SUBMISSION TO TREASURY ON THE COMPETITION POLICY REVIEW FINAL REPORT

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This submission is made in my personal capacity and is not intended to reflect the views of either the ANU College of Law or Ashurst.

This submission is confined to Recommendation 24 of the Final Report.

> Recommendation 24 — Application of the law to government activities
>
> Sections 2A, 2B and 2BA of the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.
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> This recommendation is reflected in the model legislative provisions in Appendix A.

EXECUTIVE SUMMARY

The Final Report in Recommendation 24 has recognised that the unsatisfactory current position, under which governments are exempt from the CCA in respect of procurement, should be rectified.

The substitution of "in trade or commerce" for "carries on a business" strikes the right balance between governmental activities which should be exempt and government commercial activity where exemption is inappropriate.

The Recommendation in current form does not deal with the operation of competition law and the ACL at State and Territory level and is therefore inconsistent with the 2010 reforms, a principal feature of which was uniformity.

An alternative method of implementing the change implicit in Recommendation 24 is suggested, namely, changing the definition of "business" in the CCA and the ACL.

BACKGROUND

In 1994, this author predicted that, after the implementation of the Hilmer Report,[2] governments would enjoy widespread exemption from the operation of the *Trade Practices Act 1974* (Cth) in respect of procurement of goods and services.[3] In 2012 this theme was re-visited[4] to see whether the predictions in the 1994 article had come about. It was found that they had - "in spades".

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2 Report by the Independent Committee of Inquiry, *National Competition Policy* (1993).

3 Seddon N, "Holes in Hilmer! How the Trade Practices and Fair Trading Legislation Does Not Apply to Government Procurement" (1994) 2 TPLJ 207.

4 Seddon N, "Holes in Hilmer re-visited: Government exemption from the Australian competition and consumer law" (2012) 20 AJCCL 239.

The exemption stems from four words: "carries on a business".[5] These words qualify the sections that purport to remove Crown immunity. The government and government authorities are bound only in so far as each "carries on a business". Over the years, these words have been considered in a number of cases that concluded that governments are not carrying on a business when purchasing supplies.[6] Thus, the sections that purport to remove Crown immunity actually maintain it in a very substantial way, namely, in respect of governments' principal commercial activity of procurement.

After the demise of the *Trade Practices Act 1974* (Cth) and the equivalent provisions of the State and Territory *Fair Trading Acts* and the commencement of the *Competition and Consumer Act 2010* (Cth) (CCA) and the *Australian Consumer Law* (ACL) on January 1 2011, the position relating to this exemption at all levels of government is quite complex. The details are set out in the 2012 article and will not be repeated here except to provide a summary. The effects of the words "carries on a business", in connection with ordinary government procurement, are as follows:

- the Commonwealth is exempt from the CCA (and hence the ACL);
- Commonwealth authorities, even if they are not Crown bodies, enjoy the same exemption unless procurement by such bodies is for the purpose of running a business (such as a government business enterprise);
- State and Territory governments are exempt from Part IV;[7]
- State and Territory governments are exempt from the ACL;
- State and Territory authorities which can claim Crown immunity are exempt from Part IV and the ACL unless procurement by such bodies is for the purpose of running a business (such as a government business enterprise) but State and Territory authorities which are not Crown bodies cannot claim exemption;
- local government is exempt from Part IV;
- local government is exempt from the ACL except in New South Wales or if local government cannot claim Crown status.

A PROPOSED CHANGE

The Final Report has recommended that the words "carries on a business" be replaced with "engages in trade or commerce". The Report recognised the distortion in the government procurement market where the law applies to suppliers but not to purchasers.[8] I will not canvass here the arguments for and against such a change, which are covered in the Final Report.[9]

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5 The words appear in the *Competition and Consumer Act 2010* (Cth) ss 2A, 2B and 2BA and in the State and Territory Acts that implement the *Australian Consumer Law* and the *Competition Policy Reform Acts*.

6 The case law is fully discussed in Seddon N, *Government Contracts: Federal, State and Local* (5th ed 2013) Chapter 6.

7 As demonstrated in *ACCC v Baxter Health Care Pty Ltd* (2007) 232 CLR 1; (2007) 237 ALR 512; [2007] HCA 38.

8 See Final Report 278-279.

9 Ibid 280-281.

The Recommendation strikes a proper balance between granting exemption in respect of some government activities, such as regulatory activity or making funding agreements with NGOs for the implementation of a government policy, on the one hand, and applying the law to ordinary commercial transactions, in the main procurement by government, on the other hand. The words "trade or commerce" achieve this, in my view. There will always be some activities where it is not absolutely clear whether the words apply but such instances will be worked out on a case-by-case basis.

WHAT THE RECOMMENDATION DOES NOT COVER

Competition law

Recommendation 24 does not deal with the existence at State and Territory level of the identical *Competition Policy Reform Act* in each jurisdiction. This legislation complements the CCA s 2B and implements a slightly modified Part IV.[10] The legislation binds State and Territory governments and their authorities in so far as each carries on a business.[11] If the CCA s 2B is changed to substitute "engaged in trade or commerce" for "carries on a business" there may be inconsistency between the Commonwealth Act and the State or Territory Acts.[12] The State legislation allows for changes to the text of Part IV[13] but a change to s 2B is not covered. The resulting inconsistency would be sorted out by the operation of s 109 of the Constitution in the case of the States, so that the Commonwealth provision applies; and, in the case of the Territories, by the interpretation principle that Commonwealth legislation prevails over Territory legislation in the event of inconsistency.[14]

Obviously, it would be preferable for the States and Territories to mirror the changes proposed at Commonwealth level. One of the important policy objectives of the 2010 reforms was to achieve uniformity across Australia.

