Submission from Dr Nick Seddon to the Competition Policy Review

THE CCA DOES NOT APPLY TO GOVERNMENT PROCUREMENT AT ALL LEVELS

TERMS OF REFERENCE

This submission addresses the following items in the Terms of Reference.

1 removing impediments to competition that are not in the long-term interest of consumers or the public interest;

1.1. no participant in the market should be able to engage in anti-competitive conduct against the public interest within that market and its broader value chain;

3.3. ensuring that the CCA appropriately protects the competitive process and facilitates competition, including:

3.3.5. whether existing exemptions from competition law and/or historic sector-specific arrangements … are still warranted;

3.4.2. provide appropriate mechanisms for enforcement and seeking redress including:

- whether administration and enforcement of competition laws is being carried out in an effective, transparent and consistent way;
- whether enforcement and redress mechanisms can be effectively used by people to enforce their rights—by small businesses in particular;

5. The Review Panel should also examine whether government business activities and services providers serve the public interest and promote competition;

The Review Panel should only consider the Australian Consumer Law (Schedule 2 of the CCA) and corresponding provisions in Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001*, to the extent they relate to protections (such as from unfair and unconscionable conduct) for small businesses.

THE PROBLEM

My submission is a simple one: competition law does not bind government at all levels in Australia when they are engaged in procurement. This also applies to the Australian Consumer Law. Suppliers to governments are bound but not the governments in the procurement relationship.

This distortion in the application of the law has been around for many years. It disadvantages, and is unfair to, suppliers to government.

I have written extensively about this problem[1] and made numerous submissions in the past. What follows is a short explanation of how this has come about.

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[1] Seddon, N, *Government Contracts: Federal, State and Local* (5th ed 2013), Federation Press, chapter 6; Seddon, N, "Holes in Hilmer re-visited: Government exemption from Australian competition and consumer law" (2012) 20/4 *Australian Journal of Competition and Consumer Law* 239.

GENESIS OF THE PROBLEM

The starting point is a curious historical feature of our constitutional monarchy. We still refer to the government of each of the Australian polities (the Commonwealth, the six states, the two territories and Norfolk Island) as "the Crown". The Crown is immune from legislation unless the legislation provides otherwise. This extraordinary proposition stems originally from the King or the Queen being immune from legislation. The rule of law did not apply to the ruler.

In most Acts, there is a section near the beginning that says "This Act binds the Crown". This overcomes Crown immunity from legislation. The *Trade Practices Act* and now the *Competition and Consumer Act* include s 2A which appears to get rid of Crown immunity. It provides that the Crown in right of the Commonwealth is bound by the Act but then adds an important qualification "in so far as it carries on a business". However, case law[2] has held that, when the government engages in procurement, it is not carrying on a business. Thus, the section that appears to deal with the problem of Crown immunity has been interpreted in a way that substantially maintains immunity.

Sections 2B (application of competition law to the states and territories) and 2BA (application of competition law to local government) are similar to s 2A in including the "carries on a business" limitation.

THE CONSEQUENCES

There are legal arguments about whether the case decisions adopting this interpretation are correct but the case law is now well established. Whatever the arguments against treating "business" in a private sector sense, the effect of this interpretation is dramatic. Government business through procurement is huge and a very important part of our economy. Government "business" in the narrow sense applied by the courts –broadly entrepreneurial activities - is by comparison miniscule. Governments are immune from the legislation in respect of almost all their commercial activities. The Commonwealth has been found by courts to have engaged in misleading conduct but was nevertheless not liable because it was simply not bound by the legislation when engaged in procurement. The same problem affects the states and territories and local government.[3]

Of particular relevance to this inquiry, in *ACCC v Baxter Health Care Pty Ltd*[4] it was conceded by the ACCC that state and territory governments are immune from competition law whilst engaged in conducting a tender process for procurement of medical supplies. That is, the point was not even argued. The result was that Baxter was bound by Part IV and the purchasing governments, which had encouraged the bid that turned out to infringe the law, were exempt.

THE SOLUTION

This problem can only be solved by amendment to the legislation. (It could happen through a High Court decision that overrules all the earlier cases that have given a restrictive interpretation to the word "business". But this may never happen.)

On the face of it, the problem looks formidable. There are 4 sections of the *Competition and Consumer Act*[5] that would have to be changed and various state and territory Acts where the "carries on a business" formula is used would also have to be changed. However, there is a simpler solution. The problem stems from the interpretation of the word "business". This word is presently defined in the legislation as including business not carried on for profit. This definition could be very simply altered by adding "… and includes government procurement". The definition of "business" would have to be changed in the *Competition and Consumer Act*

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2 Discussed in Seddon, N, *Government Contracts: Federal, Sate and Local* (5 ed 2013) chapter 6.

3 The explanation for this is complicated and is covered in Seddon ibid.

4 (2007) 232 CLR 1; (2007) 237 ALR 512; [2007] HCA 38.

5 Sections 2A, 2B, 2BA and 2C.

itself and in the Australian Consumer Law (Schedule 2 to the *Competition and Consumer Act*). The latter change would then flow through to the states and territories which have adopted the Australian Consumer Law. Any changes automatically apply to the adopted state and territory Australian Consumer Law unless the state or territory parliament overrides the change.[6]

Although the focus of this inquiry is principally competition law, it is submitted that the application of the Australian Consumer Law is just as important as the application of Part IV (as specifically recognised in the Terms of Reference). A market, in which some players are subject to the discipline of the Australian Consumer Law and others are not, is not a competitive market.

The analogy of the unlevel playing field with no change at half time comes to mind.

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[6] See, for example, *Fair Trading Act 1987* (NSW) ss 28-29. The state and territory legislation is the same in each jurisdiction.