

ACT NO. 49 OF 1998



I assent.

[L.S.]

K. K. T. MARA
President

[9 November 1998]

AN ACT

TO AMEND THE FAIR TRADING DECREE 1992

ENACTED by the Parliament of the Fiji Islands—

Part 1—PRELIMINARY

Short title, etc

1.—(1) This Act may be cited as the Fair Trading (Amendment) Act 1998.

(2) The Fair Trading Decree 1992 is in this Act referred to as the Decree.

Commencement

2. This Act commences on such date or dates as the Minister, by notice published in the *Gazette*, appoints.

Part 2—AMENDMENTS OF FAIR TRADING DECREE

Interpretation

3. Section 4 of the Decree is amended—

(a) by inserting in subsection (1) after the definition of 'Assistant Director' the following definitions—

"authorisation" means an authorisation granted by the Commission under Division 1 of Part VIIIA;

"authority", in relation to the State, means—

- (a) a body corporate established for a purpose of the State by or under a law of the State; or
- (b) an incorporated company in which the State, or a body corporate referred to in paragraph (a), has a controlling interest;;
- (b) by inserting in subsection (1) after the definition of 'Business' the following definitions—

‘ “Commerce Act” means the Commerce Act 1998;

“Commission” means the Commerce Commission established by the Commerce Act;”;

- (c) by inserting in subsection (1) after the definition of 'Corporation' the following definition -

‘ “Court” means the High Court;’;

- (d) by inserting in subsection (1) after the definition of 'occupier' the following definitions—

‘ “practice of exclusive dealing” means the practice of exclusive dealing referred to in subsection (2), (3), (4), (5), (6), (7), (8), or (9) of section 46;

“practice of resale price maintenance” means the practice of resale price maintenance referred to in section 47 or 47A;”

- (e) by inserting in subparagraph (ii) of subsection (9)(a) 'substantial' after 'a'; and

- (f) by inserting in subparagraph (ii) of subsection (9)(b) 'substantial' after 'is'.

Extended application of Parts III and IV

4. Section 5 is amended by deleting from subsection (1) 'Part 3 extends' and substituting 'Parts III and IV extend'.

New sections

5. Section 7 of the Decree is repealed and the following sections are substituted—

'Application of Decree to State

- 7.—(1) Subject to this section, this Act binds the State insofar as the State carries on a business, either directly or by an authority of the State.

- (2) Nothing in this Decree renders the State liable to a pecuniary penalty or to be prosecuted for an offence.
- (3) The protection in subsection (2) does not apply to an authority of the State.

Activities that are not business

7A.—(1) For the purposes of section 7, the following do not amount to carrying on a business -

(a) imposing or collecting—

- (i) taxes;
- (ii) levies; or
- (iii) fees for licences; or

(b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions).

- (2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of section 7.’

Deletion of Division heading

6. Part III of the Decree is amended by deleting the heading ‘Division’.

*Contracts, arrangements or understandings restricting dealings
or affecting competition*

7. Section 27 of the Decree is amended by inserting after subsection (4) the following subsection—

(4A) Without limiting the generality of subsections (1) to (4), a provision of a contract, arrangement or understanding, including a licence, made or arrived at after the commencement of this subsection, has no effect and is unenforceable if it -

- (a) is an exclusionary provision or has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
- (b) has the purpose, or has or is likely to have the effect, of conferring on any person (whether or not the person is a party to the contract, arrangement or understanding) exclusive rights under any Decree or Act.’

Contracts, arrangements or understandings in relation to prices

8. Section 28 of the Decree is amended—

- (a) by deleting from paragraph (4)(b) 'so acquire' and substituting 'or services so acquired';
- (b) by deleting from subsection (6) 'controlling or maintaining of, the price for, or a discount, allowance,' (secondly occurring);
- (c) by inserting in subsection (7) 'or services' after 'goods';
- (d) by inserting in subsection (7) 'goods or services by persons to whom the goods or services are or would be supplied by the' immediately after 're-supply of the'.

Covenants affecting competition

9. Section 29 of the Decree is amended:

- (a) by deleting from subsection (1) 'a person associated with a corporation if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which such person or any person associated with such person' and substituting 'an associate of the person if the covenant has, or is likely to have, the effect of substantially lessening competition in any market in which the person or an associate of the person';
- (b) by deleting from subsection (2) 'a person associated with such person' and substituting 'an associate of the person';
- (c) by deleting from subparagraph (i) of subsection (2)(a) 'associated with' and substituting 'who is an associate of';
- (d) by deleting from subparagraph (ii) of subsection (2)(a) 'associated with such person' and substituting 'who is an associate of the first mentioned person';
- (e) by deleting from subparagraph (ii) of subsection (2)(a) 'that person is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the corporation' and substituting 'the associate is, or would be, under an obligation to act in accordance with directions, instructions or wishes of the first mentioned person'; and
- (f) by deleting subsection (6) and substituting the following subsection—

(6) For the purposes of this section and section 30, two persons are taken to be associated with each other in relation to a covenant or proposed covenant if, and only if—

- (a) one of the persons is under an obligation (otherwise than in pursuance of the covenant or proposed covenant), whether formal or informal, to act in accordance with directions, instructions or wishes of the other person in relation to the covenant or proposed covenant; or
- (b) one of the persons is a body corporate in relation to which the other person is in the position mentioned in section 4(5)(a)(ii).'

Covenants in relation to prices

10. Section 30 of the Decree is amended—

- (a) by deleting from subsection (1) all the words after 'as if' and substituting 'all the words from and including "if" were omitted';
- (b) by deleting from paragraph (b) of subsection (3) 'person' and substituting 'persons'; and
- (c) by inserting in paragraph (b) of subsection (4) 'or services' after 'goods' (wherever occurring).

*Restriction on conduct that hinders or prevents the supply
of goods or services to others*

11. Section 31 of the Decree is amended by deleting from subsection (1) everything after 'where' and substituting 'the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—

- (a) substantial loss or damage to the business of the third person, the fourth person or a body corporate that is related to either of them; or
- (b) a substantial lessening of competition in any market in which the third person, the fourth person or a body corporate that is related to either of them supplies or acquires goods or services.'

*Prohibition of contracts, arrangements or understandings affecting
supply or acquisition of goods or services*

12. Section 32 of the Decree is amended by deleting subsections (3) and (4) and substituting the following subsection—

- '(3) Paragraph (a) of section 4(9) applies in relation to subsection (1) of this section as if subparagraph (a)(ii) were omitted.'

