1992

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES LEGISLATION AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Duffy MP)

36509 Cat. No. 92 5320 8

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Printed by Authority by the Commonwealth Government Printer

TRADE PRACTICES LEGISLATION AMENDMENT BILL 1992

OUTLINE

This Bill provides for a number of amendments to the *Trade Practices Act 1974* to enhance its operation and improve the efficiency and fairness of Australian business practices.

Sections 50 and 50A, which deal with anticompetitive acquisitions and mergers, are to be amended. The new test for the application of these provisions will be whether the relevant merger or acquisition would result in a substantial lessening of competition. Interpretation of the new merger provisions will be assisted by the inclusion of a non-exhaustive list of relevant matters to be considered in assessing whether a particular merger is likely to substantially lessen competition. The list includes such matters as the level of import competition in the market and the height of barriers to entry to the market.

In determining whether a merger is likely to result in such a benefit to the public that it ought to be allowed to proceed, either for the purposes of an authorisation under section 90 or for the purposes of a determination by the Trade Practices Tribunal under section 50A, a significant increase in the real value of exports, or a significant substitution of domestic products for imported goods, is to be regarded as a public benefit and consideration must also be given to any other relevant matter relating to the international competitiveness of any Australian industry.

The time limit for consideration by the Trade Practices Commission of an application for a merger authorisation is to be reduced from 45 days to 30 days, except in particularly complex matters, for which the time limit will be 45 days. A time limit of 60 days is to be introduced in which the Trade Practices Tribunal must consider appeals from determinations made by the Commission in merger authorisation cases. This time limit does not apply where the matter is particularly complex or other special circumstances arise.

A new Part IVA is to be inserted into the Act, dealing with unconscionable conduct. The existing section 52A is to be moved to Part IVA, and a new provision will be created dealing with unconscionable conduct in circumstances not already dealt with by section 52A. The new provision will not extend the existing equitable principles of unconscionability, but will make available remedies under the Trade Practices Act and make possible the involvement of the Trade Practices Commission.

Penalties for contraventions of the Act are to be substantially increased. Pecuniary penalties for breaches of the competition provisions in Part IV, with the exception of the secondary boycott provisions (sections 45D and 45E), will be increased to a maximum of $10 million for bodies corporate and $500,000 for natural persons. Penalties for contravention of the secondary boycott provisions will be maintained at their current maximum level of $250,000 for bodies corporate. Penalties for breaches of the consumer protection provisions in Part V will be increased to a maximum of $200,000 for bodies corporate and $40,000 for natural persons.

Legislative recognition is to be given to undertakings given to the Trade Practices Commission, and the new provisions will provide for the enforcement of such undertakings.

Minor amendments are made to section 46, which deals with misuse of market power, to remove doubt about whether it applies to conduct the purpose of which is aimed at classes of competitors or persons, or competitors or persons generally.

FINANCIAL IMPACT STATEMENT

Amendments made by this Bill will have resource implications for the Commission. The lower merger threshold will mean that more mergers may need to be examined and that more may possibly be challenged in court. In addition to the merger amendments made by this Bill the Government has announced its intention to introduce a scheme of pre-merger notification. Together, the two initiatives will require an additional five staff for the Commission and additional funding of $150,000 for 1992-93 has been allocated for the purposes of these initiatives.

The introduction of a new provision dealing with unconscionable conduct which is not already dealt with by section 52A may involve an increased workload for the Commission. Any additional resources which are not capable of advance estimation will need to be decided on an individual case by case basis, when and if the Commission proposes to institute proceedings under the new provision.

The amendments will help to improve the efficiency and fairness with which Australian business is conducted, to the benefit of all Australians. The amendments to the time limits for merger authorisation cases will help to minimise the costs to businesses of delays in merger cases.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

Commission:	Trade Practices Commission
Act:	*Trade Practices Legislation Amendment Act 1992*
Tribunal:	Trade Practices Tribunal
Principal Act:	*Trade Practices Act 1974.*

NOTES ON CLAUSES

Clause 1 - Short title

1. This clause provides for the Act to be cited as the *Trade Practices Legislation Amendment Act 1992*.

Clause 2 - Interpretation

2. This clause amends paragraph 4(4)(b) of the Principal Act to replace the words 'of a body corporate' with the words 'of a person'. A person is defined by paragraph 22(1)(a) of the *Acts Interpretation Act 1901* to include a body corporate. Paragraph 4(4)(b) defines what is meant by an acquisition of assets. The amendment is consequential on the amendments made by clause 6 which extend the scope of section 50 to cover acquisitions by corporations of assets of a person.

