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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRADE PRACTICES AMENDMENT BILL (NO 1) 2002

EXPLANATORY MEMORANDUM

(Circulated by authority of the Parliamentary Secretary to the Treasurer,
Senator the Hon Ian Campbell)

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TRADE PRACTICES AMENDMENT BILL (NO 1) 2002

Outline

1. The object of the *Trade Practices Act 1974* ('the TPA') is to enhance the welfare of all Australians through the promotion of competition and fair trading and provision for consumer protection (section 2 of the Act).
2. The amendments made by this Bill clarify the TPA's prohibition of pyramid selling, amend the law relating to defences to prosecutions, and correct a legislative oversight from a previous legislative amendment, to re-insert a penalty which was inadvertently omitted.
3. Section 61 of the TPA makes it illegal for corporations to promote or take part in pyramid selling schemes. The section is difficult to understand and the primary purpose of the present amendments is to re-write the provision in plain English.
4. The decision to re-draft the provision (and its 'mirror' offence provision, section 75AZO) stems from a decision by the Ministerial Council on Consumer Affairs in October 1999 recommending the preparation of a uniform plain English re-write for adoption by the Commonwealth and State/Territory jurisdictions. The aim was to clarify the intent of the provision and make it easier to understand, while not making substantial changes to the coverage of the existing provision. The redrafting of the provision was undertaken by the Parliamentary Counsel's Committee, which presented its draft legislation to the Standing Committee of Attorneys-General in December 2001.
5. The amendment to section 85 of the TPA made by the Bill restructures the defences provided by the section to exclude information in the nature of legal opinions or advice on the legal consequences of conduct from the type of information to which the defence applies. It seeks to clarify the original intent of the defence.
6. The amendment to subsection 155(6A) reinserts imprisonment as a penalty. The subsection was amended in 2001 by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001* to ensure compliance with the Criminal Code and to convert a reference to a specific penalty to penalty units. The imprisonment sanction which was provided prior to the passage of that Act was inadvertently omitted

Financial Impact Statement

There is no financial impact to the Commonwealth as a result of these measures.

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Notes on Individual Clauses

Clause 1 – Short Title

1. This clause provides the short title by which the Act may be cited.

Clause 2 – Commencement

2. This clause provides that Schedule 1 commences on the day the Bill receives Royal Assent.

Clause 3 – Schedule(s)

3. This clause makes it clear that the Act specified in the Schedule is amended or repealed as set out in the Schedule, and that the Schedule may also contain other provisions.

Schedule 1 - Amendment of the Trade Practices Act 1974

Item 1 – Section 61

4. Item 1 repeals the existing prohibition of pyramid selling in section 61 of the Act.

Item 2 – Division 1AAA – Pyramid Selling

5. Item 2 inserts a new Division 1AAA into Part V of the Act to replace section 61. The operation of the new Division is explained in the following Readers' Guide and Examples –

Readers' guide—pyramid selling legislation

1 This guide explains the law that prohibits pyramid selling in Division 1AAA.

2 It is illegal for a corporation to establish, promote or take part in any way in a pyramid selling scheme (see s 65AAB, def of *participate*, and s 65AAC(1)). It is also illegal for a corporation to attempt to induce another corporation or an individual to participate in a pyramid selling scheme (see s 65AAC(2)).

3 A pyramid selling scheme (see s 65AAD) is a scheme by which, in return for a payment by new participants (a *participation payment*), the prospect is held out to them of obtaining a payment (a *recruitment payment*) for the recruitment of further participants in the scheme. But the participation payments must be 'entirely or substantially induced' by the prospect of recruitment payments.

4 Pyramid selling schemes may (or may not) involve the marketing of goods or services.

- Marketing schemes may offer incentives to sales personnel for the recruitment of further sales personnel.

- However, these marketing schemes are not necessarily pyramid selling schemes. For example, many party-plan schemes for marketing cosmetics or other household products are legitimate schemes.

- For a marketing scheme to be held to be a pyramid selling scheme, the prospect of obtaining recruitment payments must be a substantial inducement for participation.

- Section 65AAE sets out some criteria for determining what is a 'substantial inducement'.

Examples—pyramid selling schemes

Example 1—Non-marketing scheme

Silver dollar scenario

The silver dollar scenario is promoted by SDS Pty Ltd. Frank participates in the *silver dollar scenario* by obtaining a ‘silver card’ (the *original card*) from Emma.

