

[Act 1995 No 8]



New South Wales

Competition Policy Reform (New South Wales) Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to enact legislation that will give effect in New South Wales to the reform of competition policy, as endorsed by the Council of Australian Governments and as recommended by the Hilmer Report.

The *Competition Policy Reform Bill 1995* of the Commonwealth (the Commonwealth Bill) is complemented by legislation to be enacted by the States and Territories. The package of competition law applying throughout Australia will be found in the *Trade Practices Act 1974* of the Commonwealth (as proposed to be amended by the Commonwealth Bill) and the proposed legislation of the States and Territories.

This Bill deals principally with the application of the Competition Code. It does so in concert with the Commonwealth Bill, which effectively creates the Competition Code but which does not itself apply the Code. The principal purpose of this scheme is to apply Part IV of the Trade Practices Act (TPA) to those persons and things that do not or may not fall within the

constitutional competence of the Commonwealth (especially individuals and partnerships). It does so by applying the provisions of the Part to all persons (including corporations, as well as individuals and partnerships). The Competition Code consists of:

- The text set out in the Schedule to the TPA (this repeats most, but not all, of Part IV, but generalised so as to apply to “persons” instead of “corporations”). The result will be an overlap, mainly in the area of corporations (the question of double jeopardy is dealt with in the legislation, as mentioned below).
- The remaining provisions of the TPA (with certain exceptions), so far as they would relate to the Schedule version of Part IV if the Schedule version were substituted for the actual Part IV.
- Relevant regulations under the TPA.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act. Part 1 and Part 7 will commence immediately on receiving assent. These Parts are supplementary to the substantive provisions of the Bill. Part 1 contains the name of the proposed Act, its commencement and definitions. Part 7 contains transitional provisions.

The remaining provisions are intended to commence 12 months after the date of assent to the Commonwealth Bill. Although the Commonwealth Bill contains a number of different commencement dates, virtually all of the Commonwealth Bill will have commenced 12 months after the date of assent. The result therefore is that the Commonwealth Bill will be in force when the State Bill commences.

There is provision in clause 2 of the Bill for the postponement of the commencement of those remaining provisions, to deal with any unforeseen circumstances that might arise.

Clause 3 contains interpretive provisions for the proposed Act. Clause 3 (1) contains a list of definitions. An explanation of their origin or purpose is as follows:

application law—the same as in proposed Part XIA, to be inserted into the TPA by the Commonwealth Bill.

Commission—the same as in section 4 of the TPA, as amended by the Commonwealth Bill.

Competition Code—the same as in proposed Part XIA.

Competition Code text—the text of the law to be applied as the Competition Code.

Conduct Code Agreement—the same as in section 4 of the TPA, as amended by the Commonwealth Bill.

Council—the same as in section 4 of the TPA, as amended by the Commonwealth Bill.

instrument—the same as the definition used in corporations legislation and agricultural and chemical legislation (agvet legislation).

jurisdiction—to mean a State, which is in turn defined to include a Territory.

law—the same as the definition used in corporations and agvet legislation.

modifications—the same as in proposed Part XIA.

month—the same as in the *Acts Interpretation Act 1901* of the Commonwealth.

officer—merely picks up the definition in proposed Part XIA.

participating jurisdiction—a jurisdiction that applies the Competition Code.

proclamation—makes it clear that it is a proclamation of the State, not of the Commonwealth.

Schedule version of Part IV—the same as in proposed Part XIA.

State—is defined as including a Territory.

Territory—the same as in proposed Part XIA.

this jurisdiction—will mean New South Wales. Use of this definition reduces variation between the corresponding legislation.

Trade Practices Act—a convenient short definition.

Tribunal—the same as in section 4 of the TPA, as amended by the Commonwealth Bill.

Clause 3 (2) provides for expressions used in the Bill to have the same meanings as in the TPA.

Clause 3 (3) provides that references to Commonwealth Acts include amendments and replacements.

Part 2 The Competition Code

Clause 4 defines the Competition Code text that will be applied to become the Competition Code. As mentioned above, this is primarily the provisions of Part IV of the TPA.

Clause 5 is the operative clause of the Bill. It applies the Competition Code text as a law of New South Wales.

Clause 6 provides a scheme to deal with future modifications of the Competition Code text by Commonwealth legislation. In essence, the scheme provides that there is to be at least a two month gap between the enactment or making of Commonwealth modifications and their application under clause 5. That period can be shortened by proclamation; alternatively, a proclamation can provide that a modification is not to apply at all in the State.

Clause 7 provides, for the purposes of uniformity, that the *Acts Interpretation Act 1901* of the Commonwealth applies to the interpretation of the Competition Code (instead of the *Interpretation Act 1987* of New South Wales).

Clause 8 makes it clear that the Competition Code is not to be construed as merely applying in the territorial area of the State, and that the extraterritorial competence of the legislature of the State is being used. However provisions contained in section 5 of the TPA are repeated in the clause to require consent of the Commonwealth Minister for proceedings involving conduct outside Australia.

