

Trade Practices

No. 57 of 1971

An Act to amend the *Trade Practices Act* 1965–1969 in relation to Resale Price Maintenance and to amend sections 11 and 24 of that Act.

[Assented to 25 May 1971]

BE it enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

Short title
and citation.

1.—(1.) This Act may be cited as the *Trade Practices Act* 1971.

(2.) The *Trade Practices Act* 1965–1969* is in this Act referred to as the Principal Act.

(3.) The Principal Act, as amended by this Act, may be cited as the *Trade Practices Act* 1965–1971.

Commence-
ment.

2.—(1.) Subject to the next succeeding sub-section, this Act shall come into operation on a date to be fixed by Proclamation.

(2.) Sections 1, 2 and 15 of this Act shall come into operation on the date on which this Act receives the Royal Assent.

(3.) Each Part and section inserted in the Principal Act by this Act shall come into operation on the date fixed under sub-section (1.) of this section.

* Act No. 111, 1965, as amended by No. 39, 1966; No. 30, 1967; No. 120, 1968; and No. 40, 1969.

(4.) At any time after this Act has received the Royal Assent and before the date fixed under sub-section (1.) of this section, regulations may be made under the Principal Act as amended by this Act as if the whole of this Act had come into operation on the date on which this Act received the Royal Assent but regulations so made do not come into operation before the first-mentioned date.

3. Section 3 of the Principal Act is amended—

Parts.

(a) by inserting after the words—

“ Division 3.—Review of Determinations, and Judicial Determination of Questions of Law (Sections 62–66).”

the words—

“ Part VIA.—Resale Price Maintenance.

Division 1.—The Unlawful Practice of Resale Price Maintenance (Sections 66A–66G).

Division 2.—Exemptions (Sections 66H–66L).

Division 3.—General (Sections 66M–66N).”; and

(b) by omitting the words—

“ Civil Remedies (Sections 88–90).”

and inserting in their stead the words—

“ Civil Remedies (Sections 88–90AB).”.

4. Section 5 of the Principal Act is amended by inserting after the definition of “ the Court ” the following definition:—

Definitions.

“ ‘ the practice of resale price maintenance ’ means the practice of resale price maintenance referred to in Part VIA.;”.

5. Section 7A of the Principal Act is amended by inserting in sub-section (2.), after paragraph (b), the following paragraph:—

Extended operation of Act in relation to Tasmania.

“ (ba) the practice of resale price maintenance is a practice in relation to which this section applies only if it is engaged in, or is proposed to be engaged in, wholly or partly in Tasmania;”.

6. Section 11 of the Principal Act is amended—

Terms and conditions of appointment.

(a) by omitting from sub-section (2.) the words “ the Governor-General determines ” and inserting in their stead the words “ are prescribed ”; and

(b) by omitting from sub-section (3.) the words “ the Attorney-General determines ” and inserting in their stead the words “ are prescribed ”.

7. Section 21 of the Principal Act is amended by inserting in sub-section (1.), after the words “ of Part VI.”, the words “ (including that Division in its application by virtue of section 66N of this Act) ”.

Decision of questions.

Terms and
conditions of
appointment.

8. Section 24 of the Principal Act is amended—

- (a) by omitting from sub-section (2.) the words “ the Governor-General determines ” and inserting in their stead the words “ are prescribed ”; and
- (b) by omitting from sub-section (3.) the words “ the Attorney-General determines ” and inserting in their stead the words “ are prescribed ”.

Further
consideration
by Tribunal of
determinations
and orders
upon change of
circumstances.

9. Section 58 of the Principal Act is amended—

- (a) by inserting after sub-section (1.) the following sub-section:—
 - “ (1A.) In the application of this section in relation to Part VIA., the Tribunal—
 - (a) may, by order, give such directions as it thinks fit as to giving notice of the application; and
 - (b) may make an order rescinding a determination without substituting another determination for it.”; and
- (b) by adding at the end of sub-section (6.) the words “ or under Part VIA.”.

