COMPETITION POLICY REFORM ACT 1995 – APPLYING COMPETITION LAW TO THE STATES

BY
DAVID MARKS*

This note concerns the application of Part IV of the *Trade Practices Act* 1974 (Cth) ("TPA") to the Crown in right of the States and Territories. The competition law provisions, and supporting provisions, will apply, insofar as the Crown carries on business, whether the Crown carries on business directly or through an authority.[1]

The effect of the *Competition Policy Reform Act* 1995 (Cth) ("CPRA"), in shading out existing State authorised s. 51 exemptions, should also not be forgotten. The Act replaces s. 51[2] and limits the benefits of such exemptions. The initial limitation is to States and Territories that are party to Federal agreements. After a year, the limitation is to "fully participating" States and Territories.[3]

The first part of this note deals briefly with the changes to s. 51. The latter part of this note concerns direct application of the competition law provisions to the States and Territories.

1. Amendments to State Legislation Exceptions

Commencing 17 August 1995, subs. 51(1) was repealed and new subss. (1)-(1C) substituted.[4] The most important effects may be summarised as:

(1) laws of the States and Territories excepting conduct from the ambit of Part IV of the TPA must refer expressly to the TPA;[5]

(2) exceptions created by regulations will only be effective for two years,[6] and this restriction cannot be circumvented by making a new regulation to the same effect as a former regulation[7] – the intention is that in all but emergency situations, exceptions should come before a legislature as a Bill for an Act;

(3) subject to transitional measures, an exception will only be effective while the jurisdiction that made the law is a party to the Competition Principles Agreement and the Conduct Code Agreement;[8] and

(4) as before, Federal regulations may override an exception.[9]

There is a three-year transitional period so that the State and Territory authorities can review legislation and regulations, to provide where necessary for the continuance of exceptions. During that period, conduct, authorised by laws that would not be sufficient

* Senior Associate, Feez Ruthning.

1 New s. 2B, to commence 21 July 1996. A similar provision presently affects the Commonwealth – s. 2A. Refer Peden, John R., "The Application of Legislation to the Commercial Dealings of the Crown" (1977) 51 *ALJ* 756, 762, concerning the background to the introduction of s. 2A in 1977.

2 Section 15 of CPRA.

3 The limitation is imposed by s. 86 of CPRA.

4 Section 15 of CPRA.

5 New s. 51(1C)(a).

6 New s. 51(1C)(c).

7 New s. 51(1C)(d).

8 New s. 51(1C)(e).

9 New s. 51(1C)(f).

under the new rules, will still be excepted from the operation of Part IV of the TPA.[10]

There are also transitional rules for contracts made in reliance on existing exceptions. The transitional rules prevent such contracts being kept on foot through amendment.[11]

With effect one year after assent s. 51(1C)(e) is replaced.[12] The effect is that an exception under the law of a jurisdiction can only be effective if at the time of the impugned behaviour the State or Territory was a party to the Competition Principles Agreement and applies the Competition Code[13] as a law of that jurisdiction's legislature without significant modifications.[14]

Under the Conduct Code Agreement of 11 April 1995, a protocol is established between the Federal Government and the State and Territory governments. The protocol requires notice to the Australian Competition and Consumer Commission of new exceptions created by State or Territory law in accordance with s. 51 of the TPA, and also notice of existing exceptions that will survive the end of the transitional period of three years. The Federal Minister may table a regulation in Federal Parliament, proposing to override a new exception, but only if the Minister also tables a report from the National Competition Council concerning the effect and necessity for such a law and recommending whether the exception should be overridden.

2. Direct Application of Part IV of the TPA – When does the Crown carry on business?

At present difficult questions can arise as to whether the TPA applies to a State government instrumentality. The purpose of this paper is, not so much to comment on the precise nature of those difficulties, but to suggest that the solution contained in the new s. 2B of the TPA may not provide clearer guidance in those situations.

The present state of the law appears to be that a State of the Commonwealth of Australia is immune from the direct operation of the TPA.[15] However, an instrumentality of a State may not be so immune.[16] The basic concerns in determining whether a State body is immune from the direct application of the TPA under the existing law are:

(1) Whether the body conducts State banking, or State insurance, and is doing so within the relevant State boundaries.[17]

(2) Whether the body can properly claim an immunity from the operation of statutes that do not bind the Crown in right of the State – this will only be so if the body can properly claim to be the Crown in right of a State.[18]

(3) In determining whether a State body is the Crown in right of a State, the Court will closely examine:

(i) The body's constituent statute to determine if the legislature sought to confer Crown status on the body.