Misuse of market power

13. Section 33 of the Decree is amended by deleting subsection (7).

Insertion of new section

14. After section 33 of the Decree the following section is inserted—

'Anti'-competitive conduct

- 33A.—(1) A person engages in prescribed anti-competitive conduct if the person—

- (a) has a substantial degree of power in a market; and
- (b) takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other market.

- '(2) A person must not engage in prescribed anti-competitive conduct.'

Collective tendering

15. Section 34 of the Decree is amended—

- (a) by deleting subsection (1) and substituting the following subsection—

- '(6) Any two or more persons, being wholesalers, retailers or contractors or suppliers of services must not—

- (a) tender for the supply or purchase of any goods or services at prices, or on terms, agreed or arranged between them; or
- (b) in response to an invitation to tender, agree or arrange for all or any of them to abstain from tendering for the supply or purchase of any goods or services'; and

- (b) by deleting from subsection (2) 'It shall not be a defence in proceedings for an offence against this section' and substituting 'Subsection (2) is contravened whether or not the circumstances are such'.

Repeal of sections

16. Sections 35 to 45 of the Decree are repealed.

Exclusive dealing

17. Section 46 of the Decree is amended—

- (a) by deleting from subsection (1) 'shall be guilty of an offence who in trade or commerce, engages' and substituting 'must not, in trade or commerce, engage'; and

- (b) by deleting from subsection (10) 'the practice of exclusive dealing constituted by a person engaging in conduct of a kind referred to in subsection (2), (3), (4) or (5) or paragraphs (8)(a) or (b) or (9)(a), (b) or (c)' and substituting 'a person engaging in conduct that constitutes the practice of exclusive dealing'.

Resale price maintenance

18. Section 47 of the Decree is amended—

- (a) by deleting 'shall be guilty of an offence under this Decree who engages' and substituting 'must not engage'; and

- (b) by adding the following subsections—

(2) Subject to this section, a person (supplier) engages in the practice of resale price maintenance if the person does an act referred to in any of the paragraphs of subsection (3).

(3) The acts referred to in subsection (2) are the following—

(a) the supplier making it known to a second person that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier;

(b) the supplier inducing, or attempting 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 or by a third person who, directly or indirectly, has obtained the goods from the supplier;

(c) the supplier entering into an agreement, or offering 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 withholding the supply of goods to a second person for the reason that the second person—

(i) has not agreed as mentioned in paragraph (a); 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 a price specified by the supplier as the price below which the goods are not to be sold;

- (e) the supplier withholding 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 not to sell those goods at a price 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 a price specified by the supplier as the price below which the goods are not to be sold; and
- (f) the supplier using, in relation to any goods supplied, or that may be supplied, by the supplier 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.

(4) For the purposes of subsection (3)—

- (a) a price that is specified by another person on behalf of the supplier is deemed to have been specified by the supplier;
- (b) if 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 is deemed to have been specified, in respect of the first-mentioned goods, by the supplier;
- (c) if 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 is deemed to have been specified by the supplier; and
- (d) if 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 is deemed to have been specified, in respect of the first-mentioned goods, by the supplier.

(5) In subsection (4) 'formula includes' a set form or method.

(6) For the purposes of subsection (3), anything done by a person acting on behalf of, or by arrangement with, the supplier is deemed to have been done by the supplier.

(7) A reference in any of (a) to (e) of subsection (3) including a reference in negative form, to the selling of goods at a price less than a price specified by the supplier includes a reference to—

- (a) the advertising of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be advertised for sale;
- (b) the displaying of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be displayed for sale.
and
- (c) the offering of goods for sale at a price less than a price specified by the supplier as the price below which the goods are not to be offered for sale;

and a reference in paragraph (d), (e) or (f) of subsection (3) to a price below which the goods are not to be sold includes a reference to the price below which the goods are not to be advertised for sale, to the price below which the goods are not to be displayed for sale and to the price below which the goods are not to be offered for sale.

(8) For the purposes of subsection (3)(b), 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—

- (a) by reason only of a statement of a price being applied to the goods as mentioned in subsection (12)(a) or being applied to a covering, label, reel or thing as mentioned in paragraph (12)(b), provided that the statement is preceded by the words 'recommended price'; or
- (b) by reason only of the supplier having given notification in writing to the second person (not being a notification by way of a statement being applied as mentioned in paragraph (a)) 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."

(9) For the purposes of paragraph (d) or (e) of subsection (3) the supplier is deemed to withhold the supply of goods to another person if—

- (a) the supplier refuses or fails to supply those goods to, or as requested by, the other person;

- (b) the supplier refuses to supply those goods except on terms that are disadvantageous to the other person;
- (c) in supplying goods to the other person, the supplier treats that person less favourably, whether in respect of time, method or place of delivery or otherwise, than the supplier treats other persons to whom the supplier supplies the same or similar goods; or
- (d) the supplier causes or procures a person to withhold the supply of goods to the other person as mentioned in paragraph (a), (b) or (c) of this subsection.

(10) Subsection (3)(d) does not apply in relation to the withholding by the supplier of the supply of goods to another person who, within the preceding year, has sold goods obtained, directly or indirectly, from the supplier at less than their cost to that other person—

- (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.

(11) For the purposes of subsection (1), the following must be disregarded—

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

(12) For the purposes of subsection (3)(f), 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 is taken to have been used in relation to those goods.

(13) For the purposes of subsection (12)—

“covering” including a stopper, glass, bottle, vessel, box, capsule, case, frame or wrapper,

“label” includes a band or ticket’.

Insertion of new sections

19. After section 47 of the Decree the following sections are inserted—

Resale price maintenance in relation to services

47A. (1) Sections 47 and 47B apply to conduct in relation to services in a way that corresponds to the way they apply to conduct in relation to goods.

(2) For the purposes of subsection (1), sections 47 and 47B are to be read with appropriate modifications including—

(a) references to goods are to be read as references to services;

(b) references to the sale of goods are to be read as references to the re-supply of services.

Evidentiary provisions

47B. (1) If, in proceedings under this Act by a person (the plaintiff) against another person (the defendant), it is claimed that the defendant has engaged in the practice of resale price maintenance and it is established that—

(a) the defendant has acted, in relation to the plaintiff, as mentioned in paragraph 47(1)(a), (b), (c) or (d);

(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 6 months immediately before the time when the defendant so acted, the defendant became aware of a matter or circumstance capable of constituting a reason referred to in paragraph 47(3)(d) or (e) for the defendant’s so acting,

then, subject to subsection (2), that matter or circumstance is, unless the contrary is established, taken to be the reason for the defendant’s so acting.

- (2) Subsection (1) does not apply if the plaintiff establishes the matter mentioned in paragraph 47(1)(b) or (c) 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 Commission for an injunction, references to the plaintiff must be construed 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 (1)(a).