Reconsideration
by Tribunal.

10. Section 65 of the Principal Act is amended by inserting in sub-section (4.), after the words “ under Part VI.”, the words “ or under Part VIA., as the case may be ”.

11. After Part VI. of the Principal Act, the following Part is inserted:—

“ PART VIA.—RESALE PRICE MAINTENANCE.

“ *Division 1.—The Unlawful Practice of Resale Price Maintenance.*

Application:
of Part.

“ 66A. This Part applies to and in relation to the practice of resale price maintenance where that practice is engaged in or is proposed to be engaged in—

- (a) in the course of trade or commerce with other countries or among the States;
- (b) so as to tend to prevent or hinder transactions, acts or operations in the course of trade or commerce referred to in the last preceding paragraph;
- (c) by—
 - (i) a trading corporation formed within the limits of the Commonwealth;
 - (ii) a financial corporation so formed; or
 - (iii) a foreign corporation;
- (d) in respect of the supply of goods to the Commonwealth or to an authority or instrumentality of the Commonwealth; or
- (e) in the course of trade or commerce—
 - (i) within a Territory;
 - (ii) between a State and a Territory;
 - (iii) between two Territories; or
 - (iv) between a Territory and a place outside Australia,

and, except as provided by section 7A of this Act, not otherwise.

“ 66B.—(1.) It is unlawful to engage in the practice of resale price maintenance.

Resale price maintenance an unlawful practice.

“ (2.) Subject to this Part, a person (in this section called ‘ the supplier ’) engages in the practice of resale price maintenance if—

- (a) the supplier makes it known to a second person that he will not supply goods to the second person unless the second person agrees to sell those goods at a price not less than a price specified by the supplier;
- (b) the supplier induces, or attempts to induce, a second person not to sell, at a price less than a price specified by the supplier, goods supplied to the second person by the supplier;
- (c) the supplier enters into an agreement, or offers to enter into an agreement, for the supply of goods to a second person, being an agreement one of the terms of which is, or would be, that the second person will not sell the goods at a price less than a price specified, or that would be specified, by the supplier;
- (d) the supplier withholds the supply of goods to a second person for the reason that the second person—
 - (i) has not agreed as mentioned in paragraph (a) of this sub-section; or
 - (ii) has sold, or is likely to sell, goods supplied to him by the supplier, or goods supplied to him by a third person who, directly or indirectly, has obtained the goods from the supplier, at a price less than the price specified by the supplier as the price below which the goods are not to be sold;
- (e) the supplier withholds the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, goods from the second person—
 - (i) has not agreed to sell those goods at a price not less than a price specified by the supplier; or
 - (ii) has sold, or is likely to sell, goods supplied to him, or to be supplied to him, by the second person, at a price less than the price specified by the supplier as the price below which the goods are not to be sold;
- (f) the supplier uses, in relation to any goods supplied, or that may be supplied, by him to a second person, a statement of a price that is likely to be understood by that person as the price below which the goods are not to be sold.

“ (3.) For the purposes of the last preceding sub-section, where—

- (a) a price is specified by another person on behalf of the supplier, it shall be deemed to have been specified by the supplier;
- (b) the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price specified by another person in respect of those goods, or in

respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier;

- (c) a formula is specified by or on behalf of the supplier and a price may be ascertained by calculation from, or by reference to, that formula, that price shall be deemed to have been specified by the supplier; and
- (d) the supplier makes it known, in respect of goods, that the price below which those goods are not to be sold is a price ascertained by calculation from, or by reference to, a formula specified by another person in respect of those goods, or in respect of goods of a like description, that price shall be deemed to have been specified, in respect of the first-mentioned goods, by the supplier.

“(4.) In the last preceding sub-section, ‘ formula ’ includes a set form or method.