(ii) The body's function.

(iii) The measure of control that the State exercises over the body.[19]

A more pragmatic concern in determining whether a State body has potentially breached a provision of the TPA, leaving aside matters of Crown immunity, is whether

10 Section 33 of CPRA.
11 Section 34 of CPRA.
12 Section 86 of CPRA.
13 Refer new Schedule 1 to the TPA.
14 Generally refer to ss. 150A, 150C and 150K, and Schedule 1 to the TPA.
15 *Jellyn Pty Ltd v State Bank of South Australia* (1995) ATPR 41-404, 40,470 (Court of Appeal, Queensland) ("*Jellyn*").
16 *Paul Dainty Corporation Pty Ltd v The National Tennis Centre Trust* (1990) 22 FCR 495, 523.
17 *Bourke v State Bank of New South Wales* (1990) 64 ALJR 407.
18 *Jellyn* (1995) ATPR 91 41-404, 40,475, 40,483.
19 Ibid., for an analysis of the former State Bank of South Australia, going to these parameters.

the behaviour proscribed had to occur "in trade or commerce", and whether the proscription refers to the acts of, or relates to, a "corporation" as defined in s. 4(1) of the TPA. The term "corporation" is defined relevantly as a trading or financial corporation formed within the limits of Australia, or its holding company. Assuming the ability to avoid the extended operation of the TPA s. 6, which extended operation does not rely on a party being a "corporation", there might be a nice question of characterisation of the State body to determine whether it is a trading or financial corporation, or the holding company of such a corporation. Likewise there would be a question of whether the activities of the State body are "in trade or commerce".

Finally, there are complications related to the application of s. 64 of the *Judiciary Act* 1903 (Commonwealth) and State Crown proceedings statutes.[20] In light of *Whiteford v Commonwealth of Australia*[21] and *Metway Bank Limited v The State of Queensland*[22] this must remain a real issue. However, French J. in *SGIC v GIO (NSW)* determined that the TPA pro tanto repealed s. 64 of the *Judiciary Act*.[23]

In light of the above confusion and difficulties, one would have thought that a co-operative State and Commonwealth initiative would have simplified the position. As will be shown, one set of difficult questions has now been replaced by yet another conundrum.

New s. 2B, effective 21 July 1996, provides that Part IV of the TPA (and the other provisions of the TPA, so far as they relate to Part IV) will bind the Crown in right of the States and in right of the Northern Territory and Australian Capital Territory.

The limitation on s. 2B is that the Crown will only be directly bound by Part IV (and related provisions) of the TPA to the extent that the Crown carries on a business, either directly or by an authority.[24]

There are a number of express exclusions from the scope of the concept of "carrying on business" provided in proposed s. 2C of the TPA. These exceptions go to core governmental activities, with the exception of laws compulsorily acquiring primary products without discretion.[25]

Apart from these express exclusions from the scope of the concept of "carrying on business", the question of whether the Crown is carrying on a business will cause difficulties.

2.1 Relevance of profit-making or loss-making

The term "business" is defined in s. 4(1) of the TPA as including a business not carried on for profit.[26] This eliminates the argument that a "business" requires an

20 In Queensland, refer *Crown Proceedings Act* 1980, s. 9(2), which is analogous to s. 64 of the *Judiciary Act*.

21 Unreported judgment of the New South Wales Court of Appeal, delivered 10 October 1995, coram Kirby P., Sheller and Powell JJA.

22 Unreported decision of the Queensland Court of Appeal, in Appeal No. 269 of 1992, judgment delivered 20 May 1993, coram Fitzgerald P., Derrington J. and Pincus JA.

23 (1991) 28 FCR 511, 558. Note, however, that His Honour's approach did not bear upon State Crown Proceedings Legislation.

24 "Authority" is relevantly defined at present in s.-4(1) as a body corporate established for a purpose of a State or Territory under a law of that jurisdiction, or an incorporated company in which a State or Territory has a controlling interest.

