuttled. It is unconscionable
by Dr Warren Pengilley

Tabled at hearing
by Senator Conroy
1/5/2000

LAW COUNCIL
OF
AUSTRALIA

PGL:SF:BLS

18 April, 2000

Senator Stephen Conroy
Shadow Minister for Financial Services and Regulation
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator

A New Tax System (Trade Practices) Amendment Bill introduced 16 March 2000

The Law Council's Trade Practices Committee has considered this Bill and has received a submission from Dr Warren Pengilley in relation to it. A copy of Dr Pengilley's submission is **enclosed**.

The Law Council is strongly opposed to this Bill which represents a radical departure from Competition Policy which cannot be justified for reasons set out in Dr Pengilley's paper.

Yours sincerely

Peter Levy
Secretary-General

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THE NEW TAX SYSTEM (TRADE PRACTICES AMENDMENT) BILL INTRODUCED ON 16 MARCH 2000 SHOULD BE SCUTTLED. IT IS UNCONSCIONABLE.

by

Warren Pengilley

Dr Pengilley is the Sparke Helmore Professor of Commercial Law at the University of Newcastle and Special Counsel to, and former Partner in, Sydney Lawyers, Deacons, Graham & James. He was formerly a Commissioner of the Australian Trade Practices Commission.

The Act and How the Bill amends it

Section 52 of the Trade Practices Act prohibits conduct in trade or commerce which misleads or deceives or is likely to mislead or deceive. It is a section worded in general terms and thus it was thought inappropriate to enforce it by way of criminal penalties. The section is enforced by the sanctions of damages, injunction or wide ranging "other orders", including corrective advertising, which can be made under the Trade Practices Act.

The above will apply, it seems, unless you happen to say naughty things about the Government's New Tax System. A New Tax System (Trade Practices Amendment) Bill 2000 was introduced into the House of Representatives on 16 March 2000. The Bill intends to add s.75AYA(d) as a new section of the Trade Practices Act. This provision, in short terms, provides that a corporation shall not in trade or commerce in connection with the supply or promotion of goods or services:

> "*engage in conduct that:*
>
> *(c)* .....
>
> *(d)* *misleads or deceives, or is likely to mislead or deceive, a person about the effect, or likely effect, of all or any of the New Tax System changes.*"

The provisions are to have effect for the period of the New Tax System transition period i.e. for two years commencing 1 July 2000.

Perhaps such a provision can be tolerated to the extent that it is consistent with other provisions of the Trade Practices Act and in particular s.52 noted above. Where it is not

consistent with other provisions is that, uniquely in relation to misleading or deceptive conduct, the enforcement procedures are all of those set out above in relation to s.52 **plus a maximum pecuniary per offence of $10 million in the case of a corporation and $500,000 in the case of an individual**. No other misleading or deceptive conduct has any pecuniary penalty, let alone a $10 million one.

There are, however, provisions of the Trade Practices Act which attract criminal penalties in relation to false representations. Most notably these are contained in s.53. Section 53 covers false representations on a number of matters (e.g. s.53(a) refers to false representations in relation to standards, quality, value, grade, composition, style or particular history or particular previous use of goods). Those sections with criminal penalties were thought to be specifically enough worded to be enforced by such a sanction. The new Bill also introduces s.75AYA(c) which provides that a corporation shall not in trade or commerce in connection with the supply or promotion of goods or services in the New Tax System transition period:

> *"(c) falsely represent (whether expressly or impliedly) the effect or likely effect, of all or any of the New Tax System changes."*

Maximum penalties under s.53 are $200,000 for a corporation and $40,000 in the case of an individual plus injunction, damages and "other orders". **However, the new Bill will extract $10 million and $500,000 respectively if you say naughty things about the effect, or likely effect, of the Government's New Tax System**. In no other part of the Trade Practices Act does the penalty for false representations exceed $200,000.

The penalties for error in relation to the Government's New Tax System and the Goods and Services Tax ("GST") are thus totally out of line with everything else in the Act. A most indefensible position is reached that, in the case of misleading or deceptive conduct, there is no pecuniary penalty involved at all - except if this relates to the New Tax System in which case the $10 million penalty is to be for a corporation and $500,000 for an individual.