The Australian Consumer Law

Like the Hilmer enquiry, the Terms of Reference for the current Competition Policy Review are principally restricted to competition law and policy. The Terms of Reference do extend to an examination of unconscionable conduct but only as it affects small business. The powerful and ubiquitous misleading or deceptive conduct[15] provision is outside the Terms of Reference. It is certainly arguable that competition policy includes the operation of s 18. A market in which some players are exempt from the prohibition of misleading or deceptive conduct is distorted. (Most of the cases testing the meaning of "carries on a business" have been misleading conduct cases.)

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10 See CCA Schedule 1. The Schedule version of Part IV is adopted in each State's and Territory's *Competition Policy Reform Act* and is called the Competition Code text.

11 See, for example, *Competition Policy Reform (New South Wales) Act 1995* s 13.

12 It is not clear whether the mooted change to s 2B would flow through to the equivalent provision in the State and Territory legislation.

13 See, for example, *Competition Policy Reform (New South Wales) Act 1995* s 6. A change takes effect unless vetoed by a proclamation.

14 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463-464 (Mason J); *Attorney-General for the Northern Territory v Hand* (1989) 25 FCR 345 at 366-367 (Lockhart J). See also on the interaction of Commonwealth and Northern Territory legislation *Northern Territory v GPAO* (1999) 196 CLR 553; *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 at [127]-[134]. See also *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28.

15 ACL s 18.

Nevertheless, the Final Report does not deal with the operation of the ACL except in relation to unconscionable conduct.[16]

Recommendation 24, as implemented through draft changes to the CCA set out in Appendix A to the Report, does, however, affect the ACL. This is because of the recommended change to s 2A which deals with how the whole Act binds the Commonwealth. If this is implemented, the Commonwealth will be bound by the ACL s 18 in respect of procurement activities, whereas at present it is not. The same applies to ss 20-22 on unconscionable conduct.

The overall result will be that, absent changes at State and Territory level in respect of government purchasing of goods and services, the Commonwealth and its authorities will be bound by the ACL s 18 while the State and Territory governments and their authorities, including local government, will remain exempt. The legislation that implements the ACL at State and Territory level does contemplate future changes but this only applies to the text of the ACL.[17] There is no inconsistency argument here, as there is with the competition law under s 2B, because the CCA simply does not include a provision that states how the ACL binds the Crown in right of the States and Territories.

The objective of uniformity brought about by the 2010 reforms will be thwarted if the States and Territories do not mirror the change to s 2A of the CCA in the legislation that implemented the ACL.

A POSSIBLE ALTERNATIVE CHANGE

The problem concerning the ACL at State and Territory level was foreseen in the author's 2012 article where it was suggested that, rather than change the sections that deal with Crown immunity (19 sections overall), the definition of "business" which appears both in the CCA[18] and in the ACL[19] should be amended to provide that business includes procurement by government and government authorities, including local government. Alternatively or additionally, the definition of "business" could include "conduct that is in trade or commerce". The change to the definition of "business" in the ACL would then flow through to the States and Territories where the implementing legislation allows for changes to the text of the ACL.

The same argument would apply to the State and Territory *Competition Policy Reform Acts* in that the word "business" in s 2B would be appropriately modified by a change to the definition of "business" in the CCA but the text of s 2B would not be changed. A change to the definition of "business" in the CCA would flow through to the States and Territories.[20]

This alternative simplifies implementation by two amendments at Commonwealth level, namely, to the definition of "business" in both the CCA and the ACL. In addition, this suggestion goes to the heart of the problem, namely, the interpretation of the word "business".

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16 No changes were thought to be necessary.

17 See, for example, *Fair Trading Act 1987* (NSW) s 29. A change takes effect unless vetoed by a proclamation.

18 CCA s 4.

19 ACL s 2.

20 See, for example, *Competition Policy Reform (New South Wales) Act 1995* s 4(1)(b).

CONCLUSION

It is to be hoped that Recommendation 24 of the Final Report is implemented with suitable additional implementation that will operate at State and Territory level. This will bring to an end a serious flaw in the way the legislation has operated for some 20 years. The proposed change will respond not just to the Final Report but also to earlier calls for reform.

The Productivity Commission recommended:

> The Australian Government, in consultation with the States and Territories, should give consideration to amending the TPA to ensure that all Federal, State and Territory government procurement activities are covered by relevant sections of the Act.[21]

More recently, the Senate Finance and Public Administration References Committee recommended that:

> the government provide an explanation as to whether there are any reasons why the operation of the *Competition and Consumer Act 2010* should not apply to Commonwealth procurement.[22]

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21 Productivity Commission, *Review of NCP Reforms* (No 33 28 February 2005) Recommendation 10.1.

22 Senate Finance and Public Administration References Committee, *Commonwealth procurement procedures* (July 2014) Recommendation 12. A minority report (Senators Bernardi, Smith and McKenzie) did not support this recommendation pending the outcome of the independent Competition Policy Review.