

FIRST PRINT

**INDUSTRIAL ARBITRATION (SECONDARY BOYCOTTS)
AMENDMENT BILL 1991**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Industrial Arbitration Act 1940 so as:

- (a) to provide for the recovery of pecuniary penalties from persons:
 - (i) who, in concert with others, engage in certain conduct ("secondary boycott conduct") that is intended to cause specified substantial economic disadvantage to the business of persons, other than those acting in concert, by either hindering or preventing their supplying or acquiring goods or services to or from other parties; or
 - (ii) who enter into, or give effect to, certain collusive contracts, arrangements or understandings with industrial unions of employees or their representatives containing provisions having the purpose of adversely affecting (in a specified manner) customary or obligatory arrangements relating to the supply or acquisition of goods or services to or from other persons; and
- (b) to empower the Industrial Commission of New South Wales to impose those penalties, to grant injunctions restraining persons from engaging in conduct prohibited by the proposed amendments and to award damages to persons who suffer loss or damage because of that conduct; and
- (c) to make other consequential amendments.

The prohibitions created by the proposed amendments are intended to complement and, should those sections be repealed, to replace the prohibitions presently contained in sections 45D (Boycotts) and 45E (Prohibition of contracts, arrangements or understandings affecting supply or acquisition of goods or services) of the Commonwealth Trade Practices Act 1974.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 gives effect to the Schedule of amendments.

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Clause 4 declares that the proposed amendments do not apply to conduct that occurred before those amendments commence.

SCHEDULE 1—AMENDMENTS

Secondary boycotts and other restrictive trade practices

Schedule 1 (1) inserts proposed Division 10 (consisting of proposed sections 44–52AA) into Part 3 of the Industrial Arbitration Act. Of the proposed sections:

Section 44 (Definitions) defines terms used in the proposed Division. The term “conduct” is defined so as to include refusing to do or wilfully refraining from doing something.

Section 45 (Division subject to legislative power of State) makes it clear that provisions of the proposed Division must be read down to give effect to the Commonwealth Constitution Act.

Section 46 (Application of Division to Crown etc.) applies the proposed Division to business activities of the Crown and statutory authorities and excepts any conduct of the Crown or any such authority that is authorised or approved by an Act or a statutory instrument from being prohibited.

Section 47 (Prohibition against secondary boycott conduct) creates the prohibition on engaging in secondary boycott conduct against another person (the “affected person”). The prohibition applies only where a person engages in conduct in concert with another or others.

Secondary boycott conduct is conduct that hinders or prevents the supply (by someone other than the persons acting in concert) of goods or services to the affected person or the acquisition (from someone other than the persons acting in concert) of goods or services by the affected person and that is engaged in for the purpose (and that has or is likely to have the effect) of causing:

- * substantial loss or damage to the business of the affected person; or
- * a substantial lessening of competition in any market in which the affected person acquires goods or services.

Section 48 (Exception—when affected person is the employer) excepts conduct aimed at one’s employer from being secondary boycott conduct.

Section 49 (Exception—conduct concerning remuneration, employment conditions etc.) excepts certain industrial action taken by employees over employment conditions or the dismissal of an employee from being secondary boycott conduct.

Section 50 (Exception—conduct authorised by Commonwealth Trade Practices Commission) excepts conduct authorised by the Commonwealth Trade Practices Commission from being secondary boycott conduct.

Section 51 (Exception—legitimate business activities) excepts conduct engaged in by a person whose dominant purpose is to preserve or further a business involving trade or commerce carried on by the person from being secondary boycott conduct.

Section 52 (Industrial unions of employees to be regarded as involved in conduct by members and officers) requires an industrial union of employees to be treated as having engaged in any secondary boycott conduct of two or more of its members or officers except where the union took all reasonable steps to prevent its members or officers from engaging in the conduct.