Clause 3 - Contracts, arrangements or understandings that restrict dealings or affect competition

3. This clause amends subsection 45(7) of the Principal Act to change the reference to acquisitions of assets of a body corporate to a reference to acquisitions of assets of a person. Subsection 45(7) provides that contracts, arrangements or understandings in so far as they relate to acquisitions of shares or assets are exempt from the operation of section 45. The amendment is consequential on the amendments made by clause 6.

Clause 4 - Misuse of market power

4. This clause inserts a new subsection 46(1A) after subsection 46(1). The new subsection will provide that references in section 46 to a competitor or person include references to competitors or persons generally or to a particular class or classes of competitors or persons.

5. Subsection 46(1) prohibits a corporation with a substantial degree of power in a market from taking advantage of that power for certain anticompetitive purposes aimed at a competitor or a person. For the avoidance of doubt, this amendment makes it clear that section 46 does not only apply where those purposes are aimed at a particular competitor or competitors or a particular person or persons.

Clause 5 - Misuse of market power - corporation with substantial degree of power in trans-Tasman market

6. This clause inserts a new subsection 46A(2A) after subsection 46A(2). Section 46A prohibits a corporation with a substantial degree of market power in a trans-Tasman market from taking advantage of that power for certain anticompetitive purposes. The anticompetitive purposes set out in section 46A(2) are, apart from the extent of the relevant market, the same as those set out in section 46(1).

7. The amendments made by this clause are to the same effect as the amendments being made to section 46 by clause 4 and provide that section 46A applies where the relevant anticompetitive purposes are aimed at all competitors or persons or at a class or classes of competitors or persons.

Clause 6 - Prohibition of acquisitions that would result in a substantial lessening of competition

8. This clause amends section 50 of the Principal Act by replacing the current merger test, which prohibits acquisitions or mergers which create or substantially strengthen a position of dominance, with a new test which prohibits acquisitions or mergers which substantially lessen competition in a market. Subsections (1) to (3) inclusive are omitted and three new subsections are substituted. A new subsection (6) is inserted at the end of section 50. The section heading is amended from 'Mergers and other acquisitions' to the more precise 'Prohibition of acquisitions that would result in a substantial lessening of competition'.

9. New subsection (1) will prohibit a corporation from directly or indirectly acquiring shares in the capital of a body corporate or assets of a person if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. New subsection (2) will prohibit a person from directly or indirectly acquiring shares in the capital of a corporation or assets of a corporation if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market. New subsection (6) defines 'market' to mean a substantial market for goods or services in Australia, in a State or in a Territory. This definition is currently in paragraph 50(3)(a).

10. The new subsection 50(1) refers to acquisitions by a corporation of assets of a person, whereas the existing reference is to acquisitions of assets of a body corporate. The amendment reflects the fact that an acquisition of assets may be made by a corporation from a natural person as well as from a body corporate that has the effect of substantially lessening competition. References to a person include references to a body corporate, so transactions of a kind previously covered by subsection 50(1) will continue to be covered.

11. The previous test of market dominance has been interpreted by the court as a situation where one firm has a commanding influence in the market. It is a test which focuses largely on changes to the structure of a market that would be affected by the acquisition but it also takes some account of the likely effect on the competitive process of such an acquisition. The substantial lessening test focuses on changes to the state of competition in the relevant market. As the Trade Practices Act is about competition, a test which concentrates on competition and whether there is a lessening of that competition is more consistent with the policy underlying the legislation.

12. The term 'substantially lessening competition' is used widely through the Principal Act. It is here intended to mean an effect on competition which is real or of substance, not one which must be large or weighty. While in many cases, a merger or acquisition would be caught by either the 'dominance' or the 'substantial lessening' test, there are some acquisitions that are more likely to be subject to the new test, for example, where an acquisition of a small effective competitor resulted in two well-matched competitors being left in the market.

