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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COMPETITION POLICY REFORM BILL 1995

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Hon George Gear, MP, Assistant Treasurer)



COMPETITION POLICY REFORM BILL 1995

AMENDMENTS AND NEW CLAUSES TO BE MOVED ON BEHALF OF THE GOVERNMENT

OUTLINE

At the Council of Australian Governments meeting of 11 April 1995, Australian Governments agreed to implement the package of national competition policy reforms consisting of the Competition Policy Reform Bill 1995 (the Bill) and three inter-governmental agreements (the Conduct Code Agreement, the Competition Principles Agreement and the Agreement to Implement the National Competition Policy and Related Reforms) with a number of amendments being made to the Bill.

This supplementary explanatory memorandum describes these amendments. These amendments:

- (a) insert a process in the national access regime for recognising effective State and Territory access regimes;
- (b) clarify the operation of new subsection 51(1) of the *Trade Practices Act 1974* (the Principal Act) in relation to licences issued under legislation;
- (c) withdraw part of the coverage of Part IV of the Principal Act in the Australian Capital Territory and the Northern Territory in recognition of the participation of those Territories in the cooperative scheme for applying the competitive conduct rules to all businesses within Australia;
- (d) clarify the operation of new subsection 155(7A) of the Principal Act which excludes State and Territory Cabinet material from the ambit of the compulsory information gathering powers in section 155 of that Act;
- (e) clarify the provisions of the Principal Act which exclude 'non-business' activities of the Crown from the coverage of that Act;
- (f) provide an exemption from the competitive conduct rules for local government licensing decisions and internal transactions;
- (g) clarify the operation of new section 51AAA of the Principal Act; and
- (h) make consequential amendments to the Bill.

Further, the amendments will also enable the Australian Competition Tribunal (the Tribunal) to appoint legal practitioners, and enable the Tribunal Registrar to engage consultants, to assist the Tribunal with its review role under Parts IIIA and IX of the Principal Act.

FINANCIAL IMPACT STATEMENT

These amendments provide a process for the recognition of effective State and Territory access regimes which has the potential to increase the workload of National Competition Council (the Council) and the Commonwealth Minister.

The Tribunal will receive extra funding to enable the appointment of legal practitioners and the engagement of consultants.

ABBREVIATIONS

The following abbreviations are used in this supplementary explanatory memorandum:

Bill:	Competition Policy Reform Bill 1995
Commission:	Australian Competition and Consumer Commission
Council:	National Competition Council
Principal Act:	<i>Trade Practices Act 1974</i>
Tribunal:	Australian Competition Tribunal

NOTES ON AMENDMENTS

Amendments 1 and 2 (Clause 4)

These amendments insert the date of, and names of the Parties to, two inter-governmental agreements executed at the Council of Australian Governments meeting of 11 April 1995; namely, the Competition Principles Agreement and the Conduct Code Agreement.

Amendment 3 (New clause 5A)

This amends section 6 of the Principal Act by inserting new subsection (2A) which provides for a limited withdrawal of the current coverage of the Principal Act in the Australian Capital Territory and the Northern Territory. This withdrawal of coverage in each Territory is conditional upon, and only continues for as long as, the Territory participates fully in the cooperative scheme for applying the Competition Code to persons within its legislative competence.

Amendment 4 (New clause 6A)

This amendment inserts new clause 6A. New clause 6A amends the Principal Act to insert new sections 43A and 43B.

New section 43A will enable the President of the Tribunal (on behalf of the Commonwealth) to appoint a legal practitioner to assist the Tribunal in relation to its review functions (for example, the review of an access determination of the Commission).

New section 43B will enable the Registrar of the Tribunal to engage consultants (on behalf of the Commonwealth) to assist the Tribunal.

Amendment 5 (Clause 13)

This amends clause 13 of the Bill.

Clause 13 replaces existing subsection 51(1) of the Principal Act with a new subsection 51(1) and associated provisions. New subsection 51(1) permits Commonwealth, State and Territory laws to except conduct from Part IV of the Principal Act by specifying the conduct and specifically authorising it in the law.