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- Section 52A (Liability of industrial unions for secondary boycott conduct)** provides for an industrial union of employees to be vicariously liable for any loss or damage caused by secondary boycott conduct engaged in by the union and to be so liable instead of its members or officers.
- Section 52B (Establishment of purpose—multiple purposes)** declares that conduct engaged in for various purposes can be regarded as engaged in for each of those purposes.
- Section 52C (Establishment of purpose—probable consequences)** allows the consequences of conduct to be sufficient (but rebuttable) evidence of the purpose of the conduct.
- Section 52D (Prohibition against certain arrangements)** prohibits certain collusive contracts, arrangements or understandings relating to the supply or acquisition of goods or services from being made between industrial unions of employees or their representatives and persons accustomed or obliged to supply or acquire the goods or services to or from third parties so as to affect a second party (unless the contract, arrangement or understanding is made in writing with the second party).
- Section 52E (Certain persons taken to be accustomed suppliers)** states a number of circumstances in which a person will be taken to be an “accustomed supplier”.
- Section 52F (Certain persons taken not to be accustomed suppliers)** declares that a person will not be an accustomed supplier if the contract under which the goods or services concerned were previously supplied has expired and the goods or services have subsequently been supplied by another person.
- Section 52G (Certain persons taken to be accustomed acquirers)** states a number of parallel circumstances in which a person will be taken to be an “accustomed acquirer”.
- Section 52H (Certain persons taken not to be accustomed acquirers)** declares that a person will not be an accustomed acquirer if the contract under which the goods or services concerned were previously acquired has expired and the former supplier has subsequently refused to supply the former acquirer with the goods or services.
- Section 52I (Certain arrangements not to be executed)** prohibits a person from giving effect to a provision of a contract, arrangement or understanding (whenever made) if the making of the contract, arrangement or understanding contravened section 52D or would have done so, had that section been in force when it was made.
- Section 52J (Exception—conduct authorised by Commonwealth Trade Practices Commission)** excepts conduct authorised by the Commonwealth Trade Practices Commission from constituting a contravention of proposed section 52D or 52I.
- Section 52K (Exception—legitimate business activities)** excepts conduct engaged in by a person whose dominant purpose is to preserve or further a business involving trade or commerce carried on by the person from constituting such a contravention.
- Section 52L (Establishment of purpose)** declares that a contract, arrangement or understanding entered into for various purposes can be regarded as having been entered into for each of those purposes.
- Section 52M (Interpretation)** extends the circumstances in which persons will be taken to have contravened the prohibitions referred to above. For example, a person knowingly concerned in, or who conspires with another in, contravening such a prohibition will be taken to have contravened it.

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Section 52N (Jurisdiction to grant injunction) empowers the Commission to grant an injunction (which may be an interim injunction) if satisfied that a person has engaged, or is proposing to engage, in any prohibited conduct.

Section 52O (Restrictive injunction) sets out circumstances in which an injunction may be granted restraining a person from engaging in conduct.

Section 52P (Mandatory injunction) sets out circumstances in which an injunction may be granted requiring a person to do something.

Section 52Q (Undertakings as to damages) prevents the Commission from requiring undertakings concerning the payment of damages as a condition of granting an interim injunction.

Section 52R (Pecuniary penalties) empowers the Commission to impose a pecuniary penalty for a contravention of any of the prohibitions referred to above or of an injunction. The maximum penalty is not to exceed 1,000 penalty units (currently \$100,000) in the case of a body corporate or an unincorporated industrial union of employees or 100 penalty units (currently \$10,000) in any other case.

Section 52S (Time for recovery of pecuniary penalties) limits the time within which a proceeding to recover a pecuniary penalty may be commenced.

Section 52T (Criminal proceedings not available) declares that proceedings for a criminal offence cannot be brought in respect of contraventions which may give rise to a proceeding for a pecuniary penalty under the proposed Division.

Section 52U (Order for damages) empowers the Commission to make orders for compensation for loss or damage caused because of conduct prohibited by the proposed Division.

Section 52V (Evidentiary provisions) allows findings in a proceeding for a pecuniary penalty to be evidence in an action for damages.