13. The provisions dealing with related or associated corporations (subsections 50(1AA), (2), (2A), (2AA), (2AB), (2B), (2C)) have been removed from section 50. Under the new merger test, it is the effect on competition which is important, rather than the particular position of the acquiring firm. In determining whether competition is likely to be lessened, inter-firm relationships which are likely to exist after the merger may of course be a relevant consideration.

14. New subsection 50(3) provides a non-exhaustive list of matters which must be taken into account in determining whether an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition. The matters consist of well-understood economic concepts which are considered in determining whether competition would be, or is likely to be, substantially lessened. While they are economic concepts, as Bowen CJ and Fisher J of the Federal Court said in *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 44 ALR 667, it is intended that '[t]he economic meaning must be applied in a practical way to accommodate the concern of the Act with business and commerce'.

15. This is not an exhaustive list, and some of the factors are interrelated: nor is it intended to affect the interpretation of the phrase 'substantially lessening competition' in other provisions of the Principal Act. In considering a proposed acquisition, regard is to be had to the factors specified in the list, but of course there may be other factors that would need to be taken into account in any particular case, and the weight to be given to any factor, whether included in the list or otherwise found to be relevant, has to be determined in the context of the facts of the case.

(a) the actual and potential level of import competition in the market;

16. With increasing internationalisation of the Australian economy, import competition is an increasingly important element in assessing the competitive impact of mergers. Reductions in tariffs and other forms of industry assistance have exposed many sectors of the economy to increasing levels of international competition. Such competition can help maintain competitive markets in Australia, even with a very small number of domestic firms.

17. As with competition or potential competition from domestic firms, actual or potential import competition can act as an important discipline on the competitive conduct of firms in the domestic market. A merger in a market which is exposed to actual or potential import competition is less likely to result in a substantial lessening of competition than would be the case if there was no actual or potential import competition.

(b) the height of barriers to entry to the market;

18. Barriers to entry can be any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms, including, for example, the presence of economies of scale or scope, control over essential inputs or government regulations which restrict entry into the market. Barriers to entry can include barriers to exit, such as high 'sunk' costs. Properly understood, the height of barriers to entry represents the ease with which new firms can enter or leave the market now or in the future.

19. The threat of entry of a new firm into a market can operate as an ongoing catalyst for competitive conduct. If entry barriers are low, the threat of new entry can restrain the merged firm from raising prices even when a relatively small number of competitors remain in the market. Conversely, when entry barriers are high, a merger may enhance the scope for price increases or tacit collusion among the remaining firms without attracting new entry.

20. A merger may of itself change the height of barriers to entry and hence the level of competition in the market. Alternatively the merger may have no effect on the height of barriers to entry but an assessment of its effects on competition would need to consider the

prospect of new entry, which is determined by the height of barriers to entry.

(c) the level of concentration in the market;

21. Almost all mergers result in some increased concentration in the hands of a participant in the relevant market, but that in itself is not sufficient to establish a substantial lessening of competition. A merger which results in a large increase in concentration in the relevant market may reduce competition in the market by increasing the market power of the merged firm or increasing the scope for tacit collusion or co-ordination among the remaining competitors.

22. It is possible that a merger which increases concentration may have the effect of enhancing post-merger competition. For example, two merging firms may be better placed to compete effectively with the remaining firms and competition may be heightened in a more concentrated market.

(d) the degree of countervailing power in the market;

23. The notion of countervailing power refers to the extent to which market power held by the merged firm could be offset by market power held by customers or suppliers. The degree of countervailing power held by buyers or suppliers may have an impact on the level of competition in the market, in so far as this may limit the capacity of the acquirer to take advantage of any increase in market power following the merger.

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

24. This factor may be an indicator of the extent to which the merged firm would acquire market power sufficient to allow it to raise prices significantly above cost which would not be neutralised by the competitive responses of competitors, new entrants or imports. It may therefore suggest that the merger has caused a substantial lessening of competition compared to the pre-merger situation. The ability of a firm to significantly and sustainably increase prices significantly above cost tends to suggest that its pricing policy is not inhibited by other participants, including customers or potential competitors in the market.

25. However, the ability of the merged firm to significantly increase prices following the merger may not necessarily indicate that market power has been acquired if there is reason to believe that pre-merger prices were below sustainable levels. In those circumstances a price increase following the merger may signify a return to normal profits.

