

16 Banambila Street,  
Aranda, ACT 2614

Secretary  
Trade Practices Act Review  
C/- Department of the Treasury  
Langton Crescent  
PARKES ACT 2600

25/7/02

Dear Sir/Madam,

My submission relates primarily to sections 2A and 2B of the Act and is made under Term of Reference 3 "...other aspects of the Act...".

## SUBMISSION

### The problem

As presently interpreted, the Commonwealth and its authorities are not bound by the Act in respect of most of their commercial activities. This is because section 2A only binds the Commonwealth "in so far as the Crown in right of the Commonwealth carries on a business". These words have been interpreted so as not to apply to the Commonwealth in respect of ordinary procurement activities — see *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419 and *Corrections Corp of Australia v Commonwealth* [2000] FCA 1280; (2000) 104 FCR 448.

The Commonwealth does not engage in any business activity (in the narrow sense) to any great degree and yet it is a very significant player in Australia's commercial arena (through purchasing). The Hilmer reforms were supposed to ensure that governments were subject to the same laws as private sector players in their commercial activities, at least so far as competition law is concerned.

The implications of the narrow interpretation of "carries on a business" are canvassed in N Seddon, *Government Contracts: Federal, State and Local* (2nd ed 1999) chapter 6. The narrow interpretation does not just affect Part V cases but also competition law. See, for example, *NT Power Generation Pty Ltd v Power and Water Authority* [2001] FCA 334 (currently on appeal).

The whole of the competition structure is posited on the "carries on a business" formula except the access regime in Part IIIA - see s 44E. The same formula is used in section 2B and in the Competition Policy Reform Acts at State and Territory level. Therefore any change to the legislation would be a difficult exercise.

What is far from satisfactory is to see the Commonwealth engaging in misleading conduct (as found in *McMillan*) and then arguing successfully that it is not bound by the Act.

## Reform

A model for reform is found in the New Zealand *Fair Trading Act* 1986. Section 4(1) provides that "this Act shall bind the Crown in so far as the Crown engages in trade" and s 5(1) provides "This Act applies to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade". "Trade" is defined in s 2 to mean:

any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

This definition would clearly cover ordinary government procurement or disposition of surplus assets.

## EXECUTIVE SUMMARY

The Commonwealth, States and Territories are not bound by the Trade Practices Act in respect of most of their commercial activities, that is, procurement of goods and services for governmental purposes. The legislation should be amended to ensure that governments are bound by the Act in respect of all commercial activities.

Yours sincerely,



Dr Nick Seddon.