Section 52W (Exercise of jurisdiction) requires the jurisdiction of the Commission under the proposed Division to be exercised by a judicial member of the Commission. The rules of evidence apply when such jurisdiction is exercised.

Section 52X (Appeals) provides for an appeal from any decision under the proposed Division of the Commission constituted by a single member to the Commission in court session constituted by 3 judicial members.

Section 52Y (Recovery of penalties) enables any pecuniary penalty imposed under the proposed Division to be recovered in any court of competent jurisdiction as a debt due to the Crown.

Section 52Z (Representation) provides for representation by a barrister or solicitor in any proceeding under the proposed Division.

Section 52AA (Saving of rights and remedies) saves any right or remedy a person may have apart from under the proposed Division.

Finality of decisions

Schedule 1 (2) amends section 84 of the Principal Act to exclude review pursuant to orders in the nature of prohibition or certiorari of decisions of the Commission under the proposed Division.

Statute law revision

Schedule 1 (3) amends section 113 of the Principal Act, which provides for the winding up of a trade union that fails to pay any penalty imposed on it by the

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Commission, to change the reference to the Companies (New South Wales) Code to a reference to the Corporations Law.

Enforcement of orders for loss or damage

Schedule 1 (4) amends section 119 of the Principal Act to provide for recovery of amounts ordered to be paid by the Commission under the proposed Division as compensation for loss or damage.

Enforcement of orders for costs

Schedule 1 (5) amends section 123 of the Principal Act to make it clear that orders for costs may be made by the Commission in a proceeding for damages or an injunction under the proposed Division and to provide for the recovery of any such costs.

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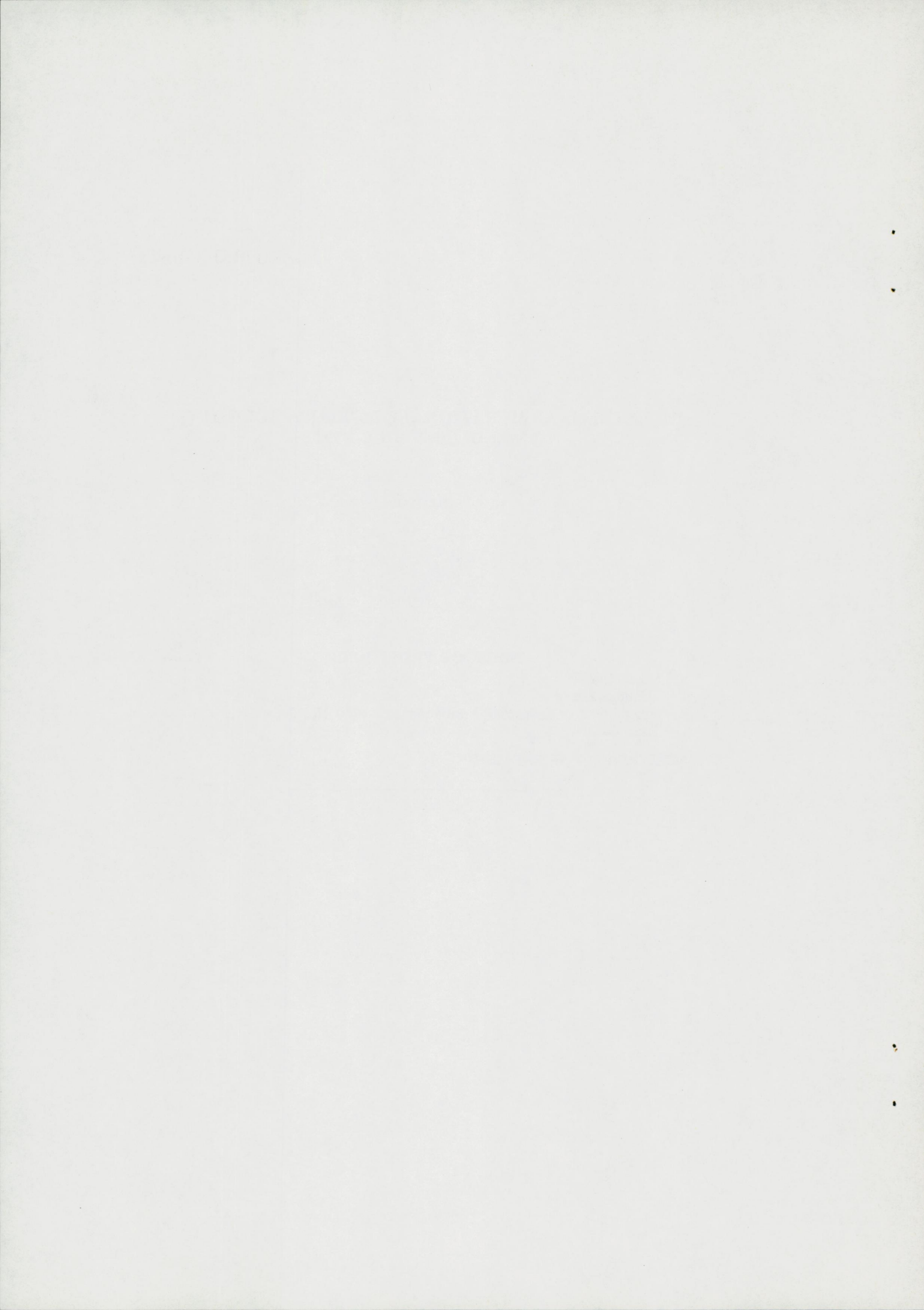
NEW SOUTH WALES