26. The capacity to increase profit margins significantly and sustainably could indicate a substantial lessening of competition. For example, following a vertical merger which achieves control over essential inputs, the merged firm may be able to raise the prices at which it sells to competitors in intermediate markets, thereby increasing its revenue and thus its profit margins, while raising the input costs of its competitors above its own.

(f) the extent to which substitutes are available in the market or are likely to be available in the market

27. The availability of substitute products in a market where a merger takes place allows consumers to purchase alternative products if the merged firm seeks to raise its price. Similarly the scope for substitution in production may limit the scope for the merged firm to raise prices. For example, in response to any attempt to increase prices, manufacturers

of other products which use similar production processes may be able to switch at low cost to producing the merged firm's product. In such circumstances it is less likely that the merger would substantially lessen competition. Similarly, if new substitutes are likely to be available if the merged firm raises its price, the merged firm is likely to be constrained in its behaviour, and competition is less likely to be lessened.

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

28. Markets are dynamic in the sense that demand for products may increase or decrease over time with changes in taste, quality and incomes. Competing firms continually upgrade and improve products in order to remain competitive. The extent of market growth, innovation and product differentiation by competitors are dynamic factors which in the short term tend to reduce or eliminate market power resulting from a merger. Conversely, brand reputation and loyalty is a factor which tends to increase market power. The creation or enhancement of market power has a bearing upon whether competition is lessened.

29. There may be a high degree of competition in a market even when there are only a small number of producers. The dynamic nature of competition is illustrated by cases where a merger results in a significant increase in market share for the acquiring firm, but where this market share is later eradicated due to a competitor's successful response in the form of lower prices or new or improved products or services.

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

30. The removal of a vigorous and effective competitor, even where that firm has a small market share, may have a significant impact on the level of competition in the market. Balanced against this, the removal of a vigorous and effective competitor may not be of significant concern where barriers to new market entrants are low, or meaningful import competition exists.

(i) the nature and extent of vertical integration in the market;

31. Vertical mergers can lessen competition where prior to the merger one of the firms has substantial market power at one market level which can be exploited in the relevant upstream or downstream market as a result of the merger; for example by denying downstream competitors access to essential inputs.

32. Horizontal mergers involving vertically integrated firms will tend not to have adverse effects on competition where viable competition remains at each market level following the merger. Conversely, a horizontal merger by a vertically integrated firm may increase market power at one market level which can be exploited at another.

Clause 7 - Acquisitions that occur outside Australia

33. Section 50A deals with certain acquisitions occurring outside Australia that have anticompetitive effects within Australia. This clause amends section 50A to maintain consistency with the amended section 50.

34. Subsection 50A(1) applies where, *inter alia*, an acquisition occurring outside Australia results in the acquiring person obtaining a controlling interest in a corporation or

corporations in Australia. To aid interpretation of the section, the expression 'the first controlling interest' is to be inserted into subsection 50A(1) to refer to the acquisition which occurs outside Australia, and the expression 'the second controlling interest' is to be inserted to refer to the obtaining of a controlling interest in a corporation or corporations in Australia (subclauses 7(a), (b) and (c)).

35. Subsection 50A(1) applies where the Tribunal is satisfied that the obtaining of the second controlling interest will have or is likely to have the anticompetitive effect specified in paragraph 50A(1)(a) and the Tribunal is satisfied in terms of paragraph 50A(1)(b) that the obtaining of the second controlling interest would not result in sufficient public benefit that it ought to be disregarded for the purposes of the section. Subclause 7(d) omits paragraphs 50A(1)(a) and 50A(1)(b). A new paragraph 50A(1)(a) is substituted which provides that the relevant anticompetitive effect is a substantial lessening of competition in a market. A new paragraph 50A(1)(b) is substituted which, by referring to 'the second controlling interest', clarifies the operation of this paragraph, but otherwise reproduces the earlier paragraph 50A(1)(b).

36. Subclause 7(e) inserts new subsection 50A(1A) after subsection 50A(1) to provide that in determining whether a substantial lessening of competition will occur, or is likely to occur, regard must be had to the list of matters set out in new subsection 50(3). As with section 50, it is made clear that the list is not an exhaustive one for the purposes of section 50A.