- The original card has a list of 5 numbered names on it: (1) Alice; (2) Bruno; (3) Carla; (4) David; (5) Emma.
- Frank must make a total payment of \$60 (the *participation payment* for s 65AAD(1)(a)) to participate in the scheme: \$20 to SDS Pty Ltd; \$20 to Alice (at no 1); and \$20 to Emma (at no 5).
- In return, SDS Pty Ltd gives Frank 3 silver cards for the recruitment of further participants. The names on the original card obtained from Emma have all been moved up, with Alice’s name removed, as follows: (1) Bruno (2) Carla (3) David; (4) Emma; (5) Frank.
- The prospect is thus held out to Frank of obtaining 2 payments (*recruitment payments* for s 65AAD(1)(b)) for the introduction of further participants:
 - \$60 (\$20 x 3) for the introduction of each of 3 participants directly by Frank himself; and
 - almost \$5,000 (potentially) on Frank’s name reaching no 1 position (by the chain of further recruitment initiated by Frank’s 3 recruits).
- The silver dollar scenario is a *pyramid selling scheme* if, as indicated by these facts, participation payments by new participants are entirely or substantially induced by the prospect of their receiving recruitment payments.

Example 2—Marketing scheme for personal development workshop

Personal enrichment plan

Georgi is attracted by a scheme (the *personal enrichment plan*) promoted by PEP Pty Ltd. Through the plan, PEP Pty Ltd holds out the prospect that if Georgi joins the plan, he will receive payments for recruiting other members to the personal enrichment plan, and for the recruitment of still further members by those recruits, and so on (*recruitment payments* for s 65AAD(1)(b)).

- Georgi is told that he must pay \$2 000 to attend a 1-day personal development workshop presented by Hui, the author of a popular self-help book.
- This is the *participation payment* for s 65AAD(1)(a).
- This is also a payment for a service (supplied by Hui) (see s 65AAE(1)).
- A comparable workshop in personal development with no recruitment aspects, and no connection with the personal enrichment plan, is offered by Raoul, an expert psychologist, for a payment of \$500 from each participant.

- The payment required for attendance at Raoul’s workshop, compared with the payment for Hui’s workshop, indicates that—
- the payment of \$2 000 for participation in the personal enrichment plan may not bear a reasonable relationship to the value of Hui’s workshop; and thus
- the participation payment may be ‘entirely or substantially induced’ by the prospect of recruitment payments (see s 65AAE(1)(a)).
- The small print of a promotional brochure given to Georgi states that he may attend Hui’s workshop (by paying \$2 000) without joining the plan.
- But Georgi is not told this by anyone associated with the plan.
- The lack of promotional emphasis given to the possibility of paying for attendance at the workshop without joining the plan also indicates that the participation payment may be ‘entirely or substantially induced’ by the prospect of recruitment payments (see s 65AAE(1)(b)).
- The brochure does make it clear, however, that payment for attendance at the workshop would not of itself entitle Georgi to membership of the personal enrichment plan. There are further conditions, as follows:
 - Actual attendance at the course and award of a course completion certificate by Hui.
 - Payment of an additional \$300 ‘application fee’ to PEP Pty Ltd.
 - Approval at an interview with an officer of PEP Pty Ltd.
- These additional membership conditions do not prevent the plan from being characterised as a pyramid selling scheme (see s 65AAD(3)(c)).
- The personal enrichment plan is a *pyramid selling scheme* if, as indicated by these facts, participation payments by new participants are entirely or substantially induced by the prospect of receiving recruitment payments.

Example 3—Marketing scheme offering discounts

Discount dress club

Sally is given a brochure by a friend inviting her to participate in a scheme (the *discount dress club*) by paying a \$200 membership fee to DDC Ltd, the promoter of the scheme (the *participation payment* for s 65AAD(1)(a)).

- The brochure states that if Sally joins the discount dress club, DDC Ltd would pay her commissions if she recruits 4 further members of the club, and for further recruitment by each of those members, and so on. These are *recruitment payments* for s 65AAD(1)(b).
- The commissions are partly in cash (financial benefits) and partly in the form of reinvestment in the discount club (non-financial benefits, potentially entitling Sally to further commissions).

Both are *payments* for s 65AAB.

- The \$200 payment would also entitle Sally to a 1% discount on purchases from a small chain of 5 dress shops.
- The \$200 is a *participation payment* for s 65AAD(1)(a).
- The \$200 is also a payment for a service (the discount) (see s 65AAE(1)).
- There are no directly comparable discount schemes currently operating with which to compare the discount dress club scheme. But the fact that the discount is small, and limited to a small chain of shops, indicates that—
- the payment of \$200 for participation in the discount dress club may not bear a reasonable relationship to the value of the discount; and thus
- the participation payment may be ‘entirely or substantially induced’ by the prospect of recruitment payments (see s 65AAE(1)(a)).
- Sally joins the discount dress club. As a member, Sally is entitled to the discounts, whether or not she recruits further members.
- But when she attends a workshop for new recruits, run for DDC Ltd by a company known as DDC Training Ltd, it is indicated that in trying to recruit members to the discount dress club, Sally should mention this only if the prospective member specifically asks.
- DDC Training Ltd recommends that the response to such a question should emphasise the prospects of recruitment payments rather than the benefit of the discounts.
- The lack of promotional emphasis given to the possibility of participating without recruiting further members also indicates that the participation payment may be ‘entirely or substantially induced’ by the prospect of recruitment payments (see s 65AAE(1)(b)).
- The discount dress club is a *pyramid selling scheme* if, as indicated by these facts, participation payments by new participants are entirely or substantially induced by the prospect of receiving recruitment payments.

