

[Act 1999 No 55]



New South Wales

Price Exploitation Code (New South Wales) Bill 1999

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 New Tax System Price Exploitation Code of the Commonwealth. The Code is intended to prevent price exploitation as a result of the New Tax System.

Amendments to the *Trade Practices Act 1974* of the Commonwealth (the **Trade Practices Act**) effected by the *A New Tax System (Trade Practices Amendment) Act 1999* of the Commonwealth (the **Commonwealth Act**) are to be complemented by legislation enacted by the States and Territories.

This Bill deals principally with the application of the New Tax System Price Exploitation Code (the **Code**). It does so in concert with the Commonwealth Act, which effectively creates the Code but which does not itself apply the Code. Its principal purpose is to apply Part VB of the Trade Practices Act 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 that Part to all persons (including corporations, as well as individuals and partnerships). The Code consists of the following:

- (a) the text set out in Part 2 of the Schedule to the Trade Practices Act (this repeats most, but not all, of Part VB, but generalised so as to apply to “persons” instead of “corporations”). The result will be an overlap, mainly in the area of corporations,
- (b) the remaining provisions of the Trade Practices Act (with certain exceptions), so far as they would relate to the Schedule version of Part VB if the Schedule version were substituted for the actual Part VB,
- (c) relevant regulations under the Trade Practices Act,
- (d) guidelines under section 75AV of the Trade Practices Act.

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 on 10 December 1999.

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 Part XIAA of the Trade Practices Act.

Commission—the same as in section 4 of the Trade Practices Act.

instrument—the same as the definition used in corporations legislation and competition policy reform legislation.

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

law—the same as the definition used in corporations legislation and competition policy reform legislation.

modifications—the same as in Part XIAA of the Trade Practices Act.

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

New Tax System Price Exploitation Code—the same as in Part XIAA of the Trade Practices Act.

New Tax System Price Exploitation Code text—the text of the law to be applied as the Code.

officer—the same as in Part XIAA of the Trade Practices Act.

participating jurisdiction—a jurisdiction that applies the Code.

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

Schedule version of Part VB—the same as in Part XIAA of the Trade Practices Act.

State—is defined as including a Territory.

Territory—the same as in Part XIAA of the Trade Practices Act.

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

Trade Practices Act—a convenient short definition.

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

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

Part 2 The New Tax System Price Exploitation Code

Clause 4 defines the Code text that will be applied to become the *New Tax System Price Exploitation Code of New South Wales* (the ***New South Wales Code***). As mentioned above, it consists primarily of the provisions of Part VB of the Trade Practices Act.

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

Clause 6 provides a scheme to deal with future modifications of the 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 New South Wales Code (instead of the *Interpretation Act 1987* of New South Wales).

Clause 8 specifies the persons to whom, and the circumstances in which, the New South Wales Code applies within the State.

Clause 9 provides that the New South Wales Code applies beyond the territorial limits of the State, and that the extraterritorial competence of the legislature of the State is being used.

Part 3 Citing the New Tax System Price Exploitation Codes

Clause 10 provides that the New Tax System Price Exploitation Code text, as applying as a law of the State, may be referred to as the “New Tax System Price Exploitation Code of New South Wales”.

Clause 11 provides that a reference in any instrument to the New South Wales Code extends to a reference to the Codes of the other participating jurisdictions.

Clause 12 provides that a reference to the Code of another participating jurisdiction is a reference to the New Tax System Price Exploitation Code text, as applying as a law of that jurisdiction.

Part 4 Application of New Tax System Price Exploitation Codes to Crown

Clause 13 provides that the application law 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 section 2B (1) (aa) of the Trade Practices Act, this will apply to the Crown only when carrying on a business.

Clause 14 is the counterpart of clause 13, and provides that the corresponding application law of another participating jurisdiction 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 reflects section 2C of the Trade Practices Act.

Clause 16 provides that the Crown is not liable to pecuniary penalties or prosecutions. This clause reflects sections 2A (3) and 2B (2) of the Trade Practices Act.

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, that law overrides any prerogative right or privilege of the Crown (for example, in relation to the payment of debts). Similar provisions are included in corporations legislation and competition policy reform legislation.

Part 5 National administration and enforcement of New Tax System Price Exploitation Codes

Division 1 Preliminary

Clause 18 provides that the object of the proposed Part is to help to ensure that the Codes of the participating jurisdictions are administered on a uniform basis.