25 In brief, the other exceptions relate to taxing, licensing, and dealings internal to the Crown. Dealings internal to the Crown are considered to be dealings between persons all acting for the Crown in the same right (but not acting for an authority of the Crown), between persons all acting for the same authority of the Crown in right of one jurisdiction, between the Crown in right of one jurisdiction and its non-commercial authorities (corporations sole which are neither trading nor financial corporations), or between non-commercial authorities of the one jurisdiction.

26 There is, however, little caselaw about the TPA definition. In *Tytel Pty Ltd v Australian Telecommunications Commission* (1986) 67 ALR 433, 436 there was no doubt that – and thus no need to analyse whether – Telecom was carrying on business. In *Thompson Publications (Australia) Pty Ltd v Trade Practices Commission* Deane and Fisher JJ made the bare finding that the Commission did not ". . . carry on business in the sense referred to by s. 2A". That finding should, however, be seen in the context of the earlier finding that the Commission was an instrumentality of the Commonwealth Crown because, among other things, the Commission's functions were "governmental": (1979) 40 FLR 257, 275.

"element of pecuniary gain or profit".[27] However, in *Chief Commissioner of Stamp Duties v Woollahra Municipal Council* ("Woollahra Case")[28] Grove J. held there was a difference between not aiming for a profit, and budgeting for a loss – His Honour accepted a submission that:

"Nothing could be less in the nature of any business . . ."

than aiming for a loss.[29]

2.2 Relevance of the degree of repetition or continuity required

An activity must involve "a degree of repetition or continuity" for the activity to be classed as a "business".[30] The difficulties that face the adviser – and, perhaps, ultimately a court – in deciding whether a particular activity is a "business", by reference to this criterion, are well illustrated by the Woollahra Case.

In the Woollahra Case the Council invested substantial sums of money from time to time that it raised by levying rates and charges, and it also received grants, subsidies and investment income. Its incomings were generally "lumpy" in comparison with the steady, periodic call on its finances for outgoings. Thus incomings, to the extent that they were temporarily surplus to requirements, were invested at interest until the Council had need of the funds. The first question at trial, and the only question on appeal, was whether the depositing and expenditure of this investment capital meant that the bank accounts concerned were kept in relation to transactions in the nature of a business. If that question had an affirmative answer, an exemption from financial institutions duty would not apply to credits to the account.

Mahoney JA held:

> "However, the significance of matters such as continuity, repetition, and the like must, I think, be assessed with care. There are bodies to whose activities descriptions of that kind may be applied which do not, in any relevant sense, carry on business. Thus, terms such as continuity, repetitiousness, system and other terms used in argument may appropriately be applied to what is done by a Department of State such as Treasury or to an institution such as the courts. These do not – at least in the sense here in question – carry on activities in the nature of a business."[31]

On looking at the activities carried on, Mahoney JA pointed out that a council of the size and resources of this Council would be expected to invest its surplus funds to earn a return on them. The ordinary investment of surplus funds by a council would be a normal part of local government activity.[32]

That having been said, his Honour then dealt with the further submission that the way in which these activities had been carried out by this Council nevertheless took the activities into the realm of a "business".

> "What the Council did constituted ordinary and well-recognised means of obtaining a return on capital by investment. The distinction has long been recognised between investment as such and the carrying on of a business by the use of the capital involved. Individuals, trusts, and the like habitually invest in

27 Taperell, G.Q., Vermeesch, R.B., and Harland, D.J., *Trade Practices and Consumer Protection*, (Third Edition), (Butterworths, Sydney, 1983), paragraph [441]; Peden, (1977) 51 ALJ 756, 762.

28 At trial before Groves J., 92 ATC 4320; and on appeal (1993) 30 NSWLR 280; 93 ATC 4285 (New South Wales, Court of Appeal), per Mahoney JA, Handley and Cripps JJA concurring in His Honour's judgment.

29 92 ATC 4320, 4322.

30 Ibid.

31 Id. 4291.

32 (1993) 30 NSWLR 280, 289-290; 93 ATC 4285, 4292.

such ways without being involved in, in the relevant sense, a business."[33]

2.3 Relevance of governmental nature of the activities

The finding by Deane and Fisher JJ in *Thompson Publications* that the Trade Practices Commission did not carry on business for the purposes of s. 2A of the TPA should be seen in the context of the earlier finding that the Commission was an instrumentality or agent of the Crown because, among other things, its functions were governmental.[34]

In the Woollahra Case Grove J. held at trial that the Council was obliged by law to provide cleansing services in discharge of a more general statutory duty to preserve public health, safety and convenience, and in accordance with a statutory power to remove garbage. The Council levied a compulsory charge to fund these operations.