“(5.) For the purposes of sub-section (2.) of this section, anything done by a person acting on behalf of, or by arrangement with, the supplier shall be deemed to have been done by the supplier.

“(6.) This section does not apply in respect of a practice that is specifically authorized or approved by an Act, a State Act or an Ordinance of a Territory or by regulations under such an Act or Ordinance.

Recommended
prices.

“ 66C. For the purposes of paragraph (b) of sub-section (2.) of the last preceding section, the supplier is not to be taken as inducing, or attempting to induce, a second person as mentioned in that paragraph in relation to any goods by reason only of his having given notification in writing to the second person of the price that he recommends as appropriate for the sale of those goods, provided that there is included in the notification, and in each writing that refers, whether expressly or by implication, to the notification, a statement to the following effect:—

‘ The price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation.’

Withholding
the supply
of goods.

“ 66D.—(1.) For the purposes of paragraph (d) or (e) of sub-section (2.) of section 66B of this Act, a person shall be deemed to withhold the supply of goods to another person if—

- (a) he refuses or fails to supply those goods to, or as requested by, the other person;
- (b) he refuses to supply those goods except on terms that are disadvantageous to the other person;
- (c) in supplying goods to the other person, he treats that person less favourably (whether in respect of time, method or place of delivery or otherwise) than he treats other persons to whom he supplies the same or similar goods; or

- (d) he causes or procures a person to withhold the supply of goods to another person as mentioned in any of the last three preceding paragraphs.

“(2.) Paragraph (d) of sub-section (2.) of section 66B of this Act does not apply in relation to the withholding by a person of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the first-mentioned person at less than their cost to him—

- (a) for the purpose of attracting to the establishment at which the goods were sold persons likely to purchase other goods; or
(b) otherwise for the purpose of promoting the business of that other person.

“(3.) For the purposes of the last preceding sub-section, there shall be disregarded—

- (a) a sale of goods that took place before the commencement of this section;
(b) a genuine seasonal or clearance sale of goods that were not acquired for the purpose of being sold at that sale; or
(c) a sale of goods that took place with the consent of the supplier of the goods.

“66E.—(1.) For the purposes of paragraph (f) of sub-section (2.) of section 66B of this Act, if—

- (a) a statement is applied to goods, whether by being woven in, impressed on, worked into or annexed or affixed to the goods or otherwise;
(b) a statement is applied to a covering, label, reel or thing in or with which goods are supplied; or
(c) a statement is used in a sign, advertisement, invoice, catalogue, business letter, business paper, price list or other document or otherwise in a manner likely to lead to the belief that it refers to goods,

the statement shall be deemed to have been used in relation to those goods.

“(2.) For the purposes of the last preceding sub-section, ‘covering’ includes a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper and ‘label’ includes a band or ticket.

“(3.) Paragraph (f) of sub-section (2.) of section 66B of this Act does not apply where a statement of a price was applied to goods as mentioned in paragraph (a) or (b) of sub-section (1.) of this section if the statement was so applied before the date of commencement of this section and the goods were supplied within the period of twelve months commencing on that date.

Statements
as to the
minimum
price of goods.

Criminal
proceedings
not to be
brought.

“ 66F. Criminal proceedings do not lie against a person by reason only that he—

- (a) has engaged in, or has attempted to engage in, the practice of resale price maintenance;
- (b) has aided, abetted, counselled or procured a person to engage in that practice;
- (c) was in any way directly or indirectly knowingly concerned in, or party to, the engagement by a person in that practice; or
- (d) conspired with others to engage in that practice.

Agreements
providing for
resale price
maintenance
unenforceable.

“ 66G. Where the practice of resale price maintenance is provided for by an agreement, the agreement is unenforceable as regards engaging in the practice.

“ *Division 2.—Exemptions.*

Applications for
exemptions.

“ 66H.—(1.) A person may apply to the Tribunal for a determination exempting from the application of this Part the goods described in the application, being goods that he supplies or is intending to supply otherwise than by way of sale by retail.