These amendments replace new subsection 51(1A) of the Principal Act and insert new subsection 51(1AA) to provide that where conduct is excepted from Part IV under a legislated licensing regime, the Act, enactment or Ordinance which establishes the licensing regime does not necessarily need to identify the person who is authorised to engage in the specified conduct or the geographical dimension of that conduct. Those attributes can be identified in licences issued or made under the legislation.

Amendment 6 (New clause 21A)

This amendment inserts new clause 21A. This clause amends section 104 of the Principal Act to make it clear that regulations can be made with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (personally

or by means of a written report). This will permit the making of regulations which, for instance, enable the Tribunal to commission and receive experts' reports as evidence.

Amendment 7 (New clause 24A)

This amendment inserts new clause 24A. This clause amends subsection 158(2) of the Principal Act to ensure that legal practitioners assisting the Tribunal also receive the protection accorded to persons appearing before the Tribunal on behalf of other persons.

Amendment 8 (New clause 32A)

New clause 32A amends section 6 of the Principal Act to provide that the provisions of section 6 (which extend the application of the Principal Act) do not apply to new Part IIIA. The application of Part IIIA is set out within that Part.

Amendments 9 and 10 (Clause 50)

The amendments to clause 50 of the Bill alter new section 29D of the Principal Act to permit the Council President to be appointed on a part-time basis.

Amendments 11 to 16 (Clause 54)

Amendment to new subsection 44B(1)

The amendments insert a definition of 'modifications' in new subsection 44B(1) and alter the definition of 'service' by deleting the word 'right' in paragraph (e).

Amendment to new sections 44G and 44H

The substitution of new subsections 44G(3) and 44H(5) clarifies the meaning of the previous version of those provisions. Consequential amendments are made to these sections to facilitate the recognition of effective access regimes established by States and Territories that are Parties to the Competition Principles Agreement.

The provisions which establish this recognition process are described below.

New section 44M (Recommendation for a Ministerial decision on effectiveness of access regime)

Under new section 44M, where a State or Territory that is a Party to the Competition Principles Agreement has established a regime for access to a service, the responsible Minister of that State or Territory can ask the Council to consider whether the regime is effective. (The responsible Minister is the Premier - in the case of a State - and the Chief Minister - in the case of a Territory.)

In determining whether the regime is effective, the Council must apply the guiding principles set out in the Competition Principles Agreement.

Once the Council has applied those principles, it must recommend to the Commonwealth Minister whether the Commonwealth Minister should decide that the regime for access to the service is effective and the period for which that decision should be in force.

New subsection 44MA (Ministerial decision on effectiveness of access regime)

New subsection 44MA provides that on receiving the Council's recommendation, the Commonwealth Minister must decide, by applying the principles in the Competition Principles Agreement, whether or not the regime for access to the service is effective. New subsection 44MA(3) requires the decision to specify the period for which it is in force.

The Commonwealth Minister must publish his or her decision and give reasons for the decision to the responsible Minister who applied to the Council for the decision.

The consequence of a decision by the Commonwealth Minister that a State or Territory regime is effective is set out in new subsections 44G(4) and 44H(5A). These subsections provide that where the Commonwealth Minister decides that the regime applying to a service is effective, the Council and the designated Minister are bound by that decision while it is in force (ie the designated Minister cannot declare the service) unless the Council or the designated Minister believe that since the Commonwealth Minister's decision was published there have been:

- (a) substantial modifications of the regime; or
- (b) substantial modifications of the principles set out in the Competition Principles Agreement.

New subsection 44MB (Review of Ministerial decision on effectiveness of access regime)

New subsection 44MB provides that the Commonwealth Minister's decision is reviewable by the Tribunal upon application of the responsible Minister in writing within 21 days after publication of the Commonwealth Minister's decision. The review is a reconsideration of the matter, with the Tribunal having the same powers as the Commonwealth Minister.