Price discrimination

20. Section 48 of the Decree is amended by omitting from subsection (1) 'shall be guilty of an offence who' and substituting 'must not'.

Mergers

21. Section 49 of the Decree is amended—

- (a) by deleting from subsection (1) 'shall be guilty of an offence who acquires' and substituting 'must not acquire';
- (b) by deleting subsection (2); and
- (c) by inserting after subsection (5) the following subsection—

'(5A) If—

- (a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a body corporate;
- (b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorisation to acquire the shares or assets; and
- (c) the person applied for the grant of the authorisation before the expiration of 14 days after the contract was entered into,

the acquisition of the shares or assets must not be regarded for the purposes of this Decree as having taken place in pursuance of the contract before—

- (d) the application for the authorisation is disposed of; or
- (e) the contract ceases to be subject to the condition,
- whichever first happens.'

Acquisition outside Fiji

22. Section 50 of the Decree is amended by deleting the final subsection.

Repeal of sections

23. Sections 51 and 52 of the Decree are repealed.

Heading to Division 1 of Part IV

24. The heading to Division 1 of Part IV of the Decree is repealed and the following heading is substituted—

'Division 1—Unfair Practices'.

Insertion of new sections

25. After section 66 of the Decree, the following sections are inserted—

'Pyramid selling schemes

- 66A. (1) A person must not act as the promoter of, or operate, a pyramid selling scheme.
- (2) For the purposes of this section, pyramid selling scheme means a scheme—
- (a) which provides for the sale or distribution of goods or services or both for reward;
 - (b) which, to many participants in the scheme, constitutes primarily an opportunity to sell an investment opportunity rather than an opportunity to sell goods or services; and
 - (c) which is or is likely to be unfair to many of the participants in the scheme in that—
 - (i) the financial rewards of many of those participants are dependent on the recruitment of additional participants (whether or not at successively lower levels); and
 - (ii) the number of additional participants in the scheme that must be recruited to produce reasonable financial rewards to participants in the scheme is not attainable or is not likely to be attainable by many of the participants in the scheme.
- (3) For the purposes of this section, pyramid selling scheme includes an arrangement for the supply of goods or services pursuant to an arrangement of the type commonly known as a chain letter arrangement but does not include any scheme or activities including

all or any of the activities of a particular person or a particular class of person) that is declared by the Minister, by notice in the Gazette, to be excluded from that term.

Unlawful actions and representations

66B. (1) A creditor, or the agent of a creditor, must not, for the purpose of recovering a trading debt of the creditor—

- (a) make any demand for payment without indicating the creditor's identity and the balance owing to the creditor and, if the demand is made by the agent, the agent's identity and authority to make the demand;
- (b) demand payment of any amount that the creditor or agent does not honestly believe to be due and owing to the creditor;
- (c) persist in demanding payment from a person who has denied liability without making reasonable inquiries to ensure that the demand is based on reasonable grounds;
- (d) make any personal calls or telephone calls for the purpose of demanding payment—
 - (i) on a public holiday; or
 - (ii) between the hours of 10.00 pm of one day and 7.00 am of the next; or
- (e) except as reasonably necessary to determine the debtor's whereabouts, communicate with an employer, acquaintance, friend, relative or neighbour of the debtor (not being a guarantor).

(2) A creditor, or the agent of a creditor, must not, for the purpose of recovering a trading debt—

- (a) falsely represent that criminal or other proceedings will lie for non-payment of the debt;
- (b) falsely pretend to be authorised in some official capacity to claim or enforce payment; or
- (c) falsely represent that a document has some official character that it does not have.

(3) In this section—

'agent' includes an employee of a creditor whose main duty of employment is to seek to recover trading debts owed to the creditor.

Collective bidding at auction

66C. A person who is a wholesaler, retailer or contractor must not enter into—

- (a) an agreement or arrangement with another person who is a wholesaler, retailer or contractor as to the price or prices which either of them will bid at any auction sale of goods or services; or
- (b) an agreement or arrangement under which a party to the agreement or arrangement agrees to abstain from bidding at an auction sale of goods or services.

Supply of trading stamps

66D. (1) A person must not—

- (a) supply, or arrange for the supply of, any coupon, stamp, token, cover, package, document or other things, either directly or indirectly, to—
 - (i) any manufacturer, packer, importer, distributor or seller of goods, or
 - (ii) any seller of services; and
- (b) undertake to redeem that coupon, stamp, token, cover, package, document or thing, or undertake that it will be redeemed, whether or not it has to be produced or surrendered to any person by giving or delivering to its holder any money, goods or services.

(2) Nothing in subsection (1) applies to any coupon, stamp, token, cover, package, document or thing issued directly or indirectly in connection with any goods or services by the manufacturer, packer, importer, distributor or seller of the goods or services, being a coupon, token, cover, package, document or thing which by itself or with any other act or thing entitles or purports to entitle the holder to receive any money from the issuer, whether or not it has to be produced or surrendered to any person.

(3) In this section—

'seller', in relation to any goods, means the person by whom the goods are sold to a person who purchases them for a purpose other than resale.

Refusal to sell goods or services unless other goods or services are also purchased

66E. (1) A person must not, whether as principal or agent, refuse to sell goods or services except on the condition that other goods or services are also purchased from that person or from any other person, or attempt to impose any such condition.

(2) Nothing in this section renders unlawful any condition against the separate sale of any goods forming part of a set or forming part of a single or composite article.

Adulteration

66F. (1) A person must not—

(a) adulterate any goods for supply by way of trade or commerce; or

(b) supply by way of trade or commerce any adulterated goods.

(2) In a prosecution of a person under section 108 for an offence against this section, it is a defence if the person establishes that the adulteration was not carried out fraudulently and that the goods were supplied accompanied by a clear and conspicuous notice stating explicitly the nature of the adulteration, or were supplied in a container displaying such a notice.

(3) It is also a defence if the person establishes that—

(a) the presence of extraneous matter is an unavoidable consequence of the collection or processing of such goods; and

(b) the amount of the extraneous matter does not exceed such tolerance as is prescribed by the Minister in regulations under subsection (4).

(4) The Minister may by regulation prescribe in respect of specified goods or a specified class of goods the amount of extraneous matter to be tolerated.

- (5) For the purposes of this section, goods are deemed to be adulterated—
- (a) if any valuable constituent has been in whole or in part omitted or removed from them;
 - (b) if a substance has been substituted wholly or in part for another substance;
 - (c) if damage or inferiority has been concealed in any way; or
 - (d) if any substance has been added to the goods or mixed or packed with the goods so as to increase their bulk or weight, reduce their quality or strength or make them appear better or of greater value than they are.
- (6) The regulations may, for the purpose of this section, specify in relation to specified goods, or goods of a specified class, constituents or substances the goods are required to contain.