“ (2.) Such an application shall be as prescribed and shall be lodged with the Registrar.

“ (3.) The prescribed fee shall be paid to the Registrar upon the lodging of the application and if the fee is not paid the application shall be deemed not to have been lodged.

“ (4.) The applicant shall serve a copy of the application on the Commissioner and he shall be taken to be a party to the proceedings.

“ (5.) As soon as practicable after an application has been lodged with the Registrar, the Registrar shall cause notice of the application to be published in the *Gazette* and may also cause the notice to be published in such newspapers (if any) as he thinks fit.

“ (6.) The notice shall include the name of the applicant and a description of the goods to which it relates.

“ (7.) The applicant may, by leave of the Tribunal, amend the application and, where leave is so granted, shall serve a copy of the application as amended on the Commissioner.

“ (8.) Where an application is amended, the Registrar shall cause notice of the amended application to be advertised as provided by subsections (5.) and (6.) of this section.

Directions to
amend.

“ 66J. The Tribunal may, on application by the Commissioner, direct an applicant to amend his application—

- (a) so as to describe more appropriately the goods in respect of which the application is made; or
- (b) so as to exclude certain goods from the application for the reason that the Tribunal cannot otherwise deal satisfactorily with the application.

“ 66K.—(1.) The Tribunal shall, after making such inquiry as it thinks fit—

Determination
of applications
for exemption.

- (a) make a determination exempting all or any of the goods the subject of the application from the application of this Part; or
- (b) make a determination dismissing the application.

“(2.) The Tribunal shall not make a determination exempting goods from the application of this Part unless the Tribunal is satisfied that, unless the exemption is granted—

- (a) the quality of the goods available for sale, or the varieties of the goods so available, would be substantially reduced to the detriment of the public as consumers or users of those goods;
- (b) the number of establishments in which the goods are sold by retail would be substantially reduced to the detriment of the public as consumers or users of those goods;
- (c) the prices at which the goods are sold by retail would ultimately be increased to the detriment of the public as consumers or users of those goods;
- (d) the goods would be sold by retail under conditions likely to cause danger to the health of human beings or animals in consequence of their misuse; or
- (e) any necessary services provided in connexion with or after the sale of the goods by retail would cease to be so provided or would be substantially reduced to the detriment of the public as consumers or users of those goods.

“(3.) For the purposes of the last preceding sub-section, detriment to the public as consumers or users of goods shall not be taken into account unless it would outweigh any detriment to them as consumers or users of the goods (whether by the restriction of competition or otherwise) that would result if the determination were made.

“(4.) The Tribunal may, if it thinks fit, make one determination in respect of two or more applications.

“(5.) In this section—

‘ consumer ’ includes a person consuming for the purpose of, or in the course of, trade or business or for a public purpose and ‘ user ’ has a corresponding meaning;

‘ necessary services ’, in relation to goods, means services that, having regard to the character of the goods, are reasonably necessary to guard against the risk of injury in connexion with the consumption, installation or use of the goods or are otherwise reasonably necessary for the benefit of consumers or users.

“ 66L. A determination under this Division has effect in respect of all the goods to which the determination relates and not merely in respect of goods of the applicant.

Exemption
extends to
goods of
others than
applicant.

“ Division 3.—General.

Evidentiary
provisions.

