

# Competition Policy Reform (Victoria) Bill

## EXPLANATORY MEMORANDUM

The object of this Bill is to enact legislation that will give effect in Victoria 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 1995 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 Trade Practices Act 1974 of the Commonwealth (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 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 purposes 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 purpose of the proposed Act, its commencement and definitions. Part 1 contains transitional provisions.

The remaining provisions are intended to commence 12 months after the date of assent to the Commonwealth Act (20 July 1995). Although the Commonwealth Act contains a number of different commencement dates, virtually all of the Commonwealth Act will have commenced 12 months after the date of assent. The result therefore is that the Commonwealth Act will be in force when the State/Territory 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 Act.

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

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 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 and agricultural and chemical 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 agricultural and chemical legislation.

modifications—the same as in Part XIA.

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

officer—merely 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.

this jurisdiction—will mean Victoria. 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 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 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 Victoria.

*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 Order in Council; alternatively, an Order in Council 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 of Legislation Act 1984**).

*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 Victoria will bind the Crown in relation to all States and Territories (to the full extent of constitutional capacity to do this). In line with section 2A (1) and 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 Victoria. 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 corresponds to section 2C of the TPA.

*Clause 16* provides that the Crown 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 Crown in right of Victoria by virtue of this Part, the Code overrides any prerogative right or privilege of the Crown (eg in relation to the payment of debts).

## **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. In particular:

*clauses 19 and 20* confer powers and functions on the ACCC, the NCC and the Australian Competition Tribunal;

*clauses 21, 22 and 23* vest jurisdiction in the Federal Court to the exclusion of the Victorian Courts other than in cross vesting matters;

*clauses 24, 25, 26 and 27* apply Commonwealth laws to offences under the Code or the Codes of other jurisdictions;

*clauses 29, 30, 31, 32 and 33* apply Commonwealth administrative laws to matters under the Code and the Codes of other jurisdictions.

## **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 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.

*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* alters or varies section 85 of the **Constitution Act 1975** to the extent necessary to ensure that the Supreme Court does not have jurisdiction concerning the matters with respect to which jurisdiction is conferred on the Federal Court by the Bill.

*Clause 39* allows regulations to be made for the purposes of the legislation including 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 sections 34 and 89 of the Commonwealth Act, 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 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 (1c) of the TPA (as inserted by section 15 of the Commonwealth Act). 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 Act is assented to. Since this Bill is intended to commence 12 months after the Commonwealth Act 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.