Hoarding, etc

- 66G. A person who is in possession of goods for mercantile purposes must not destroy or hoard the goods, or refuse to sell the goods or make them available for sale, if the destruction, hoarding or refusal raises, or tends to raise, the cost of other similar goods, or maintains the market price of the goods.

Black marketing

- 66H. (1) A person must not, whether as principal or agent, sell any goods for purposes of resale, unless the person is satisfied—
- (a) that the goods are required by the buyer, in good faith, for the legitimate purposes of his business; and
 - (b) in particular, that the effect of the transaction, whether by itself or taken in conjunction with transactions of the same or of a similar nature, will not be to increase or will not tend to increase the price to the ultimate buyer of the goods above a fair and reasonable price (whether that price be a lawful price or not).
- (2) This section does not apply with respect to the sale of any goods to a retailer for purposes of retail sale.

Limited offers and failing to supply as demanded

- 66L (1) A person must not advertise or offer goods for sale by retail upon condition that not more than a specified or limited quantity or number of the goods may be purchased by any one purchaser.
- (2) A person who offers goods for sale by retail must not refuse or fail, on demand of a quantity or number of the goods and tender of the appropriate price, to supply the goods in the quantity or number demanded.

Statement of price or condition and pull date

- 66J (1) A person must not offer goods for sale by retail if any statement of price or conditions of sale (relating to the availability of discounts or trade-in or other allowances) imprinted on, attached to or exhibited with the goods does not set out in a prominent position and in clear and legible figures the price at which the goods can be bought for cash.
- (2) A person must not sell, display for sale, or cause to be distributed for the purposes of sale any perishable or semi-perishable goods in package form unless the pull date is marked on the package.
- (3) In this section—

'pull date' means the last date on which perishable or semi-perishable goods are to be sold.

Mandatory trade-ins prohibited

- 66K (1) A person must not, in the course of trade, sell goods at retail or supply services if the person, whether as principal or agent, indicates in the course of bargaining with any purchaser or prospective purchaser of those goods or services—
- (a) that the goods will be sold or the services will be supplied only if the purchaser or prospective purchaser sells or arranges the sale of secondhand goods to the seller or to a person nominated by the seller; or
- (b) that the terms and conditions on which the seller will sell those goods or supply those services will be less favourable than those upon which he would make them available if the purchaser or prospective purchaser were to sell or to arrange the sale of secondhand goods to the seller or to a person nominated by the seller.

Offences

26. Section 108 of the Decree is amended by deleting subsection (1) and substituting the following subsections—

- (1) Subject to subsections (2) and (3), a person who—
- (a) contravenes;
 - (b) aids, abets, counsels or procures a person to contravene;
 - (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene;
 - (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
 - (e) conspires with others to contravene,
- a provision of Part IV, other than section 54, is guilty of an offence punishable on conviction by a fine not exceeding \$10,000.

(1A) Subject to subsections (2) and (3), a person found guilty of an offence under this Decree for which no other penalty is provided is punishable on conviction by a fine not exceeding \$5,000 for a first offence and \$10,000 for a second or subsequent offence.

Insertion of new sections

27. After section 124 of the Decree, the following sections are inserted—

Pecuniary penalties

124A. (1) If the Court is satisfied that a person—

- (a) has contravened a provision of Part III;
- (b) has attempted to contravene such a provision;
- (c) has aided, abetted, counselled or procured a person to contravene such a provision;
- (d) has induced, or attempted to induce, a person whether by threats or promises or otherwise, to contravene such a provision;
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision.

the Court may order the person to pay to the State such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters, including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part to have engaged in any similar conduct.

(2) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed \$1 million for each act or omission to which this section applies.

(3) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed \$300,000 for each act or omission to which this section applies.

(4) If conduct constitutes a contravention of two or more provisions of Part III, a proceeding may be instituted under this Act against a person in relation to the contravention of one or both of the provisions but a person is not liable to more than one pecuniary penalty under this section in respect of the same conduct.

Civil action for recovery of pecuniary penalties

124B. (1) The Commission may institute a proceeding in the Court for the recovery on behalf of the State of a pecuniary penalty referred to in section 124A.

(2) A proceeding under subsection (1) may be commenced within six years after the contravention.

Criminal proceedings not to be brought for contravention of Part III

124C. Criminal proceedings do not lie against a person by reason only that the person—

- (a) has contravened a provision of Part III;
- (b) has attempted to contravene such a provision;
- (c) has aided, abetted, counselled or procured a person to contravene such a provision;
- (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;

- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
- (f) has conspired with others to contravene such a provision.

Injunctions

28. Section 125 of the Decree is amended by inserting after subsection (2) the following subsection—

- (5A) A person other than the Minister or the Commission is not entitled to make an application under subsection (2) for an injunction by reason that a person has contravened or attempted to contravene or is proposing to contravene, or has been or is proposing to be involved in a contravention of, section 33A.

Action for damages

29. Section 126 of the Decree is amended by deleting from subsection (1) 'Part III or VI' and substituting 'Part III, IV, V or VI'.

Insertion of new Part

30. After Part VIII of the Decree the following Part is inserted—

'Part VIIIA—AUTHORISATIONS AND NOTIFICATIONS IN RESPECT OF RESTRICTIVE TRADE PRACTICES

Division I—Authorisations

Power of Commission to grant authorisations

129A.—(1) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person—

- (a) to make a contract or arrangement, or arrive at an understanding, when a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 27; or
- (b) to give effect to a provision of a contract, arrangement or understanding when the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 27,

and, while such an authorisation remains in force—

- (c) in the case of an authorisation to make a contract or arrangement or to arrive at an understanding—subsection 27(2) does not prevent the person from making the contract or arrangement or arriving at the understanding in accordance with the authorisation and giving effect in accordance with the authorisation to any provision of the contract or arrangement so made or of the understanding so arrived at;
- (d) in the case of an authorisation to give effect to a provision of a contract—
 - (i) the provision is not unenforceable by reason of subsection 27(1); and
 - (ii) subsection 27(2) does not prevent the person from giving effect to the provision in accordance with the authorisation; or
- (e) in the case of an authorisation to give effect to a provision of an arrangement or understanding—subsection 27(2) does not prevent the person from giving effect to the provision in accordance with the authorisation.

