



The state in the market: drawing the line between government policy and application of competition law

Never Stand Still

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Introduction

Background

- Defining the general impact of government in markets.
- Both the Harper Review and FSI recognise the importance of markets.
- What is the impact of government on markets in a broader context, for example, outside traditional competition law?
- Australia as a policy leader – should it go further?

Government in markets

- **\$194 billion:** Value of privatisation of government owned businesses in Australia in constant dollar terms between 1987 to 2012 (Abbott and Cohen, 2014).
- **\$13 billion:** The National Commission of Audit's estimate of Commonwealth equity in government business enterprises.
- **51,264:** The annual average number of contracts awarded by the Commonwealth Government over the period 2012/13 to 2014/15.



What does Harper say about government in the market?

- The Terms of Reference talked of looking at “*reviewing government involvement in markets*”
- The Final Report:

*‘Through its commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth or the States and Territories, including Local Government) has the potential to harm competition. The Panel considers that the NCP reforms should be carried a step further and that the Crown should be **subject to the competition laws** insofar as it undertakes activity **in trade or commerce.**’ (Final Report, 31 March 2015, at p 282)*

- Referenced the NZ Commerce Act and its use of these words in making the recommendation



The conundrum : philosophical balance

- Sovereignty of individual governments and policies delivered to benefit the public
- The impact of its conduct on market efficiency

This leads to a significant disconnect:

- We determine issues aimed at the **impact** of anticompetitive government conduct in the market by looking at the **context** of the conduct



The problem: limitations of current provisions

- The problem is not thoroughly articulated in Harper
- The existing position: CCA catches the Crown in right of the Commonwealth, the states and territories, and local government to the extent that each 'carries on a business' in sections 2A, 2B and 2BA of the *Competition and Consumer Act 2010* (Cth).
- *Hope v Bathurst City Council* (1980) 144 CLR 1
- Key distinction has been between fulfilling a public welfare function and a business function
- *J.S. McMillan* – did not include sale of a government business
- *ACCC v Baxter Healthcare*- accepted that tender procuring medical supplies for public hospitals not carrying on business- TPA applied to supplier but not government acquirer
- *NT Power v Power and Water Authority*- carrying on business in refusal to allow use of power lines despite the fact that no-one had ever used them except PAWA was part of the carrying on business of PAWA



Summary of current position

- Methodology of focussing on role of government in the particular transaction rather than its impact on the market means that the approach will always be of more limited impact
- Despite the amendment, if courts going forward focus on the *traditional* role of government, application will always be more limited



Harper position

Harper Review Panel view

*'Through its commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth or the States and Territories, including Local Government) has the potential to harm competition. The Panel considers that the NCP reforms should be carried a step further and that the Crown should be **subject to the competition laws** insofar as it undertakes activity **in trade or commerce.**' (Final)*

- This would :
'.. cover the supply of goods and services by a government business and all other commercial transactions undertaken by government bodies such as procurement and leasing of government owned infrastructure'
- Section 2C would still exclude 'licences' etc, and licences would be redefined to mean a ' licence, permit, authority or right granted under an enactment that allows the licensee to supply goods or services'

Where would this take us?

- *'New Zealand provides an example of how, in other countries, competition agencies (in that case, the NZCC) assist other government bodies to ensure that government commercial activity does not contravene the competition law except where it has been subject to a cost-benefit analysis, and is in the public interest.'* (DR submission, Competition Policy Review, at 32-33)



New Zealand position

Commerce Act, s5(1)

- Applies to Crown when it engages in trade
- Trade- '*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 an interest in land*'
- 'engages in trade'- carrying on trade, but distinction drawn between this and conduct 'in the course of trade', which excludes conduct of a regulatory nature- so regulatory action which has commercial effects are outside the definition
- *Glaxo New Zealand Limited v Attorney General* [1991] 3 NZLR 129
- National parks example (Harper Final 282) – restriction of concessions on environmental grounds (regulatory and out) vs restriction on concessions to maximise revenue (commercial and in)



“In trade or commerce”: Australia

Constitutional cases drawn broadly

- *W & A McArthur Ltd v Queensland*

Other TPA/CCA cases;

- *Concrete Constructions v Nelson* (1990)
- *Williams v Pisano* [2015] NSWCA 177
- Focus on context of conduct in a (now) s18 ACL environment : focus on the role of government in the particular transaction rather than on its role as an acquirer in the market
- Will this continue to limit the judicial approach to the amended provisions going forward?
- Is this the best legislative approach?