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SCHEDULE 1—AMENDMENTS



**INDUSTRIAL ARBITRATION (SECONDARY BOYCOTTS)
AMENDMENT BILL 1991**

NEW SOUTH WALES



No. , 1991

A BILL FOR

An Act to amend the Industrial Arbitration Act 1940 with respect to secondary boycotts and certain other restrictive trade practices.

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The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Industrial Arbitration (Secondary Boycotts) Amendment Act 1991.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Industrial Arbitration Act 1940 No. 2

3. The Industrial Arbitration Act 1940 is amended as set out in Schedule 1.

Transitional

4. Division 10 of Part 3 of the Industrial Arbitration Act 1940 does not apply so as to prohibit anything done or omitted to be done before the commencement of that Division.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Part 3, Division 10 (sections 44–52AA):

After section 43, insert:

Division 10—Secondary boycotts and other restrictive trade practices

Subdivision 1—Definitions

Definitions

44. In this Division:

“acquire” includes:

- (a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and

- (b) in relation to services—accept;

“business” includes a business not carried on for profit;

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SCHEDULE 1—AMENDMENTS—*continued*

“**conduct**” includes a refusal to do any act or thing or refraining (otherwise than inadvertently) from doing any act or thing;

“**secondary boycott conduct**” means conduct that contravenes section 47;

“**services**” includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges and facilities that are, or are to be, provided, granted or conferred in trade or commerce and, without limiting the generality of the foregoing, includes rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

- (a) a contract for or in relation to performing work (including work of a professional nature), whether with or without the supply of goods; or
- (b) a contract for or in relation to providing, granting or conferring rights, benefits or privileges for which a price, consideration or remuneration is payable in any form,

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service;

“**trade or commerce**” means trade or commerce within New South Wales or between places in New South Wales and places outside New South Wales.

Division subject to legislative power of State

45. This Division is to be read so as not to exceed the legislative power of the State, to the intent that, where any of its provisions would (but for this provision) be construed as being in excess of that power or as being invalid by reason of inconsistency with a law of the Commonwealth, it is nevertheless to be a valid enactment to the extent to which it is not in excess of that power or to which it can operate without inconsistency with a law of the Commonwealth.

Application of Division to Crown etc.

46. (1) This Division binds the Crown in right of New South Wales in so far as the Crown in right of the State

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SCHEDULE 1—AMENDMENTS—*continued*

carries on a business, either directly or by an authority of the State.

(2) This Division does not apply to any conduct that is, or is of a kind, specifically authorised or approved by, or by a statutory instrument made under, an Act.