37. Subclause 7(e) also inserts new subsection 50A(1B) after subsection 50A(1A) to provide that, in determining whether the obtaining of the second controlling interest ought to be disregarded for the purposes of the section, on the grounds of public benefit under paragraph 50A(1)(b), the Tribunal must regard certain things as public benefits and must consider certain other matters. Without limiting the range of other possible public benefits, paragraph 50A(1B)(a) will provide that a significant increase in the real value of exports or a significant substitution of domestic products for imported goods is to be regarded as a public benefit. Paragraph 50A(1B)(b) will provide that in considering whether public benefits are such that the obtaining of the second controlling interest ought to be disregarded for the purposes of the section, the Tribunal must consider all other relevant matters that relate to the international competitiveness of any Australian industry.

Clause 8 - Unconscionable Conduct

38. This clause has the effect of transferring existing section 52A to the new Part IVA and renumbering it as section 51AB.

Clause 9 - Insertion of new Part

39. This clause inserts new Part IVA, into which new section 51AA is inserted.

40. Subsection 51AA(1) provides that a corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

41. The provision embodies the equitable concept of unconscionable conduct as recognised by the High Court in *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. In *Amadio,* Mason J (as he then was) discussed the principles of unconscionable conduct:

> "... relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage" (at p 461).

42. It is not possible to exhaustively list all situations of special disability or disadvantage. In *Blomley v Ryan*, Fullagar J observed:

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other" (at p 405).

43. It is clear that the equitable principles of unconscionable conduct do not embrace conduct which, with nothing more, is merely unfair or unreasonable, or which merely amounts to a hard bargain.

44. Section 51AA is not intended to extend the principles of unconscionable conduct beyond those recognised by the courts of this country under the laws of equity. The advantages of providing a statutory prohibition for conduct which is already dealt with by equity lie in the availability of remedies under the Principal Act, the potential involvement of the Commission including the possibility of representative actions, and the educative and deterrent effect of a legislative prohibition in the Principal Act.

45. The phrase 'the unwritten law, from time to time, of the States and Territories' denotes the non-statutory law (ie the law which is not contained in statutes, instruments under statutes or prerogative instruments) as developed by the courts of common law and equity. Because of the position of the High Court of Australia as the ultimate appellate court for all States and Territories, the 'unwritten law' of the States and Territories is the same. If a court in a State or Territory were thought to deviate from the principles recognised by the High Court, another court exercising its jurisdiction in relation to section 51AA would not be bound to follow that deviation, unless it was satisfied that to do so was consistent (or at least not inconsistent) with the law as recognised by the High Court from time to time.

46. Subsection 51AA(2) provides that section 51AA does not apply to conduct which is within the ambit of section 51AB (old section 52A). Section 51AB prohibits unconscionable conduct involving goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. Section 51AA will deal with conduct involving other forms of goods or services, and will thus apply to a greater range of commercial settings. The insertion of section 51AA is not intended to modify the operation of section 51AB, or to imply that section 51AB has a meaning which differs from the current meaning of section 52A.

47. The prohibition of unconscionable conduct in subsection 51AB(1) is expressed in different fashion to the prohibition in subsection 51AA(1), and is affected by the operation of subsections 51AB(2), (3), (4), (5) and (6). To the extent that section 51AB may diverge from the equitable principles of unconscionable conduct, its interpretation will not affect the interpretation of section 51AA.

48. Amendments which are consequential on the insertion of the new Part, and the renumbering of section 52A as section 51AB, are included in Schedule 1 - see clause 19. The consequential amendments provide for an extended operation of Part IVA as provided by sections 5 and 6, remedies for breaches of Part IVA (injunctions under section 80 and orders under sections 87 and 87A) and other procedural, evidentiary and jurisdictional matters. There are to be no pecuniary penalties or fines for contraventions of Part IVA.

Clause 10 - Pecuniary penalties

49. This clause amends section 76 of the Principal Act to increase pecuniary penalties for most breaches of Part IV. The maximum penalty for contravention by a body corporate of a provision of Part IV, other than sections 45D or 45E, will be $10 million (increased from $250,000), and the maximum pecuniary penalty for a contravention of Part IV by a natural person will be $500,000 (increased from $50,000).