The Government says that, by these completely out of line penalties, it is ensuring that "Australian consumers are not being ripped off" [First Reading Speech - Hansard (H or R) 16 March 2000]. The more cynical of us (of which this writer is one) see the proposed legislation as an attempt by the Government to harass individuals with penalty threats if they deviate from the Governmental Goods and Services Tax line at any particular time.

There is no inherent difference between misleading conduct generally and misleading conduct in relation to the New Tax System. The consumer is the beneficiary of each

prohibition. Equity demands that all be put on the same basis insofar as penalties are concerned.

Application of the Code to States and Territories

According to the First Reading Speech, the new Bill to the States and Territories will apply as Code provisions except in relation to Queensland which has refused to accept it. This, too, is an unusual situation. The Code provisions of the Trade Practices Act provide for Commonwealth law also to run in the States thus overcoming constitutional gaps in Commonwealth legislation - primarily in relation to individuals acting solely within a State. The Code provisions apply fundamentally to restrictive trade practices law. Each State and Territory has its own consumer protection legislation covering misleading or deceptive conduct and false representations which needs specific Parliamentary amendment in each State and Territory to become the law of that State or Territory. Philosophically the provisions in the new Bill must be seen as consumer protection provisions. The Bill's provisions, if they are to be the law of a State or Territory, should logically be contained in State and Territory legislation which covers all other misleading conduct and false representations.

SOME COMMENTS ON THE EFFECT OF THE AMENDMENTS

It is to be noted that the Government has widened its coverage of conduct in relation to the New Tax System much further than in the case of other prohibitions in the Trade Practices Act in that:

(a) In the case of false misrepresentations generally (eg under S.53), the obligation is not to make "a false or misleading representation". In the case of the New Tax System one is prohibited from "falsely representing (**whether expressly or implicitly**)". The reason for the widening of the prohibition is unexplained. One might well feel that the only reason is that the Government is trying to protect its New Tax System in a way which other consumers apparently do not deserve.

(b) One would think that it is far easier to fall foul of legislation involving the likely effect of economic legislation than it is to fall foul of legislation prohibiting conduct likely to mislead or deceive a person. Every business commentator in Australia would potentially run foul of the new Bill if it were not restricted to the supply and promotion of goods and services. No-one can deny that it is currently extremely difficult for any corporation supplying goods or services to make predictions as to the likely effect of the Goods and Services Tax on the

items it supplies. The cynic might well believe that the legislation is aimed to strike fear into the hearts of suppliers more than anything else and to prevent them, under pain of huge penalty if wrong, making even genuine assessments of the effects of the Goods and Services Tax.

(c) The penalties are imposed in relation to conduct in which no intention to mislead or deceive has to be established. Under established case law covering misleading or deceptive conduct, a belief in the accuracy of a statement is not a relevant defence. An infringement may be involved even if the statement has been made honestly, innocently and without any intention actively to mislead. The many cases in support of the above propositions do not need citation here. [For a convenient collection of such cases see Ray Steinwall : Annotated Trade Practices Act 1974 (2000 Edition – Butterworth & Co p. 203)].

(d) The legislation has a huge impact on professional advisers. The Trade Practices Act provides that parties who aid, abet, counsel, procure or are "knowingly concerned" in a breach are liable as principal parties. The ACCC has, of recent times, been stating that this liability is very wide in the case of professional advisers. The ACCC's attitude has been of great concern to the professional bodies such as the Law Council of Australia. In effect, the ACCC has been very close to asserting, if it has not in fact asserted, that professional advisers who wrongly, but genuinely, advise on the law, can be liable under the accessorial provisions of the Trade Practices Act. The writer believes that the ACCC is simply wrong in most of what it asserts. It, of course, not likely that it will apply the same standards to its own conduct in those court cases which it loses. Nonetheless, its attitude, coupled with the extremely wide provisions in the Bill, must have a huge impact on professional advisers and the advice they are prepared to give. The GST has been very controversial. It is hardly clear law. Public disagreement between various Ministers and the ACCC itself have been a feature of what it really means. Many people still do not know what the law is or how to comply with it. Freedom to give independent advice without fear of $500,000 if this advice is "wrong" (which may well mean, in this context, advice with which the ACCC does not agree), is the linchpin of business being able to know what the legislation means and what to do to comply with it.