(3) Nothing in this Division renders the Crown in right of the State liable to be ordered to pay a pecuniary penalty.

Subdivision 2—Secondary boycott conduct

Prohibition against secondary boycott conduct

47. A person must not, in concert with a second person, engage in conduct towards a third person (in this Subdivision referred to as “the affected person”), being conduct that hinders or prevents the supply to the affected person of goods or services by, or the acquisition by the affected person of goods or services from, a fourth person and that is engaged in for the purpose (and that has or is likely to have the effect) of causing:

- (a) substantial loss or damage to the business of the affected person; or
- (b) a substantial lessening of competition in any market in which the affected person acquires goods or services.

Exception—when affected person is the employer

48. Conduct engaged in by a person is taken not to be secondary boycott conduct if the affected person is the person’s employer.

Exception—conduct concerning remuneration, employment conditions etc.

49. (1) A person is taken not to contravene or be involved in a contravention of section 47 (Prohibition against secondary boycott conduct) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to:

- (a) the remuneration, conditions of employment, hours of work or working conditions of the person; or

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SCHEDULE 1—AMENDMENTS—*continued*

(b) an employer of the person having terminated or taken action to terminate the employment of that person.

(2) If conduct is engaged in by the following persons in concert with each other (and not in concert with any other person):

(a) an industrial union of employees or industrial unions of employees or any officer or officers of such an industrial union; and

(b) an employee or employees who are employed by the one employer,

the conduct is taken not to be secondary boycott conduct if the dominant purpose for which the conduct is engaged in is substantially related to:

(c) the remuneration, conditions of employment, hours of work or working conditions of that employee or those employees; or

(d) the employer of that employee or those employees having terminated or taken action to terminate the employment of any of the employer's employees.

(3) A person is not taken to be precluded from engaging in secondary boycott conduct in concert with another person merely because the other person is, by the operation of this section, taken not to be contravening or being involved in a contravention of section 47.

Exception—conduct authorised by Commonwealth Trade Practices Commission

50. Conduct is taken not to be secondary boycott conduct if the conduct is the subject of an authorisation under section 88 of the Trade Practices Act 1974 of the Commonwealth.

Exception—legitimate business activities

51. Conduct that is engaged in for the purpose of hindering the affected person in, or preventing the affected person from engaging in, trade or commerce is not secondary boycott conduct if the person who engaged in the conduct establishes

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SCHEDULE 1—AMENDMENTS—*continued*

that the dominant purpose for which the conduct was engaged in was to preserve or further a business involving trade or commerce carried on by the person.

Industrial unions of employees to be regarded as involved in conduct by members and officers

52. (1) When two or more persons (“the participants”) who are members or officers of the same industrial union of employees are engaged in conduct with each other, the industrial union is taken to have engaged in that conduct in concert with the participants and to have done so for the purpose or purposes for which the participants engaged in it.

(2) This section does not apply if it is shown that the industrial union of employees took all reasonable steps to prevent the participants from engaging in the conduct.

(3) The operation of this section is not affected by the fact that the participants engaged in the conduct in concert with any person who is not a member or officer of the industrial union of employees.

Liability of industrial unions for secondary boycott conduct

52A. If an industrial union of employees engages in conduct in concert with its members or officers in contravention of section 47 (Prohibition against secondary boycott conduct):

- (a) any loss or damage suffered by a person as a result of the conduct is taken to have been caused by the conduct of the industrial union; and
- (b) a proceeding to recover the amount of loss or damage suffered is not to be brought under this Division against any of the members or officers of the industrial union.

Establishment of purpose—multiple purposes

52B. For the purposes of this Subdivision, a person is taken to have engaged or to be engaging in conduct for a particular purpose if the person engaged or engages in the conduct for purposes that included or include that purpose.

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SCHEDULE 1—AMENDMENTS—*continued*

Establishment of purpose—probable consequences

52C. For the purposes of this Subdivision, the purpose for which a person engages in conduct is taken to be the probable consequence or consequences of the conduct engaged in by the person unless he or she establishes the contrary.