(2) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person—

- (a) to require the giving of, or to give, a covenant when the proposed covenant would have the purpose, or would have or might have the effect, of substantially lessening competition in a market referred to in paragraph 29(2)(a); or
- (b) to enforce the terms of a covenant,

and, while such an authorisation remains in force:

- (c) in the case of an authorisation to require the giving of, or to give, a covenant—
 - (i) the covenant is not unenforceable by reason of subsection 29(1); and
 - (ii) subsection 29(2) does not apply in relation to the covenant; or
- (d) in the case of an authorisation to enforce the terms of a covenant—
 - (i) the covenant is not unenforceable by reason of subsection 29(1); and
 - (ii) paragraphs 29(2)(b) and (c) do not apply in relation to the covenant.

- (a) in the case of an authorisation to make a contract or arrangement or arrive at an understanding—becomes a party to the proposed contract or arrangement at a time after it is made or becomes a party to the proposed understanding at a time after it is arrived at; or

- (b) in the case of an authorisation to give effect to a provision of a contract, arrangement or understanding—becomes a party to the contract, arrangement or understanding at a time after the authorisation is granted.

(9) An authorisation under subsection (2) may be expressed so as to apply to or in relation to another person who—

- (a) in the case of an authorisation to require the giving of, or to give, a covenant—becomes bound by, or entitled to the benefit of, the proposed covenant at a time after the covenant is given; or
- (b) in the case of an authorisation to enforce the terms of a covenant—becomes bound by, or entitled to the benefit of, the covenant at a time after the authorisation is granted.

(10) The Commission does not have power to grant an authorisation to a person to make a contract or arrangement, to arrive at an understanding or to require the giving of, or to give, a covenant if the contract or arrangement has been made, the understanding has been arrived at or the covenant has been given before the Commission makes a determination in respect of the application.

(11) An application made to the Commission under this section for an authorisation in relation to a particular contract or proposed contract may be expressed to be made also in relation to another contract or proposed contract that is or will be, or in relation to two or more other contracts or proposed contracts that are or will be, in similar terms to the first-mentioned contract or proposed contract and, if an application is so expressed, the Commission may grant a single authorisation in respect of all the contracts or proposed contracts or may grant separate authorisations in respect of any one or more of the contracts or proposed contracts.

(12) When an application made to the Commission under this section for an authorisation in relation to a particular contract or proposed contract is expressed in accordance with subsection (11), to be made also in relation to another contract or contracts or proposed contract or proposed contracts—

- (a) the application must set out—

- (i) the names of the parties to each other contract; and
- (ii) the names of the parties to each other proposed contract if those names are known to the applicant at the time when the application is made; and

- (b) if an authorisation is granted in respect of a proposed contract the names of the parties to which were not so known to the applicant, the authorisation is, by force of this subsection, deemed to be expressed to be subject to a condition that any party to the contract will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract.

(13) In subsections (11) and (12)—

- (a) contract includes an arrangement, understanding or covenant, and proposed contract has a corresponding meaning; and
- (b) the reference to the parties to a contract or proposed contract is, for the purposes of the application of those subsections in relation to a covenant or proposed covenant by reason of paragraph (a) of this subsection, to be read as a reference to the persons who are or will be, or but for subsection 29(1) would be, respectively bound by, or entitled to the benefit of, the covenant or proposed covenant.

(14) A person who has made an application to the Commission for an authorisation may at any time, by notice in writing to the Commission, withdraw the application.

Procedure for applications

129B.—(1) An application for an authorisation must be made in writing as prescribed.

(2) The Commission must cause to be made public in such manner as it thinks fit notice of the receipt by the Commission of an application for an authorisation.

(3) The Commission must keep a register of applications for authorisations received by it (including applications that have been withdrawn).

(4) Subject to this section, the register kept under subsection (3) must include—

(a) any document furnished to the Commission in relation to an application for an authorisation;

(b) any draft determination, and any summary of reasons, by the Commission furnished to any person under section 129C;

(c) any document relating to—

(i) the revocation by the Commission of an authorisation; or

(ii) the substitution of an authorisation for an authorisation previously in force;

- (d) any record of a conference made in accordance with subsection 129C(8) and any certificate in relation to a conference given under subsection 129C(9);
- (e) particulars of any oral submissions made to the Commission in relation to such an application; and
- (f) the determination of the Commission on such an application and the statement of the reasons given by the Commission for that determination.

(5) When a person furnishes a document to the Commission in relation to an application for an authorisation or makes an oral submission to the Commission in relation to such an application, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (3) by reason of the confidential nature of any of the matters contained in the document or submission.

(6) When such a request is made—

- (a) if the document or the part of the document, or the submission or the part of the submission, to which the request relates contains particulars of—
 - (i) a secret formula or process;
 - (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
 - (iii) the current costs of manufacturing, producing or marketing goods or services,

the Commission must exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (3); and

- (b) in any other case, the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(7) If the Commission refuses a request to exclude a document or part of a document from the register kept under subsection (3), the Commission must, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, paragraph (4)(a) does not apply in relation to the document or part of the document.

(8) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (3), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, paragraph (4)(e) does not apply in relation to the submission or that part of the submission as the case may be.

(9) If the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in paragraph (4)(e) or particulars referred to in paragraph (4)(e) from the register kept under subsection (3).

(10) If a person requests, in accordance with subsection (5) that a document or a part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (3), the document or part of the document, or ~~particulars of the submission~~ or of the part of the submission, must not be included in that register until the Commission has made a determination in relation to the request.

Determination of applications for authorisations

129C.—(1) The Commission must, in respect of an application for an authorisation—

- (a) make a determination in writing granting such authorisation as it considers appropriate; or
- (b) make a determination in writing dismissing the application.

(2) The Commission must take into account any submissions in relation to the application made to it by the applicant, by the State or by any other person.

(3) The Commission must state in writing its reasons for a determination made by it.

(4) Before making a determination in respect of an application for an authorisation, the Commission must comply with the requirements of section 129D.

(5) The Commission must not make a determination granting an authorisation under subsection 129A(1), (2) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if—

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in,

as the case may be.

(6) The Commission must not make a determination granting an authorisation under subsection 129A(1) or (2) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, ~~or is likely to result~~, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(7) The Commission must not—

(a) make a determination granting—

- (i) an authorisation under subsection 129A(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision;
- (ii) an authorisation under subsection 129A(4) in respect of proposed conduct; or
- (iii) an authorisation under subsection 129A(6) for proposed conduct to which section 47 applies,

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorisation under subsection 129A(1) in respect of a provision of a contract, arrangement or understanding that is

or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(8) The Commission must not make a determination granting an authorisation under subsection 129A(7) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50 unless it is satisfied in all the circumstances 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.