The ACCC should live by the same rules and not be misleading in its Guidelines

If we are to have this Bill, perhaps the ACCC itself should comply with the same law in what it says. The ACCC says in its Guideline, for example, that all retail prices marked on goods and services or on shelf signs "must be GST inclusive". "Must", to my mind means that this result is compelled by law. There is no legal provision which compels this result. In a seminar conducted by the ACCC, the writer asked the question as to how this conclusion followed as a matter of law. After some evasive responses, the Commission Member conducting the seminar advised that this was what the Minister wanted. Ministerial desire is not the law and the ACCC is misleading in representing in its Guideline that it is. To complete the story, it should be added that at GST seminar conducted by the Taxation Office, the writer asked the same question to receive the answer that prices could be posted however a person liked and that the Taxation Office thought it a good idea there be transparency by the GST being separately itemised. Professor Allan Fels may personally not like the idea that the cash register price and the shelf price are different, as in the United States, and he has said so in an ACCC Press Release of 9 March. But Professor Fels' particular likes or dislikes as to marketing methods do not constitute the law either. In any event, separate itemisation of prices does not necessarily mean that the cash register and ticket prices are different. The separate itemisation can be on the ticket price itself so that the purchaser knows precisely what he or she is paying before greeting the cash register.

Similarly, the ACCC Guidelines say that no price may increase more than 10 per cent. This conclusion resulted from an embarrassing public debate in which Minister Hockey eventually was forced, politically, to give this assurance. But it is not the law and the ACCC is misleading in its Guideline in saying that it is. If a corporation's increased tax, purchase and compliance costs exceed 10 per cent, there is no reason at all, as the writer sees it, why prices cannot increase to cover these.

The ACCC should not effectuate political decisions by representing that they are the law and it can well be argued that it is engaging in misleading or deceptive conduct in its Guideline in doing so.

Enforcement Problems

Finally, of course, the whole issue of price exploitation is one which is fraught with the usual problems of accounting controversies. Some entities will make assessments based on supply costs of which they are unaware. Some will use different accounting methods for allocating capital costs and overheads. The ACCC says in its Guideline that entities have to give an offset for matters such as "savings in not having to deal with the existing tax regime". Some entities may simply be quite unable to cost this intangible into its various products yet

in any of these cases, if a customer asks why the price went up and the supplier replies, logically enough, "Because of the GST," then a potential liability of $10 million arises if the ACCC likes to cost things another way. This potential liability exists even though the statement is made honestly, innocently and without any intention to mislead anyone.

IN CONCLUSION

For a Government which says it believes in competition policy any necessity at all for the Price Exploitation provisions of the Trade Practices Act is difficult to justify. The Government has exhorted the principles of competition policy and applied them to such decidedly non commercial matters as hospitals, education and employment agencies. Why those same policies cannot be applied in areas where they are so obviously relevant i.e. commercially traded goods and services, is quite beyond this writer. New Zealand survived its GST legislation without its Commerce Commission second guessing every managerial pricing policy.

If, however, we do have such legislation and if the ACCC is to snoop into all pricing decisions, it would be well for the ACCC to bear in mind the judgment in Vardon v The Commonwealth (1943) 67 CLR 434 in which the High Court held an Australian War Time Price Regulation invalid. The Court looked at various accounting texts in an attempt to determine the meaning of the word "cost". It concluded that, because of the number of ways in which "cost" could be calculated, these methods involving different accounting principles and different allocations of overhead and capital expenses, the price fixing regulation before it was void for uncertainty. Despite the advent of computers and the increase in accounting sophistication since 1943, the fundamental problem in Vardon remains. There is certainly no law which says that the courts have to accept the ACCC approach to cost calculations. Unless the method of calculation of the relevant "cost" is legislatively prescribed (which it is not), all theoretical analysis becomes somewhat academic and uncertain in result. It may well be that when the ACCC prosecutes its first offender, it will be defeated because the "costs" it wants passed on, or not, as the case may be, are incapable of either definition or calculation.

We should rely on competition law, not regulatory law, to deliver appropriate market prices. But whatever view one has of this, the Bill introduced on 16 March should be scuttled because it involves huge penalties for uncertain conduct - penalties which are not imposed for far more certain conduct in other parts of the Trade Practices Act.

The enactment of this Bill will be nothing short of Governmental unconscionable conduct.