COMPETITION POLICY REFORM (QUEENSLAND) BILL 1995

EXPLANATORY NOTES

GENERAL OUTLINE

Object of the Legislation

The object of the Bill is to enact legislation that will apply the Schedule version of part IV of the *Trade Practices Act 1974* ("TPA") of the Commonwealth as the law of Queensland.

Reasons for the Bill

The Bill enacts legislation that will give effect in Queensland 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 Act of the Commonwealth ("the Commonwealth Act") 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 TPA (as amended by the Commonwealth Act) 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 Act, 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 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 part IV 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.

Alternatives Ways to Achieve Policy Objectives

The policy objective of the Bill could also be achieved by a referral of power to the Commonwealth of that activity over which it currently does not have the constitutional power to regulate under the TPA. After the application of the TPA to the Crown in right of the States and Territories by the Commonwealth, this remaining area is not great.

The view taken by the States was that they could have a greater influence in the application of part IV of the TPA through the application method rather than through a referral of power to the Commonwealth.

Some of the benefits which arise from the adopted procedure are that all States and Territories have an opportunity to be consulted on and to vote on amendments made by the Commonwealth to part IV of the TPA. The States and Territories also have the ability to be consulted on appointments to be made to the Commonwealth’s Australian Competition and Consumer Commission and the National Competition Council.

Estimated Cost of Government Implementation

The costs to the Government for implementing the measures set out in the Bill are not significant.

Consistency with Fundamental Legislative Principles

The Bill raises two areas of conflict with fundamental legislative principles. Firstly, it provides for regulations to be made to exempt behaviour which would otherwise be in breach of the TPA. These regulations however are intended to be used in emergency situations when it is not possible to have an exemption inserted in an Act of Parliament. Such

regulations are only valid for two years and cannot be remade. The exemption can however be made again in an Act of Parliament. The Commonwealth has the power to override any State exemption from the TPA by regulation as is currently the situation.

Secondly, as the Bill applies a Commonwealth law, amendments made to the TPA by the Commonwealth will apply to the Queensland Competition Code. This is directed at ensuring that there is one consistent set of competition laws and policy applying Australia-wide. There is however an ability for the State not to apply an amendment. Clause 6 of the Bill provides an ability for a State to pass a regulation declaring that the amendment does not apply in the State. The use of a regulation for this purpose takes account of the differing sitting schedules of the Parliaments. The regulations are subject to disallowance by Parliament.

The modification procedure is subject to section 150K of the TPA. This section enables the Commonwealth Minister to declare by notice published in the Commonwealth of Australia Gazette that a State's modifications are excessive. If a notice is published in result of a State, this has the effect of that State not being able to make an exemption, by Act or regulation, from the TPA.

Consultation

Extensive consultation with affected groups as part of the negotiations on the National Competition Policy (NCP) reform package. There was general support for the reforms. The concerns of some affected groups are mainly in the other areas of the NCP reforms. These are being addressed separately and do not directly impact on the Bill.

OUTLINE OF PROVISIONS

Part 1—PRELIMINARY

Clause 1 sets out the short title of the Bill.

Clause 2 provides for the commencement of the Bill. Sections 1 and 2

will commence on the date of assent in accordance with the provisions of the Acts Interpretation Act. Sections 3 and 39 and parts 7 and 8 will also commence on the date of assent. Section 3 and parts 7 and 8 are supplementary to the substantive provisions of the Bill. Section 39 provides for exempting regulations to be made for the purposes of the Bill and the TPA. As the TPA provisions currently operate, section 39 is to commence on assent to enable exempting regulations to be made for the purposes of section 51 of the TPA prior to the commencement of the remainder of the Bill.

The remaining provisions are intended to commence on 21 July 1996. Although the Commonwealth Act contains a number of different dates, virtually all of the Commonwealth Act will have commenced by this date. The result therefore is that the Commonwealth Act will be in force when this Bill commences.

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

Clause 3 contains interpretative provisions for the Bill. 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 XIA inserted into the TPA by the Commonwealth Act.

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

Competition Code—the same as in 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 Act.

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

instrument—the same as the definition used in corporations legislation.

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

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

modifications— the same as in part XIA.

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

officer—picks up the definition in part XIA.

participating jurisdiction—a jurisdiction that applies the Competition Code.

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

State—is defined as including a Territory.

Territory—the same as in part XIA.

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

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 the 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 the law of Queensland.

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 regulation. Alternatively, a regulation can provide that a modification is not to apply at all in Queensland.

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 Queensland *Acts Interpretation Act 1954*.

Clause 8 makes it clear that the Competition Code is not to be construed as merely applying in the territorial area of Queensland, and that the extraterritorial competence of the Queensland legislature 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 the 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 Bill and the Competition Code of Queensland will bind the States (to the full extent of its constitutional capacity to do this). In line with section 2A (1) and section 2B (when commenced) of the TPA, this will apply to a State only when carrying on a business.

Clause 14 is the counterpart of clause 13, and provides that the Bill and Competition Code of another State or Territory will bind Queensland. Again this will apply to the State 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 corresponds to section 2C of the TPA.

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

Clause 17 makes it clear that, where the law of another jurisdiction binds the State by virtue of this part, the Code overrides any prerogative right or privilege of the State (e.g. in relation to the payment of debts). Similar provisions are included in the corporations 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 Queensland, the Competition Code of another jurisdiction, or the TPA), and removes this double jeopardy. The clause has its counterpart in 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 legislation.

Clause 37 provides that fees, taxes, penalties, fines and other money paid under the Competition Code of Queensland 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 Bill.

Clause 39 provides a specific power to make regulations under the Bill for the purposes of prescribing exceptions under section 51 of the TPA or section 51 of the Competition Code. Under these sections any regulations are valid for two years only and cannot be remade.

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 sections 34 and 89 of the Commonwealth Act, those sections 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 purposes 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 sections of the Commonwealth Act in this respect.

Clause 42 complements section 33 of the Commonwealth Act. Section 33 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. 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 assent of the Commonwealth Act (that is, two years after 20 July 1995). Since this Bill is intended to commence 21 July 1996, 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.

Clause 46 provides for the Schedule version of part IV of the TPA to be set out as an Attachment to the Bill. The clause makes it clear that the Attachment does not form part of the Bill. It also provides for the Attachment being updated in any reprint of the Bill.

Attachment. This is the Scheduled version of part IV of the TPA.

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