(9) In determining what amounts to a benefit to the public for the purposes of subsection (8)—

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph)—

- (i) a significant increase in the real value of exports;
- (ii) a significant substitution of domestic products for imported goods;
and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Fiji Islands industry.

(10) Subject to subsections (11), (14), (15), (16) and (17), if—

(a) the Minister, by notice published in the Gazette, fixes a date for the purposes of the application of this subsection in relation to applications for authorisations under subsection 129A(1), (2), (4), (5) or (6); and

(b) the Commission does not determine an application for an authorisation under a subsection in relation to which a date is so fixed within 4 months from that date or the date on which the application was or is received by the Commission, whichever is the later,

the Commission is deemed to have granted, at the expiration of that period, the authorisation applied for.

(11) If, within the latest occurring 4-month period referred to in subsection (10)(b) in relation to an application for an authorisation, the Commission gives to the applicant a written notice requesting the applicant to give to the Commission additional information

relevant to the determination of the application, the reference in that paragraph to 4 months is to be read as a reference to a period consisting of 4 months increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide.

(12) Subject to subsections (14), (15) and (17), if the Commission does not determine an application for an authorisation under subsection 129A(7) within—

- (a) 30 days from the day on which the application is received by the Commission; or
- (b) if the Commission, before the end of that period of 30 days gives to the applicant a notice in writing requesting the applicant to give to the Commission additional information relevant to the determination of the application - the period consisting of 30 days from the day on which the application is received by the Commission increased by the number of days in the period commencing on the day on which the notice is given to the applicant and ending on the day on which the applicant gives to the Commission such of the additional information as the applicant is able to provide,

the Commission is deemed to have granted, at the end of that period, the authorisation applied for.

(13) The Commission may, within the 30-day period mentioned in subsection (12), notify the applicant in writing that the Commission considers that the period should be extended to 45 days due to the complexity of the issues involved. If the Commission so notifies the applicant, the references in subsection (12) to 30 days are to be read as references to 45 days.

(14) If the applicant for an authorisation informs the Commission in writing before the expiration of the period referred to in subsection (10) or (12) (in this subsection and in subsection (15) referred to as the base period) that the applicant agrees to the Commission taking a specified longer period for the determination of the application, that longer period is deemed, for the purposes of the application, to be substituted in subsection (10) or (12), as the case may be, for the base period.

(15) For the purposes of any application of subsection (14), a reference in that subsection to the base period is to be read, if another period is deemed by any other application or applications of that subsection to have been substituted in subsection (10) or (12) for the base period, as a reference to that other period.

(16) If a person to whom a notice has been sent under subsection 129D(2) in relation to a draft determination in respect of an application for an authorisation notifies the

Commission in accordance with subsection 129D(6) that he or she wishes the Commission to hold a conference in relation to the draft determination, the period referred to in subsection (10) of this section is deemed to be increased by a period equal to the period commencing on the day on which the first notification in relation to the draft determination was received by the Commission and ending on the seventh day after the day specified in the certificate given by a member of the Commission in pursuance of subsection 129D(9) as the day on which the conference terminated.

(17) If a party to a joint venture makes at the one time two or more applications for authorisations, being applications each of which deals with a matter relating to the joint venture—

- (a) the Commission must not make a determination in respect of any one of those applications unless it also makes determinations at the same time in respect of the other applications; and
- (b) ~~if the Commission does not make a determination in respect of any one of the applications within the period referred to in whichever of subsections (10) and (12) is applicable in relation to that application, the Commission is deemed to have granted, at the expiration of that period, all the authorisations applied for.~~

Commission to afford opportunity for conference before determining application for authorisation

129D.—(1) Before determining an application for an authorisation (other than an application for an authorisation under subsection 129A(7)), the Commission must prepare a draft determination in relation to the application.

(2) The Commission must, by notice in writing sent to the applicant and to each other interested person, invite the applicant or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the applicant or other person wishes the Commission to hold a conference in relation to the draft determination.

(3) If—

- (a) the draft determination provides for the granting of the application unconditionally; and
- (b) no person has made a written submission to the Commission opposing the application,

each notice by the Commission under subsection (2) must inform the person to whom the notice is sent that the draft determination so provides.

(4) If—

- (a) the draft determination does not provide for the granting of the application or provides for the granting of the application subject to conditions; or
- (b) the draft determination provides for the granting of the application unconditionally but a written submission has, or written submissions have, been made to the Commission opposing the application,

the Commission must send with each notice under subsection (2) a copy of the draft determination and—

- (c) in a case to which paragraph (a) applies - a summary of the reasons why the Commission is not satisfied that the application should be granted or why it is not satisfied that the application should be granted unconditionally; or
- (d) in a case to which paragraph (b) applies - a summary of the reasons why it is satisfied that the application should be granted unconditionally.

(5) If each of the persons to whom a notice was sent under subsection (2)—

- (a) notifies the Commission within the period of 14 days mentioned in that subsection that he or she does not wish the Commission to hold a conference in relation to the draft determination; or
- (b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference,

the Commission may make the determination at any time after the expiration of that period.

(6) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft determination, the Commission must appoint a date (being not later than 3 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(7) At a conference held under subsection (6)—

- (a) the Commission must be represented by a member or members of the Commission (being a member or
- (b) members who participated in the preparation of the draft determination) nominated by the Chairperson;

- (c) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate;
- (d) person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and
- (e) no other person is entitled to be present.

(8) A member of the Commission participating in the conference must make a record of the discussions sufficient to set out the matters raised by the persons participating in the conference.

(9) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson—

- (a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;
- (b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and
- (c) must give a certificate certifying the day on which the first notification under subsection (6) in relation to the draft determination was received by the Commission and the day on which the conference terminated,

and any such certificate must be received in all courts as evidence of the matters certified.

(10) A document purporting to be a certificate referred to in subsection (9) is, unless the contrary is established, deemed to be such a certificate and to have been duly given.

(11) The Commission must take account of all matters raised at the conference and may at any time after the termination of the conference make a determination in respect of the application.

(12) For the purposes of this section, interested person means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the application, being an interest that, in the opinion of the Commission, is real and substantial.

(13) If the Commission considers that two or more applications for authorisations that are made by the same person, or by persons being bodies corporate that are related to each other, involve the same or substantially similar issues, the Commission may treat the applications as if they constituted a single application and may prepare one draft determination in relation to the applications and hold one conference in relation to that draft determination.

Grant, revocation and variation of authorisations

129E.—(1) An authorisation may be expressed to be in force for a period specified in the authorisation and, if so expressed, remains in force for that period only.

(2) An authorisation, other than an authorisation deemed to have been granted under subsection (10) or (12) of section 129C, comes into force on the day specified for the purpose in the authorisation.

