Supplementary submission from Dr Nick Seddon to the Competition Policy Review

DRAFT RECOMMENDATION 19 AND THE ACL

> Draft Recommendation 19 — Application of the law to government activities
> 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.

This recommendation appears to be limited to "the competition law provisions", that is, Part IV of the CCA. I understand that the Terms of Reference limit the Panel to competition law except in the case of small business where the ACL can be considered.

My submissions are that:

- it would not be practical or rational to limit the application of the legislation to government activities by reference to Part IV alone.
- it would not be practical or rational to ensure that the ACL applies to governments at all levels, but only in respect of their dealings with small business.

The Hilmer reforms were limited in the same way as the present review appears to be. It would be unfortunate if the outcome of the present review was a selective application of the legislation to government's most important commercial activity, that is, procurement, as has been the case since the Hilmer reforms.

The discussion at 16.3 of the ACL and small business focuses only on unconscionable conduct. There is no mention of the vastly important misleading or deceptive conduct (ACL s 18).[1] If ever there was a single legislative provision that has transformed commercial life and the norms of conduct in the market place, s 18 must be the front runner. The importance of this provision means that it cannot be left out of the discussion of an efficient and competitive economy. It is, in my submission, just as important that s 18, and the ACL more generally, should apply to government as is the application of Part IV to government.

The underlying rationale for draft Recommendation 19 is a simple one: it is unfair and contrary to the principles of fair competition for the law to apply to a supplier to government and not to the government itself. It follows that any change to the way in which the legislation applies to government should not be selective. So long as the government is engaged in "trade or commerce", that should be sufficient.

I note that the Panel has drawn comparisons with the law in other countries. Reference was made to the New Zealand *Commerce Act 1986* and its application to the Crown, in particular to procurement. The New Zealand government is bound by the *Fair Trading Act 1986* in the same way. This Act includes a misleading or deceptive conduct provision virtually identical to the Australian s 18.

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[1] A legal text devoted to this section Lockhart, *The Law of Misleading or Deceptive Conduct* (3 ed 2011) includes over 2000 cases in its Table of Cases.

I do understand that the Panel is restricted by the Terms of Reference but it is my submission that attention should be drawn to the unsatisfactory outcome of selective application of the CCA and the ACL to government purchasing. This could be done in Chapter 22.

As recommended by the recent report of the Senate Standing Committee on Finance and Public Administration References Committee's Inquiry into Commonwealth Procurement Procedures:

> The committee recommends 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.

In a dissenting report, government senators did not support this recommendation pending the outcome of this Panel's review.[2]

[2] Senate Standing Committee on Finance and Public Administration References Committee, *Inquiry into Commonwealth Procurement Procedures* (July 2014) 87.