Subdivision 3—Interference with supply or acquisition of goods or services

Prohibition against certain arrangements

52D. (1) A person who has been accustomed or is under an obligation to supply goods or services to or to acquire goods or services from a second person must not make a contract or arrangement, or arrive at an understanding, with a third person (being an industrial union of employees, an officer of such an industrial union or another person acting for and on behalf of such an industrial union) if the proposed contract, arrangement or understanding contains a provision that:

- (a) has the purpose of preventing or hindering the first-mentioned person from or in supplying or continuing to supply any such goods or services to the second person or from acquiring or continuing to acquire any such goods or services from the second person; or
- (b) has the purpose of preventing or hindering the first-mentioned person from or in supplying or continuing to supply any such goods or services to the second person except subject to a condition as to the persons to whom, the manner in which or the terms on which the second person may supply any goods or services; or
- (c) has the purpose of preventing or hindering the first-mentioned person from or in acquiring or continuing to acquire any such goods or services from the second person except subject to a condition as to the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

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SCHEDULE 1—AMENDMENTS—*continued*

(2) This section does not apply in relation to a contract, arrangement or understanding that is in writing if the second person is a party to the contract, arrangement or understanding or has consented in writing to its being made or arrived at.

Certain persons taken to be accustomed suppliers

52E. A reference in section 52D to a person who has been accustomed to supply goods or services to a second person includes a reference to each of the following:

- (a) a regular supplier of any such goods or services to the second person;
- (b) the latest supplier of any such goods or services to the second person;
- (c) a person who at any time during the preceding 3 months supplied any such goods or services to the second person.

Certain persons taken not to be accustomed suppliers

52F. (1) A person (“**the original supplier**”) is taken not to be a person who has been accustomed to supply goods or services to a person (“**the recipient**”) if:

- (a) those goods or services were supplied pursuant to a contract between those persons under which the original supplier was required over a particular period to supply the goods or services and that period has expired; and
- (b) after that period has expired the recipient has been supplied with those goods or services by another person or other persons and has not been supplied with those goods or services by the original supplier.

(2) This section operates only in relation to things done after the recipient has been supplied with goods or services as described in subsection (1) (b).

Certain persons taken to be accustomed acquirers

52G. A reference in section 52D to a person who has been accustomed to acquire goods or services from a second person includes a reference to each of the following:

- (a) a regular acquirer of any such goods or services from the second person;

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SCHEDULE 1—AMENDMENTS—*continued*

- (b) a person who, when he or she last acquired such goods or services, acquired them from the second person;
- (c) a person who at any time during the preceding 3 months acquired any such goods or services from the second person.

Certain persons taken not to be accustomed acquirers

52H. (1) This section applies to cases where:

- (a) goods or services have been acquired by a person from a second person pursuant to a contract between those persons under which the first-mentioned person was required over a particular period to acquire those goods or services; and
- (b) that period has expired; and
- (c) after that period has expired the second person has refused to supply those goods or services to the first-mentioned person.

(2) In such a case, the first-mentioned person is not, in relation to anything done after the second person has refused to supply those goods or services, to be regarded as a person who has been accustomed to acquire those goods or services from the second person.

Certain arrangements not to be executed

52I. (1) A person must not give effect to a provision of a contract, arrangement or understanding if, as a result of the provision, the making of the contract or arrangement or the arriving at of the understanding contravened section 52D (Prohibition against certain arrangements).

(2) This section applies to a contract or arrangement made or an understanding arrived at before this section commenced:

- (a) as if this section had then been in force; and
- (b) as if the references in section 52D (2) to a contract, arrangement or understanding, or a consent, being in writing were omitted.

*Industrial Arbitration (Secondary Boycotts) Amendment 1991*SCHEDULE 1—AMENDMENTS—*continued***Exception—conduct authorised by Commonwealth Trade Practices Commission**

52J. A person does not contravene a provision of this Subdivision by engaging in conduct if the conduct is the subject of an authorisation under section 88 of the Trade Practices Act 1974 of the Commonwealth.