Grove J. accepted a submission that the fulfilment by the Council of a statutory obligation here to provide the cleansing services was unlike the carrying on of a business.[35] Thus the account that received the cleansing dues was exempt from duty. The correctness of this conclusion was not agitated on appeal.

Recall, however, that the Court of Appeal in that case recognised an argument that an activity that was a normal part of a local government's functions might nevertheless be conducted in such a way as to be, in itself, a business.[36] Statutory obligations to perform activities will not necessarily mean that the activity will not be a "business" if the activity is conducted in a businesslike manner.

2.4 Combined activities

The greatest difficulties of application of s. 2B (and its counterpart, s. 2A, in relation to the Commonwealth) will occur when the Crown or an authority of the Crown fulfils functions that are clearly governmental and other functions that may not be so.

Apart from the Woollahra Case, there are few direct analogues to assist in proposing an analysis for such situations.

A similar situation occurs under stamp duty and industrial relations laws, where the legislation focuses on whether a business has been acquired. Under s. 54A of the *Stamp Act* 1894 (Qld) the question is generally formulated as whether sufficient assets of a business have been acquired to enable the acquirer to carry on the same business. A problem that frequently arises, but that is yet to be resolved for stamp duty purposes, is whether the sale of a division or functional unit of a business can constitute an acquisition of a business.[37]

The way that the matter has been resolved in the industrial relations context offers more guidance. The question is whether, when a body ceases a function and lets out the function to tender to contractors (who then re-employ the body's former staff), there has been an acquisition of a business. The court considers whether the function was the business in itself, or a severable part of the body's business. If so, a "business" has been acquired.[38] However, if a function, such as cleaning a motel, is let out to contract, and the function is merely ancillary to the main business of the body, no business will have been

33 Id. 290-291; 4293.

34 (1979) 40 FLR 257, 275.

35 92 ATC 4320, 4322.

36 (1993) 30 NSWLR 280, 290-291; 93 ATC 4285, 4293.

37 This is one of the bases for dispute in on-going litigation between Westpac Banking Corporation and the Commissioner of Stamp Duties: refer *Westpac Banking Corporation v CSD* [1994] 1 QdR 99, 103. Curiously s. 54A was initially proposed as a basis of the assessment in *Westpac Banking Corporation v CSD* 92 ATC 4572, a separate matter involving the takeover by the bank of certain governmental functions of the Commonwealth in relation to the provision of subsidised home-lending to defence personnel. The assessment was never justified by the Commissioner on that basis in the Court of Appeal.

38 *Rastill v Automatic Refreshment Services* [1978] CLY 1015.

acquired.[39]

2.5 Conclusion about proposed s. 2B of the TPA

The conundrum that formerly faced advisers and courts, in relation to the direct operation of the TPA, was whether the body in question was the Crown in right of a State or Territory, or an instrumentality representing the Crown.

This problem will shortly be replaced by another fluid concept, about which there is little law. The question for Part IV purposes will be whether the Crown in right of a State or Territory carries on business.

Perhaps the most difficult problem will be with bodies that have mixed functions, some of which are less clearly governmental. The stamp duty and industrial relations contexts do not provide direct analogues for the analysis of this problem. Perhaps the analysis should be:

(1) if the activity concerned is severable from the other activities of the body, it might be considered a potential business – if not, it will be merely ancillary to the body's other activities of a governmental character;

(2) where an activity is considered more than simply ancillary to the main governmental activity of the organisation, these factors must be considered to determine if the body is carrying on business in relation to that activity:

   (a) whether the activity is carried on for profit, or at least not with a view to making a loss;

   (b) whether the activity is carried on with continuity, repetition, and according to a system of business – this criterion must, however, be treated cautiously, and it is not conclusive;

   (c) whether the activity can be classed as governmental in itself; and

   (d) whether the activity, even if governmental in character, is nevertheless carried on in a businesslike manner. ■

39 *Crosilla v Challenge Services* (1982) 2 IR 488, 458 (Industrial Court of South Australia, Russell J.)