A NEW TAX SYSTEM (TRADE PRACTICES AMENDMENT) BILL 2000

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Financial Services and Regulation, the Honourable Joe Hockey, MP)
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Proposed amendments

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Outline

Prohibition on misrepresentations as to the effect of the New Tax System changes

1. A New Tax System (Trade Practices Amendment) Bill 2000 inserted Part VB into the Trade Practices Act 1974 to provide the Australian Competition and Consumer Commission (ACCC) with powers to monitor prices. The purpose of these powers was to prevent the possibility of consumer exploitation and excessive profit taking in the transition to the New Tax System. The States have adopted the Schedule version of Part VB to establish the National Price Exploitation Code.

2. The Bill will amend Part VB of the Trade Practices Act 1974 (TPA) by inserting a new provision to 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. Consistent with the rest of Part VB, such conduct is subject to penalties of up to $10 million for a body corporate, and up to $500 000 for a person other than a body corporate. Actions to have these penalties imposed will be taken by the ACCC in the Federal Court.

3. The ACCC will also be able to seek injunctions to restrain conduct that is, or may be, in breach of the prohibition. The ACCC will be able to accept voluntary undertakings in line with its existing powers in section 87B of the TPA.

4. This provision will apply from when the Bill commences until two years after the introduction of the GST.

5. To achieve Australia-wide coverage, the Bill also inserts a version of the new provision into the Schedule to the TPA, which can be applied by the States and Territories. This Schedule version essentially replicates the new provision with certain modifications, such as referring to a ‘person’ rather than a ‘corporation’.

6. By virtue of the Price Exploitation Code (Name of State) Act 1999 in each State (except WA) and the Northern Territory, the proposed amendment to the Schedule will be adopted as part of the price exploitation legislation in each jurisdiction, effective 2 months from when the Bill commences. Each jurisdiction retains the discretion to issue a regulation declaring that the amendment takes effect at an earlier date, or does not take effect at all. Under the New Tax System Price Exploitation Code (Western Australia) Act 1999, a modification of the Schedule does not apply as a law of WA unless the modification is declared by an order to be such a law. The ACT did not pass a Price Exploitation Code Act.

7. The Bill makes a number of consequential amendments to the TPA to apply various enforcement and remedy provisions of the TPA to the new provision.

Clarifying the operation of Part IIIA of the Trade Practices Act 1974

8. The Bill will also clarify the operation of the access undertaking provisions in Part IIIA of the TPA, which enable a service provider to provide an access undertaking to the ACCC that sets out terms and conditions for providing third parties with access to a service. The Bill contains amendments to make certain that the provisions in section 44ZZA of the TPA regarding access undertakings fall within the Commonwealth’s legislative power, and to clarify that the ACCC has the ability to perform functions and exercise powers in relation to access undertakings. The Bill
also makes a consequential amendment to repeal subsection 44ZZJ(3), which sets out the Constitutional basis for enforcement of access undertakings.
Financial impact statement

1. 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.

2. The Office of Regulation Review has advised that a Regulation Impact Statement is not required for this amendment because it is of a minor nature and does not substantially alter existing arrangements.
Proposed amendments

Clause 1 – Short title

1. Upon enactment, the Bill will be known as *A New Tax System (Trade Practices Amendment) Act 2000*.

Clause 2 – Commencement

2. Schedule 1 to the Act (amendments related to the New Tax System), and Item 3 of Schedule 2, will commence on the day on which the Act receives Royal Assent.

3. Clause 2 provides that Item 1 of Schedule 2 is taken to have commenced when Part 3 of the *Competition Policy Reform Act 1995* commenced. Item 1 is an amendment to section 44ZZA to add a new subsection (3A). The retrospective operation of item 1 will ensure that existing undertakings accepted under section 44ZZA of the TPA fall within the Commonwealth’s legislative power. The new subsection (3A) does not extend the intended scope of section 44ZZA and is consistent with the original intention of the legislation.

4. Clause 2 provides that Item 2 of Schedule 2 is taken to have commenced when the *Trade Practices Amendment (Industry Access Codes) Act 1997* commenced. Item 2 is an amendment to section 44ZZA to substitute a new subsection (6A) for the current subsection (6A). The retrospective operation of item 2 ensures that the clarified operation of subsection (6A) applies to existing access undertakings. The amendment does not extend the intended scope of section 44ZZA(6A) and is consistent with the original intention of the legislation.

Clause 3 – Schedules

5. The Bill amends the TPA as set out in Schedules 1 and 2.

**SCHEDULE 1 – AMENDMENTS RELATED TO THE NEW TAX SYSTEM**

**Item 1 – Extended application of Parts IV, IVA, V and VB - amendment to paragraph 6(2)(b)**

6. Paragraph 6(2)(b) of the TPA currently extends the application of various Parts of the TPA in reliance on the Commonwealth’s constitutional trade and commerce power. This item amends the paragraph to similarly extend the application of section 75AYA.

**Item 2 – Prohibition on misrepresenting the effect of the New Tax System changes – new section 75AYA**

7. This item sets out the prohibition on misrepresenting the effect of the New Tax System changes. It contains a number of elements. The item specifies the conditions under which a corporation is captured by the provision. A corporation must, in trade or commerce, be engaged in conduct in connection with the supply or possible supply of goods or services, or the promotion by any means of the supply or use of goods or services.

8. Further, the item specifies the two types of conduct in which a corporation must not engage. First, conduct that falsely represents (whether expressly or impliedly) the effect, or likely effect, of
the New Tax System changes. Second, conduct that misleads or deceives, or is likely to mislead or deceive, a person about the effect, or likely effect, of the New Tax System changes.