“ 66M.—(1.) Where, in proceedings under this Act by a person (in this section referred to as ‘ the plaintiff ’) against another person (in this section referred to as ‘ the defendant ’), it is claimed that the defendant has engaged in the practice of resale price maintenance and it is proved that—

- (a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph (a), (b), (c) or (d) of sub-section (1.) of section 66D of this Act;
- (b) during a period ending immediately before the time when the defendant so acted, the defendant had been supplying goods of the kind withheld to the plaintiff or to another person carrying on a business similar to that of the plaintiff; and
- (c) during the period of six months ending immediately before the time when the defendant so acted, the plaintiff, or a person who had obtained goods, directly or indirectly, from the plaintiff, to the knowledge of the defendant—
 - (i) did not, when requested to do so, enter into an agreement as mentioned in paragraph (a) of sub-section (2.) of section 66B of this Act;
 - (ii) sold, at a price less than a price specified by the defendant (or that, by virtue of sub-section (3.) of section 66B of this Act, is to be deemed to have been so specified), goods supplied by the defendant or by a person who, directly or indirectly, had obtained those goods from the defendant; or
 - (iii) had indicated to the defendant his intention so to sell goods supplied as mentioned in the last preceding sub-paragraph,

then, subject to the next succeeding sub-section, it shall be presumed, unless the contrary is proved, that the defendant withheld the supply of the goods for the reason that the plaintiff, or a person who had obtained goods, directly or indirectly, from the plaintiff, had acted as mentioned in sub-paragraph (i) or (ii), as the case may be, of paragraph (d) or (e) of sub-section (2.) of section 66B of this Act.

“ (2.) The last preceding sub-section does not apply where the plaintiff proves the matter mentioned in paragraph (b) or (c) of sub-section (1.) of section 66D of this Act but the terms disadvantageous to the plaintiff, or the less favourable treatment of the plaintiff, consisted only of a requirement by the defendant as to the time at which, or the form in which, payment was to be made or as to the giving of security to secure payment.

“ (3.) In the application of this section in proceedings by the Attorney-General or the Commissioner for an injunction, references to the plaintiff shall be read as references to a person specified in the application for the injunction as the person in relation to whom the defendant is claimed to have acted as mentioned in paragraph (a) of sub-section (1.) of this section.

“ 66N. Section 58 of this Act and Division 3 of Part VI. apply in relation to this Part as they apply in relation to that Part.”.

Application of certain provisions.

12. Section 88 of the Principal Act is amended by omitting sub-sections (1.) and (2.) and inserting in their stead the following sub-section:—

Actions for damages.

“ (1.) A person who suffers loss or damage by an act of another person that—

(a) was done in contravention of an order of the Tribunal in proceedings under Part VI.;

(b) constitutes the practice of resale price maintenance; or

(c) was done in contravention of section 85 or 86 of this Act,

may recover the amount of the loss or damage by action against that other person.”.

13. Section 89 of the Principal Act is amended by adding after the word “ Tribunal ” the words “ or of a court ”.

Deferment of hearing on application of Attorney-General.

14. After section 90 of the Principal Act the following sections are inserted in Part X.:—

“ 90AA.—(1.) Where a person has engaged in the practice of resale price maintenance, the Court may, on application by—

Injunctions.

(a) the Attorney-General;

(b) the Commissioner; or

(c) a person who has suffered loss or damage by reason of the first-mentioned person having engaged in that practice,

grant an injunction restraining the first-mentioned person from engaging in the practice of resale price maintenance in respect of such goods as are specified in the order.

“ (2.) The Court may rescind or vary an order made under the last preceding sub-section.

“ (3.) Proceedings for contempt of court in respect of an injunction granted under this section may be brought by a person referred to in any of the paragraphs of sub-section (1.) of this section.

“ 90AB. Jurisdiction is conferred on the Court to hear and determine actions and other proceedings under this Part and that jurisdiction is exclusive of the jurisdiction of any other court, other than the jurisdiction of the High Court under section 75 of the Constitution.”.

Jurisdiction of Court.

15. Section 97 of the Principal Act is amended by inserting in paragraph (a) of sub-section (1.), after the word “ Tribunal ” (second occurring), the words “, filed or lodged with the Registrar ”.

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

16. Section 103 of the Principal Act is amended by omitting from sub-section (1.) the words “ or examinable practice ” and inserting in their stead the words “, an examinable practice or the practice of resale price maintenance”.

Commissioner may require furnishing of information and production of documents.