Specific issues

Other issues

- Procurement issues
- Exclusive rights: the licensor
- Regulators generally
- Other problematic contract/licence terms.

The core of the reform debate

- **NSW Government:** *'governments undertake commercial activities in markets where full competition may not be necessary, or in some cases appropriate, to achieve the greatest public benefit'* (DR submission, Competition Policy Review, at p 12)



Procurement: how far?

- McMillan: procurement by government for its own use is not carrying on business- in this case it was acquiring services systematically and regularly but only for the purposes of governing

- *GEC Marconi Systems Pty Ltd v BHP Technology* (2003)

“... it is somewhat surprising that when the State enters the market place to acquire goods or services, it should exempt itself from those norms of conduct considered appropriate to the conduct of trade or commerce that it has imposed upon the private sector as of course- the more so given the ‘business-like’ manner in which the Executive government commonly professes it conducts its affairs both internally and in its dealings with the community.”

- After NT Power: how far is procurement caught within carrying on business?
- Corones: if procurement is for mixed business and Governmental activities it should suffice under NT Power as carrying on business
- Comments in Harper
- “trade or commerce” : NZ view



Procurement

- *What of the Baxter scenario?* The impact on the market is likely to be the same regardless of use

- Procurement: Harper Policy approach:

“All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes. Procurement and privatisation policies and practices should not restrict competition unless: • the benefits of the restrictions to the community as a whole outweigh the costs; and • the objectives of the policy can only be achieved by restricting competition.”

- Will the dual law/policy approach effectively assist with anticompetitive procurement practices where the goods or services are for a non-commercial purpose? This may be the larger portion of procurement



Exclusive rights: the government as licensor

- Subject to the exclusion for licences, on the basis of NT Power, the licensee will be caught but whether the licensor will be caught will depend upon whether the licensor is acting “in trade or commerce” i.e. involved in commercial activity in granting the licence
- Look at NZ position espoused in Harper: regulatory/commercial split depending upon motive
- Licensor may not be ‘in trade or commerce’ involved in a commercial activity- may be “affecting trade or commerce” but may not be acting “in trade or commerce”
- Should the licence exemption remain?
- Should the conduct be treated the same/ differently in respect of the grant of the contract or licence, and in respect of the operations in the context of the contract or licence?



Conduct of regulators

- On the basis of NT Power, the regulated party will be caught but whether the licensor will be caught will depend upon whether the licensor is acting 'in trade or commerce' i.e. involved in commercial activity (and subject to the licence exemption)
- Under the amendment and the NZ analogue, purely regulatory conduct will not be covered
- Under 'in trade or commerce' case law, regulator itself is most likely to be 'affecting trade or commerce' but may not be acting 'in trade or commerce'
- Traditional conundrum: Sovereignty of individual governments and policies delivered to benefit the public vs. the impact of its conduct on market efficiency
- Should the response be one of law or Competition Policy commitment by governments?



All or nothing?

Productivity Commission

- *'The scope for particular competition reforms will vary across sectors and regions, and competition policy at the national level needs to be **sufficiently flexible** to accommodate these differences.'* (IP submission, Competition Policy Review, at 31-32).
- Issues of efficiency, time and cost / disruption by dissatisfied regulated parties



International comparators

Do nations competition laws cover SOEs?