50. The maximum pecuniary penalty for contraventions of sections 45D or 45E will continue to be $250,000 for a body corporate. Subsection 76(2) provides that pecuniary penalties do not apply to contraventions of sections 45D or 45E by natural persons.

51. Subclause 10(2) provides that the amendments made to section 76 will apply only to acts or omissions that happen after the commencement of the Act. This reproduces the policy of section 4F of the *Crimes Act 1914*, which does not apply to section 76 because breaches of Part IV of the Principal Act are not criminal offences.

Clause 11 - Offences against Part V

52. This clause amends section 79 of the Principal Act to provide that the maximum fine for a breach of Part V will be $40,000 (increased from $20,000) in the case of a natural person and $200,000 (increased from $100,000) in the case of a body corporate.

53. The increases in penalties will apply to offences committed after the commencement of the Act by virtue of section 4F of the *Crimes Act 1914.*

Clause 12 - Divestiture

54. This clause deletes the words 'or (b)' from subsection 81(1B) of the Principal Act. This amendment is consequential on amendments to section 50A made by clause 7.

Clause 13 - Insertion of new section

55. This clause inserts a new section 87B - 'Enforcement of Undertakings' - after section 87A of the Principal Act. Subsection (1) provides that the Commission may accept a written undertaking given by a person in connection with a matter in relation to which the Commission has a power or function under the Principal Act (other than Part X). This provision provides legislative recognition of a practice already adopted by the Commission in appropriate cases. The content of an undertaking will be a matter for agreement between the Commission and the person giving the undertaking.

56. Subsection (2) provides that the person giving an undertaking may withdraw or vary the undertaking at any time with the consent of the Commission.

57. Subsection (3) provides the Commission with a right to enforce undertakings given under subsection (1). Where the Commission considers that a term of an undertaking has been breached it may apply to the Federal Court for an order under subsection (4).

58. Subsection (4) provides that, where the Court is satisfied that a term of an undertaking has been breached by the person giving the undertaking, it may make all or any of the orders described in paragraphs (a) to (d). Paragraph (a) provides for an order directing the person who has breached the term of an undertaking to comply with that term. Paragraph (b) provides for an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit directly or indirectly obtained that is reasonably attributable to the breach. This paragraph has been included to ensure that persons should not be able to profit from their own breach of an undertaking. Paragraph (c) provides for an order directing the person to compensate any other person who has suffered loss or damage as a result of the breach. Paragraph (d) permits the Court to make any other order that it considers appropriate. This is a wide power which would encompass at least orders of the kind mentioned in sections 80, 87(2) and 87A(2) and orders ordinarily made to provide remedies at law or equity under the Court's inherent jurisdiction. It is intended to provide the Court with suitable flexibility to deal with the range of circumstances which may arise in the enforcement of undertakings.

Clause 14 - Power of Commission to grant authorisations

59. This clause amends subsection 88(9) of the Principal Act, which deals with applications for authorisations of mergers. The amendment is consequential on the amendments made to section 50 which extend the scope of section 50 to acquisitions by corporations of assets of a person.

Clause 15 - Procedure for applications

60. This clause amends section 89 of the Principal Act which relates to the procedures for applications for authorisations, by substituting assets of 'a person' for assets of a 'body corporate'.

Clause 16 - Determination of applications for authorisations

61. This clause amends section 90 of the Principal Act. A new subsection (9A) is to be inserted following subsection (9), addressing the question of what is a public benefit for purposes of merger authorisations. Subsection (9) provides that the Commission shall not grant an authorisation under sub-section 88(9) in respect of a proposed acquisition coming within sections 50 or 50A unless it is satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

62. New paragraph (9A)(a) will provide that in assessing benefits to the public under subsection (9) the Commission must regard a significant increase in the real value of exports, or a significant substitution of domestic products for imported goods, as being a public benefit. It is made explicit that these are not the only possible public benefits and it will continue to be for the Commission to assess, on the merits of each individual case, whether there are other possible public benefits and the weight to be placed upon any relevant benefits.