Exception—legitimate business activities

52K. Conduct does not contravene a provision of this Subdivision if the person who engaged in the conduct establishes that the dominant purpose for which the conduct was engaged in was to preserve or further a business involving trade or commerce carried on by the person.

Establishment of purpose—multiple purposes

52L. For the purposes of this Subdivision, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding is to be considered to have had or to have a particular purpose if the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding for purposes that include that purpose.

Subdivision 4—Enforcement and remedies**Interpretation**

52M. For the purposes of this Subdivision, a person is taken to be involved in a contravention of a provision of Subdivision 2 or 3 if:

- (a) the person has done or attempted to do the act or thing that constitutes the contravention; or
- (b) the person has aided, abetted, counselled or procured the contravention; or
- (c) the person has induced or attempted to induce, whether by threats, promises or otherwise, the contravention; or
- (d) the person has been in any way, directly or indirectly, knowingly concerned in or party to the contravention; or
- (e) the person has conspired with another or others to effect the contravention.

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SCHEDULE 1—AMENDMENTS—*continued*

Jurisdiction to grant injunction

52N. (1) If, on the application of any person, the commission is satisfied that a person has engaged or is proposing to engage in conduct by which he or she is involved in a contravention of any provision of Subdivision 2 or 3, the commission may grant an injunction in such terms as the commission determines to be appropriate.

(2) If in the commission's opinion it is desirable to do so, the commission may grant an injunction that is expressed to have been made pending the further consideration of an application under this section. Any such injunction may be referred to as an "**interim injunction**".

(3) The commission may rescind or vary any injunction granted under this Subdivision on the application of any party to the proceeding in which the injunction was granted or of any person duly substituted for such a party.

Restrictive injunction

52O. The power of the commission to grant an injunction restraining a person from engaging in conduct may be exercised:

- (a) whether or not it appears to the commission that the person intends to engage again or to continue to engage in conduct of that kind; and
- (b) whether or not the person has previously engaged in conduct of that kind; and
- (c) whether or not there is imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

Mandatory injunction

52P. The power of the commission to grant an injunction requiring a person to do any act or thing may be exercised:

- (a) whether or not it appears to the commission that the person intends to refuse or fail again or to continue to refuse or fail to do that act or thing;
- (b) whether or not the person has previously refused or failed to do that act or thing; and

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SCHEDULE 1—AMENDMENTS—*continued*

- (c) whether or not there is imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

Undertakings as to damages

52Q. (1) If the Minister makes an application to the commission for the grant of an injunction pursuant to this Subdivision, the commission is not to require the Minister or any other person, as a condition of granting an interim injunction, to give an undertaking as to payment of damages and any interlocutory order made is not to contain an undertaking of that kind.

(2) If in a case to which subsection (1) does not apply:

- (a) the commission would, but for this subsection, require a person to give an undertaking as to payment of damages or costs; and
(b) the Minister gives the undertaking,

the commission is to accept the undertaking by the Minister and is not to require a further undertaking from any other person and it is not necessary for any interlocutory order for an injunction made to contain an undertaking by the party at whose instance the injunction is granted.

Pecuniary penalties

52R. (1) If the commission is satisfied that a contravention of any provision of Subdivision 2 or 3 or of an injunction granted under this Subdivision has occurred and that a person is involved in that contravention, the commission may order the person to pay to the Minister, for payment into the Consolidated Fund, a pecuniary penalty in respect of each act or omission constituting the conduct in question that the commission determines to be appropriate having regard to all relevant matters, including:

- (a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and
(b) the circumstances in which the act or omission took place; and

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SCHEDULE 1—AMENDMENTS—*continued*

(c) whether the person has previously been found by the commission in proceedings under this Division to have engaged in similar conduct.

(2) The pecuniary penalty is not to exceed 1,000 penalty units in the case of a body corporate or an unincorporated trade union or 100 penalty units in the case of any other person.