Division 2 Conferral of functions

Clause 19 confers functions under the proposed Act on certain authorities and officers of the Commonwealth.

Clause 20 empowers the Commission to do things in New South Wales in the exercise of its functions under the Code of a participating jurisdiction.

Division 3 Offences

Clause 21 provides that the object of the proposed Division is to provide that offences against the New South Wales Code and the Codes of the other participating jurisdictions are taken to be Commonwealth offences.

Clause 22 applies Commonwealth law to offences against the New South Wales Code.

Clause 23 applies Commonwealth law to offences against the Codes of the other participating jurisdictions.

Clause 24 ensures that any power conferred on a Commonwealth officer or authority by Commonwealth law, as applied by proposed sections 22 and 23, is exercisable in relation to an offence against the New South Wales Code or the Code of a participating jurisdiction.

Clause 25 prevents a New South Wales officer or authority from exercising any power that is exercisable by a Commonwealth officer or authority under the proposed Division.

Division 4 Administrative law

Clause 26 defines the expression *Commonwealth administrative laws* for the purposes of the proposed Division.

Clause 27 applies the Commonwealth administrative laws as laws of New South Wales to matters arising under the New South Wales Code.

Clause 28 applies the Commonwealth administrative laws as laws of New South Wales to matters arising under the Codes of the other participating jurisdictions.

Clause 29 ensures that any power conferred on a Commonwealth officer or authority by the Commonwealth administrative laws, as applied by proposed sections 27 and 28, is exercisable in relation to a matter arising under the New South Wales Code or the Code of a participating jurisdiction.

Clause 30 prevents a New South Wales officer or authority from exercising any power that is exercisable by a Commonwealth officer or authority under the proposed Division.

Part 6 Miscellaneous

Clause 31 recognises that the same conduct is capable of being punished under more than one law (the New South Wales Code, the Code of another jurisdiction, or the Trade Practices Act), and removes this double jeopardy. The clause has its counterpart in section 150S of the Trade Practices Act.

Clause 32 makes it clear that documentation and other things are not invalid because they also serve the Trade Practices Act or the Code of another participating jurisdiction.

Clause 33 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 legislation and competition policy reform legislation.

Clause 34 provides that fees, taxes, penalties, fines and other money paid under the New South Wales Code are to be paid to the Commonwealth. This will not apply to amounts recovered in actions for damages or to money ordered to be refunded

under section 80B of the Trade Practices Act. Clause 34 (2) is a technical provision that imposes fees (including fees that are taxes) prescribed by the applied regulations.

Clause 35 allows regulations to be made for the purposes of the proposed Act.

Clause 36 is a formal provision giving effect to Schedule 1 (Amendment of other Acts).

Schedule 1 Amendment of other Acts

Schedule 1.1 contains a consequential amendment to the *Competition Policy Reform (New South Wales) Act 1995*.

Schedule 1.2 [1] contains an amendment to the *Federal Courts (State Jurisdiction) Act 1999* to make the proposed Act a relevant State Act for the purposes of that Act. The amendment will enable regulations under that Act to make provision for or with respect to enabling jurisdiction conferred by or under the proposed Act, or by or under the Commonwealth laws applied by the proposed Act, to be exercised by State courts. As a result of the decision of the High Court in *Re Wakim; Ex parte McNally* [1999] HCA 27, State legislatures are not competent to confer jurisdiction on federal courts. Although the proposed Act is silent as to the courts that are to have jurisdiction to deal with matters arising under the Act, the Commonwealth laws applied by the proposed Act contemplate such jurisdiction being exercised by the Federal Court. It is intended that regulations under the *Federal Courts (State Jurisdiction) Act 1999* will confer this jurisdiction on the Supreme Court instead and provide for references in those laws to the Federal Court to be construed as references to the Supreme Court.

Schedule 1.2 [2] contains a further amendment to the *Federal Courts (State Jurisdiction) Act 1999* to ensure that a relevant State Act, and any law applied by a relevant State Act, does not attempt to confer jurisdiction on a federal court. The amendment protects a federal court's power to exercise jurisdiction arising under State legislation to the extent to which a federal court can validly exercise such jurisdiction, and nullifies the effect of any applied law that purports to exclude State courts from exercising jurisdiction arising under the applied law.