63. The value of exports is the value of goods and services which are produced in Australia and sold overseas, and the real value is the dollar value of those goods and services, discounted to account for changes in the level of Australian prices. The word 'significant' is not intended to be interpreted in a relative sense. The effect on exports of any single merger is likely to be insignificant when assessed against the value of all Australian exports. Rather, the word 'significant' should be interpreted in an absolute

sense, and is intended to mean increases which, when viewed in isolation, are not insignificant or ephemeral.

64. A substitution of domestic products for imported goods occurs when consumers alter their consumption to choose goods produced in Australia, where previously they had chosen goods produced outside Australia. This factor looks at the overall balance of choices made by individual consumers. If the total level of consumption of an Australian product rises at the expense of consumption of foreign-produced goods, and this change is attributable to the merger, the merger may be said to have produced a substitution of domestic products for imported goods. As with the real value of exports, the word 'significant' should be interpreted in an absolute sense to mean not insignificant or not ephemeral.

65. Paragraph (9A)(b) provides that in determining public benefit for the purposes of subsection (9) the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry. Changes in international competitiveness may be attributed to a wide range of matters, which it is impossible to list exhaustively, but could include matters such as changes in the quality of inputs, improvements in technology, or better work practices. The range is qualified by the requirement that the matters looked at be 'relevant', which indicates that they should be attributable to the merger in question. It is not required that the improvement in international competitiveness be in the industry in which the merger occurs.

66. Subclause 16(c) amends paragraphs 11(a) and (b) to provide that the Commission must make a determination in merger authorisation cases within 30 days, subject to subsections (12), (13) and (15). This amendment shortens the time limit from the previous 45 days.

67. Subclause 16(d) inserts a new subsection (11A) which will provide that the Commission may extend the period mentioned in subsection (11) to 45 days if it considers the matter is too complex to be determined in 30 days and it notifies the applicant in writing within the initial 30 day period. Subsections (12),(13) and (15) which provide for variations in the time limit in certain circumstances, for example where information has been sought from the applicant, will apply to both the 30 and 45 day periods.

Clause 17 - Register of notifications

68. This clause amends subparagraph 95(3)(a)(ii) by omitting a reference to assets of a body corporate and replacing it with a reference to assets of a person. The amendment is consequential on the amendments made by clause 6 which extend the scope of section 50 to cover acquisitions by corporations of assets of a person.

Clause 18 - Functions and powers of Tribunal

69. This clause inserts a new subsection (1A) into section 102 of the Principal Act, to introduce a 60 day time limit for determinations by the Tribunal in which it reviews determinations of the Commission relating to the grant or revocation of merger authorisations under subsection 88(9). New subsection (1A) also provides that this time limit will not apply if the Tribunal considers that the matter cannot be properly dealt with within 60 days, either because of its complexity or because of other special circumstances.

70. Subclause (2) provides that subsection (1A) will only apply to applications for review that are made after the commencement of the Act. No time limits will apply to applications for review received before that date.

Clause 19 - Other amendments of the Principal Act

71. This clause provides that further amendments to the Principal Act are to be made as set out in Schedule 1. These amendments are consequential on the insertion of new Part IVA and the renumbering and movement of section 52A to section 51AB.

Clause 20 - Amendment of other Acts

72. This clause provides that Acts specified in Schedule 2 are amended as set out in the Schedule.

Clause 21 - Application of the merger amendments

73. This clause provides for the application of the merger amendments to acquisitions that happen after the commencement of the amendments, subject to the preservation of the existing regime for certain proposed acquisitions which were the subject of court proceedings or authorisation applications.

Schedule 1

74. Schedule 1 contains a list of amendments which are consequential on the amendments made by clauses 8 and 9.

Schedule 2

75. Schedule 2 provides, pursuant to clause 20, a list of amendments to Acts other than the Principal Act.

76. Section 10 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* provides for the transfer of certain proceedings between certain courts. Schedule 2 amends subparagraph 10(b) to insert a reference to the new Part IVA.

77. Section 28 of the *Telecommunications Act 1991* is amended to refer to 'the *Trade Practices Act 1974* (as in force immediately before the commencement of the *Trade Practices Legislation Amendment Act 1992*)'. Certain provisions of the *Telecommunications Act* rely on the concept of dominance of a market as defined by section 50 of the Principal Act. Changing the merger test in section 50 from dominance to substantial lessening of competition necessitates this amendment.