NEW TAX SYSTEM PRICE EXPLOITATION CODE (QUEENSLAND) BILL 1999

EXPLANATORY NOTES

Short Title

The short title of the Bill is the *New Tax System Price Exploitation Code (Queensland) Bill 1999.*

Policy Objectives of the Bill and the Reasons for them

The object of this Bill is to enact legislation that will give effect in Queensland to the New Tax System Price Exploitation Code of the Commonwealth.

The *Trade Practices Act 1974* of the Commonwealth (the "TPA"), as amended by the *A New Tax System (Trade Practices Amendment) Bill 1999*, confers power on the Australian Competition and Consumer Commission ("ACCC") to monitor prices in order to prevent the possibility of consumer exploitation and excessive profit taking in the transition to the new tax system. A corporation that engages in price exploitation commits an offence under Part VB of the TPA.

The TPA amendments also insert a new Part XIAA into the TPA. Part XIAA establishes the Commonwealth New Tax System Price Exploitation Code.

The Commonwealth legislation cannot provide full coverage for price monitoring and the prohibition of price exploitation. As part of the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Arrangements ("IGA"), States and Territories undertook to adopt a Schedule version of the Commonwealth New Tax System Price Exploitation Code as a law of their own respective jurisdictions to cover those areas outside the Commonwealth's constitutional powers (eg to cover individuals and unincorporated bodies). The Commonwealth legislation

will apply to most businesses, leaving a relatively small gap for the State legislation to cover.

The way these policy objectives will be achieved by the Bill and why this way of achieving the policy objectives is reasonable and appropriate

To facilitate the State and Territory legislation, the TPA amendments insert a version of the new Part VB into the Schedule to the TPA, known as "the Schedule version of Part VB". The Schedule version of Part VB is modified to refer to conduct by "persons" rather than "corporations".

The New Tax System Price Exploitation Code of each State and Territory will consist of the Schedule version of Part VB and the other provisions described in clause 4(1) of the proposed Act.

The aim of the State and Territory legislation is to apply the provisions of Part VB of the TPA to those persons and activities that do not or may not fall within the legislative power of the Commonwealth Parliament (ie. business activities of individuals or partnerships).

Alternative way of achieving the policy objective

Alternatives to the Bill are:

- establishing a State law and regulatory body; or

- referring power to the Commonwealth.

The former would not be cost effective or provide seamless national regulation. The latter involves an abdication of the State's legislative sovereignty to the Commonwealth for what is a temporary regulation.

Administrative costs for Government implementation of the Bill

The Commonwealth will administer the regime.

Consistency with fundamental legislative principles

The Bill raises some issues regarding fundamental legislative principles.

Template legislation

The adoption of template (or "mirror") legislation might be considered an abdication of the sovereignty of Parliament. However, the Government has agreed to the enactment by Queensland of the proposed legislation to enable seamless and uniform application of the rules prohibiting price exploitation — associated with changes to the national tax system — across all jurisdictions. The alternative would be to refer the necessary legislative power to the Commonwealth under section 51(xxxvii) of the Constitution. By the adoption of mirror legislation, Queensland retains the right to alter the legislation independently at some point in the future whereas a referral of power arguably would not allow this unless the power referred were first withdrawn.

Additionally, the proposed section 6 of the legislation is a "Henry VIII" clause. As the proposed legislation will apply a Commonwealth law, amendments made by the Commonwealth to the Schedule Version of Part VB will apply to the Queensland Price Exploitation Code. This is directed at ensuring that there is one consistent set of price exploitation laws and policy applying Australia wide. However, section 6 will provide that the State can make a regulation declaring that a particular Commonwealth amendment will 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 the Queensland Parliament. A similar arrangement was adopted in the *Competition Policy Reform (Queensland) Act 1996*.