(3) If a person's conduct constitutes a contravention of two or more provisions of this Division, a proceeding may be instituted under this section against the person in respect of a contravention of any one or more of the provisions but the person is not liable to more than one pecuniary penalty in respect of the same conduct.

(4) A proceeding to recover a pecuniary penalty alleging a contravention of a provision of Subdivision 2 or 3 may be commenced only with the consent of the Minister.

Time for recovery of pecuniary penalties

52S. A proceeding to recover a pecuniary penalty referred to in section 52R must be commenced:

- (a) in the case of a contravention that consists of continuing conduct, within 6 years after the contravention has terminated; or
- (b) in any other case, within 6 years after the contravention has occurred.

Criminal proceedings not available

52T. Proceedings for an offence against this Act do not lie against a person in respect of a contravention of any provision of Subdivision 2 or 3 or of an injunction granted under this Subdivision.

Order for damages

52U. (1) On application made to the commission by a person who claims to have suffered loss or damage because of conduct in contravention of a provision of Subdivision 2 or 3 or in contravention of an injunction granted under this Subdivision, the commission may hear and determine the claim and may make an order for payment of the whole or any specified proportion of the amount of the loss or damage by:

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SCHEDULE 1—AMENDMENTS—*continued*

- (a) the person or persons who engaged in that conduct; or
 - (b) any person or persons who is or are to be regarded as being involved by reason of that conduct in a contravention of Subdivision 2 or 3.
- (2) This section is subject to section 52A.

Evidentiary provisions

52V. In an action against a person to recover damages, a finding of fact by the commission made in a proceeding under this Division in which the person has been found to be involved in a contravention of Subdivision 2 or 3 or of an injunction is evidence of that fact.

Exercise of jurisdiction

52W. (1) The jurisdiction of the commission conferred by this Division may be exercised only by a judicial member of the commission.

(2) The commission is bound by the rules of evidence in the exercise of its jurisdiction under this Division.

(3) The commission (however constituted) in exercising its jurisdiction under this Division has all of the powers conferred on it by section 30A (1) but is not required to exercise any of those powers.

Appeals

52X. (1) An appeal lies to the commission in court session from any decision of the commission under this Division.

(2) For the purposes of any such appeal, the commission is to be constituted by 3 judicial members (not including the member whose decision is the subject of the appeal) chosen by the President.

(3) On any such appeal, further evidence shall be admitted on special grounds only and not without special leave of the commission in court session.

(4) The commission in court session may affirm, vary or set aside the decision subject to the appeal as the commission in court session thinks fit.

Recovery of penalties

52Y. (1) Any pecuniary penalty imposed under this Division by order of the commission may be recovered in

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any court of competent jurisdiction from the person against whom the order was made as a debt due to the Crown.

(2) For the purposes of this section, the order of the commission imposing the penalty is taken to be a judgment of the court in which proceedings for recovery are taken.

Representation

52Z. A party to any proceedings under this Division may be represented by a barrister or solicitor.

Saving of rights and remedies

52AA. This Division does not exclude, limit or affect any right or remedy to which any person is entitled apart from this Division.

- (2) Section 84 (**Decision of commission or member final**):
- (a) From section 84 (1) (a), omit "section 14", insert instead "sections 14 and 52X".
 - (b) Renumber section 84 (1) (a) and (b) as section 84 (1) and (2), respectively.
 - (c) At the end of section 84, insert:
 - (3) No order in the nature of prohibition or certiorari may be made in respect of any decision under Division 10 of Part 3 of the commission however constituted.
- (3) Section 113 (**Enforcement of order of commission imposing penalty**):
- Omit "Companies (New South Wales) Code", insert instead "Corporations Law".
- (4) Section 119 (**Enforcement of certain orders**):
- After section 119 (2), insert:
- (2A) This section applies to orders made under section 52U for the payment of money in the same way as it applies to other orders for the payment of money.
- (5) Section 123 (**Orders for costs**):
- In section 123 (1), after "section 118", insert ", for damages or an injunction under Division 10 of Part 3".
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