(3) If the Commission considers that it is appropriate to do so—

(a) for the purpose of enabling due consideration to be given to an application for an authorisation; or

(b) for any other reason,

an authorisation granted in respect of the application may be expressed to be an interim authorisation and the Commission may at any time revoke an authorisation so expressed.

(4) Subsections (3) to (8) of section 129C do not apply in relation to an authorisation that is expressed to be an interim authorisation.

(5) An authorisation may be expressed to be subject to such conditions as are specified in the authorisation.

(6) If, at any time after the Commission has granted an authorisation, it appears to the Commission that the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular, that a condition to which the authorisation was expressed to be subject has not been complied with or that there has been a material change of circumstances since the authorisation was granted—

(a) the Commission must give notice accordingly to the person to which the authorisation was given and any other persons who appear to the Commission to be interested and afford them a reasonable opportunity of making submissions to the Commission in the matter; and

- (b) when, after so notifying the person and other persons (if any) and considering any submissions made by those persons, the Commission is satisfied that the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular, that the condition has not been complied with or that there has been such a material change of circumstances,

the Commission may make a determination revoking the authorisation and, if it considers it appropriate to do so, granting a further authorisation in substitution for the authorisation so revoked.

Division 2—Notifications

Notification of exclusive dealing

129F.—(1) Subject to subsection (2), a person who engages, or proposes to engage, in conduct of a kind referred to in subsection (2), (3), (4), (5), (6), (7), (8) or (9) of section 46 may give to the Commission notice, as prescribed, setting out particulars of the conduct or proposed conduct.

- (2) A person may not give a notice for conduct or proposed conduct if—

- (a) the person applied for an authorisation for the conduct or proposed conduct; and
- (b) the Commission made a determination dismissing the application or granting an authorisation (whether or not the authorisation is still in force).

(3) If the Commission is satisfied that the engaging by a person in conduct or proposed conduct of a kind referred to in subsection (2), (3), (4), (5), (6), (7), (8) or (9) of section 46 the subject of a notice given by the person to the Commission under subsection (1) has or would have the purpose or has or is likely to have, or would have or be likely to have, the effect of substantially lessening competition within the meaning of section 46 and that in all the circumstances—

- (a) the conduct has not resulted or is not likely to result, or the proposed conduct would not result or be likely to result, in a benefit to the public; or
- (b) any benefit to the public that has resulted or is likely to result from the conduct, or would result or be likely to result from the proposed conduct, would not outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct;

the Commission may at any time give notice in writing to the person stating that the Commission is so satisfied and accompanied by a statement setting out its reasons for being so satisfied.

(4) Before giving a notice under subsection (3), the Commission must comply with the requirements of section 129G.

(5) In satisfying itself for the purposes of subsection (3) in relation to any conduct or proposed conduct referred to in a notice given to the Commission by a person under subsection (1), the Commission must seek such relevant information as it considers reasonable and appropriate and may make a decision on the basis of any information so obtained and any other information furnished to it by the person or any other person or otherwise in its possession.

(6) A person who has given a notice to the Commission under this section in relation to any conduct or proposed conduct may, at any time before the Commission has given to the person a notice under subsection (3) in relation to the conduct or proposed conduct, by notice in writing to the Commission, withdraw the first-mentioned notice.

(7) When a person has given notice to the Commission under subsection (1), the engaging by the person in the conduct referred to in the notice after the giving of the notice must not be taken, for the purposes of section 46, to have the purpose, or to have or be likely to have the effect, of substantially lessening competition within the meaning of that section unless—

(a) the Commission has given notice to the person under subsection (3) of this section in relation to the conduct and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or

(b) the notice has been, or is deemed to have been, withdrawn and the conduct takes place after the day on which the notice was, or is deemed to have been, withdrawn.

(8) If—

(a) a person gives a notice to the Commission under subsection (1) in relation to any conduct or proposed conduct;

(b) before or after the notice is given the person makes an application to the Commission for an authorisation to engage in that conduct; and

(c) the Commission—

(i) makes a determination dismissing the application; or

(ii) makes a determination granting an authorisation in respect of the application,

the notice is deemed to be withdrawn the notice is thereupon deemed to be withdrawn.

(9) If—

- (a) a person has given a notice to the Commission under subsection (1) in relation to conduct or proposed conduct and the Commission has given notice to the person in writing under subsection (3) in relation to the conduct or the proposed conduct; or
- (b) a notice given by a person to the Commission under subsection (1) in relation to conduct or proposed conduct is withdrawn or deemed to be withdrawn,

the person is not entitled to give a further notice under subsection (1) to the Commission in relation to the same conduct or proposed conduct or in relation to conduct or proposed conduct to the like effect.

Commission to afford opportunity for conference before giving notice in relation to exclusive dealing

129G.—(1) Before giving a notice under subsection 129F(3) in relation to any conduct or proposed conduct, the Commission must prepare a draft notice in relation to that conduct or proposed conduct.

(2) The Commission must, by notice in writing sent to the person in relation to whose conduct or proposed conduct the draft notice relates and to each other interested person, invite the person or other person to notify the Commission, within 14 days after a date fixed by the Commission being not earlier than the day on which the notice is sent, whether the person or other person wishes the Commission to hold a conference in relation to the draft notice.

(3) The Commission must send with each notice under subsection (2) a copy of the draft notice and a summary of the reasons why it proposes to give the notice under subsection 129F(3).

(4) If each of the persons to whom a notice was sent under subsection (2)—

- (a) notifies the Commission in writing within the period of 14 days mentioned in that subsection that the person does not wish the Commission to hold a conference in relation to the draft notice; or
- (b) does not notify the Commission within that period that he or she wishes the Commission to hold such a conference,

the Commission must decide after the end of that period whether or not to give the notice under subsection 129F(3).

(5) If any of the persons to whom a notice was sent under subsection (2) notifies the Commission in writing within the period of 14 days mentioned in that subsection that he or she wishes the Commission to hold a conference in relation to the draft notice, the Commission must appoint a date (being not later than 30 days after the expiration of that period), time and place for the holding of the conference and give notice of the date, time and place so appointed to each of the persons to whom a notice was sent under subsection (2).

(6) At a conference held under section (5)—

- (a) the Commission must be represented by a member or members of the Commission (being a member or members who participated in the preparation of the draft notice) nominated by the Chairperson;
- (b) each person to whom a notice was sent under subsection (2) and any other interested person whose presence at the conference is considered by the Commission to be appropriate is entitled to attend and participate personally or, in the case of a body corporate, may be represented by a person who, or by persons each of whom, is a director, officer or employee of the body corporate;
- (c) a person participating in the conference in accordance with paragraph (a) or (b) is entitled to have another person or other persons present to assist him or her but a person who so assists another person at the conference is not entitled to participate in the discussion; and
- (d) no other person is entitled to be present.