Commonwealth Administrative Laws

The Bill has been amended to omit the provision which applies the Commonwealth Judicial Review Act as application of this Act may raise constitutional law issues. The Commonwealth is proposing to draft legislation to resolve these issues. As a result, during the interim period, a person to whom only the Queensland price exploitation laws apply will not be able to seek judicial review of any actions performed by the ACCC or its officers. However, an aggrieved person may still be able to seek redress in the Federal Court by virtue of the Commonwealth *Judiciary Act* or in the High Court pursuant to the Commonwealth Constitution.

Other issues

According to the draft legislation, the activity of "price exploitation" arises when, *inter alia*, the price for the supply is unreasonably high having regard to the New Tax System changes and the price is not attributable to the supplier's costs, supply and demand conditions or any other relevant matter. The use of the phrase "unreasonably high" may lead to uncertainty in the application of the Price Exploitation Code. An all-inclusive definition of "unreasonably high" would be unwieldy given that price is subject to a number of factors which vary enormously between suppliers. However, the proposed legislation provides the ACCC to publish guidelines about when a price may be regarded as being in contravention of the prohibition on price exploitation.

The proposed section 75AW of the Schedule Version of Part VB provides that a notice issued by the ACCC will be prima facie evidence that the price charged for a supply is unreasonably high. This section has the effect of reversing the onus of proof. However, prosecutions for price exploitation will be civil and not criminal proceedings. The reversal of the onus of proof is also justified on the basis that the supplier will be the only person with complete details of the supplier's costs and it would arguably be impossible to enforce the Price Exploitation Code otherwise.

Consultation

Consultation has taken place with the Department of State Development, the Department of Premier and Cabinet, the Department of Justice, the Department of Equity and Fair Trading, the Department of Employment, Training and Industrial Relations, the Commonwealth Government and State and Territory Treasury officers.

PART 1—PRELIMINARY

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

Clause 2 provides for the commencement of the proposed Act to be fixed by proclamation..

Clause 3 contains the interpretative provisions for the proposed Act. Clause 3(1) contains a list of definitions as follows:

application law—this is the same as in Part XIAA of the Trade Practices Act;

Commission—this is the same as in s.4 of the Trade Practices Act;

instrument—this is the same as in s.3 of the Competition Policy Reform (Queensland) Act 1996 ("the CPRQA");

jurisdiction—means a State, which includes a Territory;

law—this is the same as in s.3 of the CPRQA;

modifications—this is the same as in s.3 of the CPRQA;

month—this is the same as in s.3 of the CPRQA;

New Tax System Price Exploitation Code—this is the same as in proposed Part XIAA of the TPA, to be inserted by the Commonwealth Bill;

New Tax System Price Exploitation Code text—the text described in proposed clause 4.

notification—this is the same as in s.3 of the CPRQA;

officer—this is the same as in Part XIAA of the Trade Practices Act;

participating jurisdiction—a jurisdiction that applies the Code;

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

State—is defined as including a Territory;

Territory—means the Australian Capital Territory and the Northern Territory of Australia;

this jurisdiction—means Queensland in this Bill;

Trade Practices Act—means the *Trade Practices Act 1974* of the Commonwealth.

Clause 3(2) provides that expressions used in this Bill have the same meaning as in the Trade Practices Act.

Clause 3(3) provides that references to a Commonwealth Act include the Act as in force from time to time, and any Act that may replace the Commonwealth Act.

PART 2—THE NEW TAX SYSTEM PRICE EXPLOITATION CODE

Clause 4 defines what will constitute the New Tax System Price Exploitation Code text. The text consists of:

(a)   the Schedule version of Part VB;

(b)   the remaining provisions of the TPA, so far as they would relate to the Schedule version of Part VB if it were substituted for Part VB;

(c)   relevant regulations made under the TPA; and

(d)   the guidelines to be published by the ACCC under proposed section 75AV of the TPA.

The provisions referred to in paragraphs (b), (c) and (d) above are to be modified as required to fit in with the Schedule version of Part VB, and in particular, so that references to "corporations" are to include references to persons other than corporations.

Clause 5 is the operative clause of the Bill. It applies the Code as a law of Queensland.