New subsection 44MC (State or Territory ceasing to be a party to Competition Principles Agreement)

New subsection 44MC provides that if a State or Territory ceases to be a Party to the Competition Principles Agreement, a decision by the Commonwealth Minister that an access regime of that State or Territory is effective ceases to be in force. And, if at that time, the Council, the Commonwealth Minister or the Tribunal is considering an application by the responsible Minister of that State or Territory for a decision by the Commonwealth Minister that a regime is effective, the Council, Commonwealth Minister or Tribunal (as the case may be) need not take any further action in relation to the application.

New subsection 44MD (Register of decisions and declarations)

Decisions by the Commonwealth Minister that an access regime is effective must be placed on a public register which is also to contain access declarations.

Amendment to new section 44ZZL (Regulations about review by the Tribunal)

The regulation making power is amended to ensure that the regulations can be made for the appointment of persons to assist the Tribunal by giving evidence (personally or by means of a written report).

Amendment 17 (Clause 65)

Clause 65 inserts new subsection 155(7A) into the Principal Act. New subsection 155(7A) protects State and Territory Cabinet material from the ambit of the Commission's compulsory information gathering powers under section 155 of the Principal Act.

This amendment clarifies new subsection 155(7A) of the Principal Act to ensure that the protection extends to documents prepared for the purposes of a meeting of the Cabinet of a State or Territory.

Amendment 18 (Clause 66)

Clause 66 inserts new section 155AA into the Principal Act. New section 155AA provides for the protection of Part IV information acquired by the Commission pursuant to its compulsory information gathering powers under section 155 of the Principal Act.

This amendment amends new section 155AA of the Principal Act to limit the ability of Commission officials to disclose protected Part IV information; Commission officials cannot disclose protected Part IV information when performing a Commission function described in section 28 of the Principal Act. (Section 28 of the Principal Act confers information and research functions on the Commission.)

Amendments 19 to 21 (Clause 76)

Clause 76 of the Bill inserts new section 2B of the Principal Act which provides that the Crown in right of the States and Territories is bound by Part IV of the Principal Act. Like the Crown in right of the Commonwealth, the Crown in right of the States and Territories will only be bound by the Principal Act in so far as it carries on a business, either directly or by an authority. Clause 76 of the Bill also inserts new section 2C of the Principal Act which describes certain activities that do not 'amount to carrying on a business'.

These amendments clarify the operation of new paragraph 2C(1)(a) of the Principal Act, providing that imposing or collecting taxes, or levies, or fees for licences does not amount to the carrying on of a business.

The amendments also extend the protection of new paragraph 2C(1)(c) (which provides that certain activities internal to the Crown in each right do not amount to carrying on a business) to certain transactions involving non-commercial corporations sole and make it clear that the protection does not extend to transactions between the Crown and a commercial authority.

Further, these amendments insert new section 2D into the Principal Act. New section 2D exempts local government licensing decisions and transactions internal to local government from Part IV of the Principal Act.

Amendment 22 (Clause 82)

This replaces new section 51AAA of the Principal Act with a provision which makes it clear that Part IV is not intended to make State or Territory laws inoperative where those laws are not directly inconsistent with Part IV.

This provision is in slightly different terms to current subsection 75(1) of the Principal Act. Despite the difference of wording, it is intended to have the same operation as that subsection which was considered by the High Court in *R.v. Credit Tribunal; ex parte General Motors Acceptance Corporation* (1975 - 1977) 137 CLR 545. In that case, Mason J (as he then was) stated that subsection 75(1) indicates:

'a very clear expression of intention that the *Trade Practices Act* is not an exhaustive enactment on the topics with which it deals and that it is not intended to operate to the exclusion of State laws on those topics. As such it does not avoid any instance of direct inconsistency ... but ... it eliminates any suggestion of inconsistency otherwise arising.'

Amendment 23 (Schedule 1)

This amends Schedule 1 (which contains the Schedule version of Part IV) to make an amendment consequential upon the amendment to section 51 described above.

Amendments 24 and 25 (Schedule 3)

Amendment 24 inserts a consequential amendment to the *Employment Services Act 1994*, replacing the reference to the Trade Practices Commission with the Australian Competition and Consumer Commission.

Amendment 25 inserts the date and names of the Parties to the inter-governmental Competition Principles Agreement executed at the Council of Australian Governments meeting of 11 April 1995.