- All in survey do; aware UAE does not
- Major determinant whether body engaged in trade or economic activity or carrying on business- in most cases includes not for profits
- How economic activity is characterised and whether the law applies to all levels of government are the major differentials internationally
China, Mexico, Pakistan, Switzerland
- Very broad scope in India – *Union of India v Competition Commission of India*:
- “ *barring functions such as administration of justice, maintenance of law and order and repression of crime ... the State cannot claim any immunity.. the fact that government runs railways to provide quick and cheap transport... will not convert what amounts to carrying on business into an activity of the State as a sovereign body*”
- Other end of the spectrum: US



EU: applies to ‘undertakings’

- Undertakings are entities engaged in economic activity

BUT exclusions:

- **Activities based on solidarity** – ‘*the inherently uncommercial act of involuntary subsidisation of one social group by another*’ (A.G.Fennelly)
 - *Poucet & Pistre* [1993] ECR 1-637- social security offices administering sickness and maternity insurance scheme to self employed
- **Activities connected with the exercise of the powers of a public authority**
 - *Eurocontrol case* [1994] ECR 1-43
 - *E Cali e Figli (Port of Genoa)* [1997] ECR1-1547
- **Procurement ancillary to non- economic activity**
 - *FENIN* [2006] ECR 1-6295 – purchase of medical equipment for Spanish Hospital
- **Employees and trade unions**



Services of general economic interest: EU

- Art 106 Services of general economic interest or having the character of a revenue producing monopoly are subject to the competition rules *‘insofar as the application of such rules does not obstruct the performance, in law or fact, of the particular tasks assigned to them.’*
- State must demonstrate that such a service needs to be established and that the infringement of competition law is necessary and proportionate to the general interest claims
 - *Hofner & Elser*
 - *Port of Genoa*
 - *Ambulanz Gockner* [2001] ECR 1-8089 61
 - *Corbeau*
- So there is an assumption that the competition rules apply to the government where it is engaged in economic activity in a broad interpretation of that concept
- Malaysia, Singapore, Hong Kong have variants of the EU provision; each EU jurisdiction has similar provisions, some do not have the last qualification



Treaty Commitment by EU members

- TEU Art 4(3)- members have a duty of sincere co-operation to facilitate the achievement of the Union's tasks and refrain from measures which could jeopardise the Union' objects
- Coupled with TFEU competition provisions results in an obligation not to adopt or apply laws which would render the competition laws ineffective
- *Italian Matches* involved a requirement commanding members of the industry to fix quotas for the sale of matches in Italy
- Competition Principles role in Australia ?



Other mechanisms for controlling anticompetitive government activity internationally

- In a number of jurisdictions the competition authority has a formal advocacy role which ranges from review and advice to challenging particular government behaviour in courts or tribunals
 - Italy
- Some competition jurisdictions have a legal obligation to consider competition in making laws and rules
 - Lithuania
- Under the AML in China there is a broad remit to prevent administrative monopoly, although economic factors mean that it is pervasive and the enforcement mechanisms are unwieldy
- Notably in the Russian Federation more than 50% of the antitrust complaints considered by FAS annually relate to government agencies and state-owned enterprises
- On procurement, questionnaire asked: Does your competition law proscribe procurement requests to bid that contain anticompetitive specifications?
12 Yes, 19 No Other Law? 18 yes, 13 no



What will work best for Australia?

- Current test: application only 'in so far as carr[ying] on business'
 - limiting application- default position is to exempt
 - focus on character of actor
- 'In trade or commerce'
 - how far will it take us and how far do we want to go?
 - approach of courts: would statutory guidance assist?
- Would other wording be more effective ? Do we need guidance or do we need to better define the line?
- Commercial/regulatory dichotomy remains; conduct/ purpose of acquisition remains
- EU default position : economic conduct is covered with limited exceptions
 - coupled with statutory obligation on states re Treaty compliance
- Should Australian amendments be supplemented by new Competition Policy commitment?



Conclusions : outstanding considerations

- Issues of cost/ benefit of more comprehensive amendments: what ultimately is best in the public interest?
- Legal issues with implementation given Constitutional considerations
- Outcome will be impacted by : perceived erosion of sovereignty in individual jurisdictions; effects on policy imperatives; cost and time efficiency, particularly in respect of local government
- Issues will be highlighted sharply if Harper recommendations on human services are adopted