Clause 6 sets out a scheme to deal with future modifications of the Code text by Commonwealth legislation. The scheme provides that there is to be at least a two month gap between the modification of the text by the Commonwealth Act or Regulation, and the application of the modifications under clause 5. The modification is deemed to occur on the date the Commonwealth Act receives Royal Assent or the Regulation is notified in the Commonwealth of Australia Gazette. The two month 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 Queensland Code (instead of the *Acts Interpretation Act 1954*).

Clause 8 Specifies the persons to whom, and the circumstances in which, the Queensland Code applies within the State.

Clause 9 Provides that, subject to clause 8, the Queensland Code operates extra-territorially.

PART 3—CITING THE NEW TAX SYSTEM PRICE EXPLOITATION CODES

Clause 10 provides for citation of the Code, applying as a law of Queensland.

Clause 11 provides that a reference in any instrument to the Queensland 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 THE NEW TAX SYSTEM PRICE EXPLOITATION CODES TO THE CROWN

Clause 13 provides that this Act binds the State of Queensland and each other State and Territory, so far as the legislative power of the Queensland Parliament permits. 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 provides that the applications laws of other participating jurisdictions binds the State of Queensland when carrying on a business.

Clause 15 identifies, for the purposes of clauses 13 and 14, certain activities that do not constitute carrying on a business. This is not an exhaustive list of nonbusiness activities.

Clause 16 provides that nothing in this Act, or an application law of any other participating jurisdiction, renders the State liable to a pecuniary penalty or to be prosecuted for an offence. This protection does not extend to an authority of any jurisdiction.

Clause 17 makes it clear that, where the law of another jurisdiction binds the State by virtue of this Part, that law overrides any prerogative right or privilege of the State.

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 are administered on a uniform basis.

Division 2—Conferral of functions

Clause 19 confers powers and functions under the proposed Act upon certain Commonwealth officers and authorities (including the ACCC).

Clause 20 provides that the ACCC may do things in Queensland in the exercise of any function or power conferred on it under the Code of another participating jurisdiction.

Division 3—Offences

Clause 21 states that the provisions of this Division are aimed at furthering the object of this Part by providing that an offence against the Code, of this and other participating jurisdictions, is to be treated as if it was an offence against a law of the Commonwealth.

Clause 22 applies Commonwealth law to offences against the Queensland Code.

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

Clause 24 provides 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 Queensland Code or the Code of another participating jurisdiction.

Clause 25 Prevents a Queensland 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 2*7 applies the Commonwealth administrative laws as laws of Queensland to matters arising under the Code of this jurisdiction.

Clause 28 applies the Commonwealth laws as laws of Queensland to matters arising under the Code of other participating jurisdictions. However, any provision of a Commonwealth administrative law, which applies because of the section, that purports to confer jurisdiction on a federal court is taken not to have that effect.

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

Clause 30 prevents a Queensland 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 provides that a person who has been punished for an offence against the Trade Practices Act or an application law of another participating jurisdiction is not liable to be punished under the Queensland Code for the same offence.

Clause 32 ensures that things given or done for the purposes of the Queensland Code are not invalid simply because they are also given or done for the purposes of 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.

Clause 34 provides that all fees, taxes, penalties, fines and other moneys payable under the Queensland Code are to be paid to the Commonwealth. This does not apply to any amount that a court orders to be refunded to another person.

Clause 35 authorises the Governor in Council to make regulations for the purposes of the Act.

PART 7—ATTACHMENT

Clause 36 provides that the Schedule version of Part VB is an attachment and does not form part of the proposed Act.

PART 8 – AMENDMENT OF COMPETITION POLICY REFORM (QUEENSLAND) ACT 1996

Clause 37 provides for consequential amendments to the *Competition Policy Reform (Queensland) Act 1996*.

SCHEDULE

Amendment of *Competition Policy Reform (Queensland) Act 1996*

Consequential amendments to *Competition Policy Reform (Queensland) Act 1996.*

Attachment to *New Tax System Price Exploitation Code (Queensland) Act 1999*

Attaches the Schedule version of Part VB of the *Trade Practices Act.*