(7) A member of the Commission participating in the conference must make such record of the discussions as is sufficient to set out the matters raised by the persons participating in the conference.

(8) The member of the Commission who represents the Commission at the conference, or, if the Commission is represented by more than one member of the Commission, one of those members appointed by the Chairperson—

- (a) may exclude from the conference any person who uses insulting language at the conference, creates, or takes part in creating or continuing, a disturbance at the conference or repeatedly interrupts the conference;
- (b) may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference (other than persons excluded from the conference under paragraph (a)); and

- (c) must give a certificate certifying the day on which the first notification under subsection (5) in relation to the draft notice was received by the Commission and the day on which the conference terminated,

and any such certificate is to be received in all courts as evidence of the matters certified.

(9) A document purporting to be a certificate referred to in subsection (8) is, unless the contrary is established, deemed to be such a certificate and to have been duly given.

(10) The Commission must take account of all matters raised at the conference.

(11) After the conference, the Commission must decide whether or not to give a notice under subsection 129F(3).

(12) For the purposes of this section, interested person means a person who has notified the Commission in writing that he or she, or a specified unincorporated association of which he or she is a member, claims to have an interest in the matter, being an interest that, in the opinion of the Commission, is real and substantial.

(13) If the Commission is of the opinion that two or more notices given to the Commission under subsection 129F(1) by the same person, or by persons being bodies corporate that are related to each other, deal with substantially similar conduct or proposed conduct, the Commission may treat the notices as if they constituted a single notice and may prepare one draft notice in relation to the notices so given to the Commission and hold one conference in relation to that draft notice.

Register of notifications

129H.—(1) The Commission must keep a register containing—

- (a) draft notices, and summaries of reasons, by the Commission furnished to any person under section 129G;
- (b) records of conferences made in accordance with section 129G(7) and certificates in relation to conferences given under section 129G(8);
- (c) notices (including notices that have been withdrawn) given to the Commission under section 129F;
- (d) documents furnished to the Commission in relation to such notices;

- (e) particulars of any oral submissions made to the Commission in relation to such notices;
- (f) particulars of notices given by the Commission to persons by which notices under section 129F were given; and
- (g) particulars of any permits given by the Commission under paragraph (a) of section 129F(7).

(2) If a person furnishes a document to the Commission in relation to a notice given to the Commission under section 129F or makes an oral submission to the Commission in relation to the notice, he or she may, at the time when the document is furnished or the submission is made, request that the document or a part of the document, or that particulars of the submission or of part of the submission, be excluded from the register kept under subsection (1) by reason of the confidential nature of any of the matters contained in the document or submission.

(3) If a request is made under subsection (2) then—

- (a) if the document or part of the document, or the submission or part of the submission, to which the request relates contains particulars of—
 - (i) a secret formula or process;
 - (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or of assets of a person; or
 - (iii) the current costs of manufacturing, producing or marketing goods or services,

the Commission must exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from the register kept under subsection (1); and

- (b) in any other case the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of matters contained in the document or the part of the document, or in the submission or the part of the submission, exclude the document or the part of the document, or particulars of the submission or of the part of the submission, as the case may be, from that register.

(4) If the Commission refuses a request to exclude a document or a part of a document from the register kept under subsection (1), the Commission must, if the person who furnished the document to the Commission so requires, return the document or part of the document to him or her and, in that case, subsection (1)(d) does not apply in relation to the document or part of the document.

(5) Subsection (4) does not apply in relation to a document that was produced to the Commission in pursuance of a notice under section 106.

(6) If the Commission refuses a request to exclude particulars of an oral submission or of part of an oral submission from the register kept under subsection (1), the person who made the submission may inform the Commission that he or she withdraws the submission or that part of the submission and, in that case, subsection (1)(e) does not apply in relation to the submission or that part of the submission, as the case may be.

(7) If the Commission is satisfied that it is desirable to do so for any reason other than the confidential nature of matters contained in a document or submission, the Commission may exclude a document or part of a document referred to in subsection (1)(d) or particulars referred to in subsection (1)(e) from the register kept under subsection (1).

(8) If a person requests in accordance with subsection (2) that a document or part of a document, or that particulars of a submission or of part of a submission, be excluded from the register kept under subsection (1), the document or the part of the document, or particulars of the submission or of the part of the submission, must not be included in that register until the Commission has made a determination in relation to the request.

Limitation of action

31. Section 133 of the Decree is amended—

- (a) by inserting in paragraph (a) of subsection (1) “the Commission,” after “Director,”;
- (b) by adding at the end of paragraph (b) of subsection (1) ‘or by the Commission or on the Commission’s behalf’; and
- (c) by deleting from subsection (2) ‘or an Inspector’ and substituting, ‘an Inspector, the Commission, a person acting on the Commission’s behalf or an officer of the Commission’.

Preservation of secrecy

32. Section 134 of the Decree is amended—

- (a) by inserting in subsection (1) ‘or a member or officer of the Commission’ after ‘Inspector’; and

- (b) by inserting in paragraph (c) of subsection (2) 'or the Commission' after 'Director' (wherever occurring).

Schedule of minor and other amendments

33. The Decree is amended as set out in the Schedule.

SCHEDULE

CONSEQUENTIAL AND MINOR AMENDMENTS OF FAIR TRADING DECREE
(Section 33)

1. Section 24 of the Decree is amended by inserting in paragraph (a) of subsection (3) '(other than Part VIIIA)' after 'Decree'.
2. The following provisions of the Decree are amended by inserting 'or the Commission' after 'Department'—

Sections 105(1), 106(3)(a), (8) 130, 133(1)(a), (2) 134(1) and (2)(a).

3. The following provisions of the Decree are amended by inserting 'or the Commission' after 'Director' -

Sections 98(1), 102(3), (4) (5), 105(6), 106(a), 111, 116(1), 119, 125(3)(b)(i), (4), (9) (10), 129(1), 133(1)(a) (b) (2), 134(1) and (2)(a)(b) and (c).

4. Section 125(2) of the Decree is amended by inserting, 'the Commission' after 'Director'.
5. Section 126 of the Decree is amended by deleting subsection (3)(a).
6. Section 127 of the Decree is amended in subsection (6) by adding at the end—

'or unless the goods or services involved in the contravention do not exceed \$150,000 in value'.

Passed by the House of Representatives this 15th day of October 1998.

Passed by the Senate this 28th day of October 1998.