9. The item specifies that the prohibition be effective from date of commencement until the end of the New Tax System transition period.

Item 3 – Interpretation – amendment to subsection 75B(1)

10. Part VI of the TPA deals with enforcement and remedies. Subsection 75B(1) provides that a reference in Part VI to a person involved in a contravention of Part IV, IVA or V, or of section 75AU shall be read as a reference to a person who has been involved in the contravention, for example, by aiding, abetting, or being knowingly concerned. This item amends subsection 75B(1) so that it also applies in relation to a contravention of new section 75AYA.

Item 4 – Pecuniary penalties – amendment to paragraph 76(1)(a)

11. This item amends paragraph 76(1)(a) to provide that a contravention of new section 75AYA will attract the same penalties as a contravention of section 75AU – up to $10 million for a body corporate, and up to $500 000 for a person other than a body corporate. These penalties are substantial and demonstrate the Government’s commitment to address legitimate community concerns regarding the possibility of consumer exploitation in the transition to the New Tax System.

Item 5 – Defence to proceedings under section 76 relating to a contravention of section 75AYA – new section 76A

12. This item inserts new section 76A to provide a defence to an alleged contravention of section 75AYA. It is a defence if the respondent establishes that the contravention was due to reasonable mistake; or reasonable reliance on information supplied by another person; or the act or default of another person, and the respondent took reasonable precautions and exercised due diligence to avoid the contravention.

What happens if substantially the same conduct is a contravention of section 75AYA and an offence – new section 76B

13. This new section clarifies the situation to apply where substantially the same conduct is a contravention of section 75AYA and an offence. New section 76B provides that a court must not make a pecuniary penalty order against a person if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

14. Further, proceedings for a pecuniary penalty order against a person are stayed in the event that criminal proceedings are started or have already been started for an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.

15. If a pecuniary penalty order has been made against a person, criminal proceedings may still be started against the person for conduct that is substantially the same as conduct constituting a contravention of section 75AYA.

16. This new section applies to a person who has been involved in the contravention, for example, by aiding, abetting, or being knowingly concerned.
Item 6 – Criminal proceedings not to be brought for contraventions of Part IV or section 75AU or 75AYA—amendment to subparagraph 78(a)(ii)

17. Section 78 of the TPA currently provides that criminal proceedings are not to be brought for contraventions of Part IV or section 75AU. This item amends paragraph 78(a) to extend this ‘exemption’ from criminal proceedings to new section 75AYA. The heading to section 78 is amended to reflect this.

Items 7 and 8 – Injunctions – amendment to paragraph 80(1)(a) and subsection 80(1A)

18. Subsection 80(1) of the TPA states who may apply for injunctions, and in what circumstances. This item amends paragraph 80(1)(a) so that an injunction may be granted if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of new section 75AYA.

19. Subsection 80(1A) places restrictions on who may apply for an injunction in relation to certain provisions. Currently, only the ACCC may apply for an injunction in relation to a contravention of sections 50 and 75AU of the TPA. This item amends subsection 80(1A) to similarly provide that only the ACCC may apply for an injunction relating to a contravention of new section 75AYA.

Item 9 – Prohibition on misrepresenting the effect of the New Tax System changes – new section 75AYA of the Schedule

20. This item inserts a version of section 75AYA into the Schedule. Essentially, the Schedule version replicates the text of section 75AYA with references to ‘corporation’ replaced by ‘person’. The Schedule version of Part VB is designed to facilitate application of Part VB by the States and Territories.

SCHEDULE 2 – OTHER AMENDMENTS

Item 1 – Access undertakings by providers – new subsection 44ZZA(3A)

18. Section 44ZZA of the TPA includes provisions that enable a service provider to submit an access undertaking to the ACCC that sets out terms and conditions for providing third parties with access to a service. The new subsection 44ZZA(3A) provides that the ACCC must not accept such an undertaking unless:

- the provider, or proposed provider is a corporation (or a partnership or joint venture consisting wholly of corporations); or
- the undertaking provides for access only to third parties that are corporations; or
- the undertaking provides for access that is (or would be) in the course of, or for the purposes of, constitutional trade or commerce.

19. The intention of the amendment is to make certain that section 44ZZA falls within the Commonwealth’s legislative power. The new subsection (3A) is consistent with the original intention of the legislation, and does not extend the intended scope of section 44ZZA.
Item 2 – Access undertakings by providers - replace subsection 44ZZA(6A) with new subsection 44ZZA(6A)

20. Subsection 44ZZA(6A) was inserted by the Trade Practices Amendment (Industry Access Codes) Act 1997. Where an undertaking provides for the ACCC to make decisions, subsection 44ZZA(6A) requires that the ACCC must make decisions in accordance with the undertaking.

21. The new subsection 44ZZA(6A) confers a power on the ACCC to ‘perform functions’ or ‘exercise powers’ where an undertaking so provides. If the ACCC accepts an undertaking which provides for the ACCC to perform functions or exercise powers, the ACCC must perform those functions and exercise those powers in accordance with the undertaking.

22. The amendment is intended to clarify that the TPA provides for the ACCC to perform a broader range of activities than might be considered to be ‘decisions’. The amendment does not extend the intended scope of subsection 44ZZA(6A), and does not provide the ACCC with powers that extend beyond the undertaking.

Item 3 – Access undertakings by providers - repeal subsection 44ZZJ(3)

23. Section 44ZZJ of the TPA provides a role for the ACCC to apply to the Federal Court to enforce access undertakings where there has been a breach by a service provider.

24. Subsection 44ZZJ(3) sets out the Constitutional basis for enforcement of access undertakings. This subsection is made redundant by the new subsection 44ZZA(3A) and will be repealed.