Clause 9 provides for the interpretation of the expression “the commencement of this section” in the Schedule version of Part IV. This expression will, in effect, be read as a reference to the commencement of substantive provisions of the Bill.

Part 3 Citing the Competition Codes

Clauses 10–12. This Part provides a system for referring to the Competition Codes.

Part 4 Application of Competition Codes to Crown

Clause 13 provides that the Act and Competition Code of New South Wales will bind the Crown in all its capacities (to the full extent of constitutional capacity to do this). In line with section 2A (1) and proposed section 2B (1) of the TPA, this will apply to the Crown only when carrying on a business.

Clause 14 is the counterpart of clause 13, and provides that the Act and Competition Code of another State or Territory will bind the Crown in right of New South Wales. Again, this will apply to the Crown only when carrying on a business.

Clause 15 makes it clear that certain activities carried on by governments or government authorities do not amount to carrying on a business (for the purposes of clauses 13 and 14). The clause is the same as proposed section 2C of the TPA.

Clause 16 provides that the Crown is not liable to pecuniary penalties or prosecutions. This is in line with proposed sections 2A (3) and 2B (2) of the TPA.

Clause 17 makes it clear that, where the law of another jurisdiction binds the Crown in right of New South Wales by virtue of this Part, the Code overrides any prerogative right or privilege of the Crown (eg in relation to the payment of debts). Similar provisions are included in corporations and agvet legislation.

Part 5 National administration and enforcement of Competition Codes

Clauses 18–33. The provisions of this Part are intended to promote the uniform administration of the Competition Codes, as if they were a single Commonwealth Act. The provisions are similar to those included in corporations legislation.

Part 6 Miscellaneous

Clause 34 recognises that the same conduct is capable of being punished under more than one law (the Competition Code of the State, the Competition Code of another jurisdiction, or the Trade Practices Act), and removes this double jeopardy. The clause has its counterpart in proposed section 150H of the TPA.

Clause 35 makes it clear that documentation and other things are not invalid because they also serve other Competition Codes or the TPA.

Clause 36 is intended to deal with the technical point that a reference in an applied law to another Commonwealth law is to be treated as if the other law were itself an applied law. There is a similar provision in the corporations and agvet legislation.

Clause 37 provides that fees, taxes, penalties, fines and other money paid under the Competition Code of the State are to be paid to the Commonwealth. This will not apply to amounts recovered in actions for damages. Clause 37 (3) is a technical provision that imposes fees (including fees that are taxes) prescribed by the applied regulations.

Clause 38 allows regulations to be made for the purposes of the proposed legislation.

Clause 39 provides a specific power to make regulations for the purposes of prescribing exceptions under section 51 of the TPA or section 51 of the Competition Code.

Part 7 Transitional rules

Clause 40 contains definitions used in Part 7.

Clause 41 gives effect to the policy that existing contracts made before 19 August 1994 (the date the legislative scheme was announced) are not caught by the Competition Code. However, if such a contract is varied on or after that date, the Competition Code will apply to future conduct in relation to the varied contract, except as regards matters that were previously protected. The Code applies to future conduct in relation to contracts made after that date.

Although a contract is “grandfathered” under clause 41 in relation to the Competition Code, it may still be caught by Part IV of the TPA.

Although clause 41 corresponds generally to clauses 30 and 84 of the Commonwealth Bill, those clauses do not contain provisions that correspond to clause 41 (1) (c) and (3). That paragraph and that subclause are inserted in this Bill for the purpose of clarifying the way the Competition Code applies in relation to existing contracts made on or after 19 August 1994, and are not intended to imply that clause 41 operates differently from those clauses of the Commonwealth Bill in this respect.

Clause 42 complements clause 29 of the Commonwealth Bill. Clause 29 is intended to provide a three-year continuation of current exceptions (under section 51 of the TPA) that do not comply with the requirements of new section 51 (1) and (1B) of the TPA (to be inserted by clause 13 of the Commonwealth Bill). Clause 42 provides that the same exceptions will be treated as exceptions from Part IV of the Competition Code for that three-year period.

Clause 43 gives effect to the policy that pecuniary penalties will not apply in respect of conduct that is being subjected to the competition law for the first time, until two years have passed after the Commonwealth Bill is assented to. Since this Bill is intended to commence 12 months after the Commonwealth Bill is assented to, this effectively means that there will be one year during which pecuniary penalties will not be available under the Competition Code. Other remedies will be available during that period of one year.

The period of one year will be extended if the commencement of the substantive provisions of this Bill is postponed under clause 2.

Clause 44 permits persons to apply to the Commission for authorisation of conduct and to notify conduct to the Commission before the Competition Code applies to the conduct.

Clause 45 enables regulations to be made for savings and transitional purposes. Regulations can be made retrospectively for this purpose, but any retrospective effect is not to prejudice rights or impose liabilities (except as regards the State or its authorities).