Example 4—Marketing scheme for garden products

Green fingers foundation

Graham becomes a member of a scheme (the *green fingers foundation*) that requires the purchase of garden products from the promoters, GFF Ltd, to a minimum value every 3 months.

- Graham becomes a member by agreeing to buy garden products from GFF Ltd to a required minimum value of \$50 each quarter from the catalogue (a supply of goods for s 65AAE(1)) (the \$50 per quarter is the *participation payment* for s 65AAD(1)(a)).
- As a member of the foundation, Graham is entitled to a small commission on the sale of garden products by the foundation to other foundation members whom he recruits. This is a *recruitment payment* for s 65AAD(1)(b).

- The prices of the garden products are on the high side, but comparable to the retail price of similar products of comparable quality available elsewhere. In addition, special deals are offered to members to allow them to obtain some products more cheaply than through retail outlets. These facts indicate that—
- the participation payment may bear a reasonable relationship to the value of the garden products; and thus
- the participation payment may not be ‘entirely or substantially induced’ by the prospect of recruitment payments (see s 65AAE(1)(a)).
- The green fingers foundation is promoted with most emphasis on the garden products available through the scheme, and the special deals available. The entitlement to the commissions is presented as an additional, but not essential, benefit from membership.
- The promotional emphasis given to the marketing of garden products also indicates that the participation payment may not be ‘entirely or substantially induced’ by the prospect of recruitment payments (see s 65AAE(1)(b)).
- The green fingers foundation is not a *pyramid selling scheme* if, as indicated by these facts, participation payments by new participants are not entirely or substantially induced by the prospect of receiving recruitment payments.

Item 3 – Section 75AZO

6. Item 3 repeals the provision which makes pyramid selling a criminal offence and replaces it with a new provision creating offences related to participation in pyramid selling schemes. Pyramid selling schemes have the same meaning as in Division 1AAA of the Act

Item 4 – Application

7. Item 4 makes it clear that that the new provisions relating to pyramid selling apply only to conduct engaged in after the commencement of the sections.

Item 5 – Paragraphs 85(1)(a) and (b)

8. Item 5 repeals paragraphs 85(1)(a) and (b) and substitutes a new paragraph.
9. The present paragraph 85(1)(b) provides a defence to a charge under the unfair trading provisions of the Act (for example, the pyramid selling provisions) for a mistake made by the defendant ‘in reasonable reliance on information supplied by another person’.
10. The Supreme Court of South Australia, in its decision in *Gilmore v Poole-Blunden* ((1999) 74 SASR 1; 151 FLR 166), held that the corresponding defence in the South Australian fair trading law extends to a mistake made in reasonable reliance on an opinion about the legality of the defendant’s activities. This decision has since been followed by a magistrate in the NSW Local Court.

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11. The Standing Committee of Officials of Consumer Affairs (SCOCA), at its meeting in December 1999, agreed to seek a uniform amendment of the *Trade Practices Act 1974* (Cwlth) and the State Fair Trading laws in response to the *Gilmore* decision. SCOCA's intent was that the defence in paragraph 85(1)(b) (and its State and Territory fair trading law equivalents) be expressly restricted to mistakes of fact (not law) made in reliance on information supplied by another person.
 12. By the *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001* (Cwlth), a new subsection 85(1AA) was inserted into the TPA to the effect that the defence of mistake in paragraph 85(1)(a) 'is to be interpreted as having the same effect as section 9.2 of the *Criminal Code* has in relation to offences of strict liability'.
 13. Consideration was given to whether it was necessary for the proposed new paragraph 85(1)(a) to take the insertion of subsection 85(1AA) expressly into account. It was decided that there was no need to do so. The existence of subsection 85(1AA) does not compromise the effect of this amendment to section 85—the amendment still effectively removes any suggestion of a defence to fair trading offences based on mistake of law. Conversely, the amendment does not alter the intended effect of subsection 85(1AA).

Item 6 – Subsection 85(1A)

14. Item 6 is a consequential amendment having regard to the amendment made by Item 5.

Item 7 – Application

15. Item 7 makes it clear that that the amended defences in prosecutions for offences against provisions in Part VC apply only where the contravention occurs after the commencement of the amendment.

Item 8 – Subsection 155(6A)

16. Item 8 reinserts imprisonment as a penalty for a contravention of subsections 155(5) or (6). The subsection was amended in 2001 by the *Treasury Legislation Amendment (Application of Criminal Code) Act (No 2) 2001* to ensure compliance with the Criminal Code and the imprisonment sanction which was provided prior to the passage of that Act was inadvertently omitted.

Item 9 – Application

17. Item 9 makes it clear that that the persons may only be imprisoned for contravening subsections 155(6) and (7) where the contravention occurs after the commencement of the amendment.

