

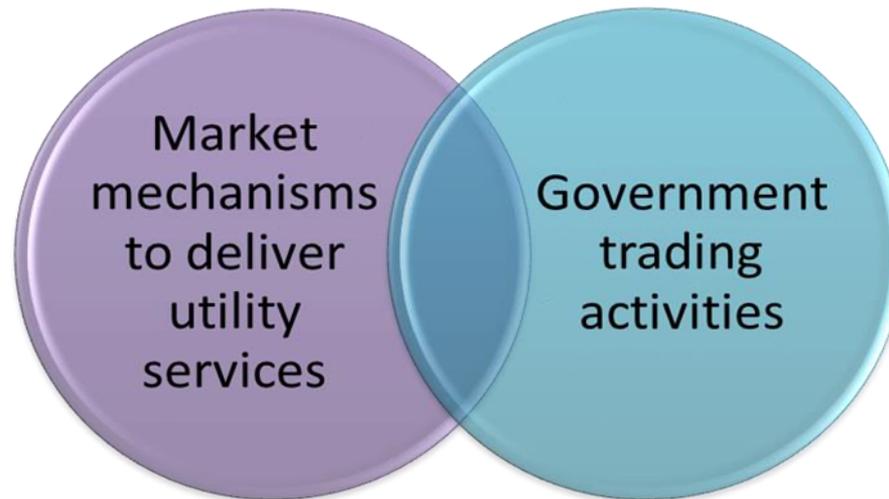
# **EXTENDING COMPETITION LAW TO GOVERNMENT ACTIVITY IN TRADE OR COMMERCE**

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# WHAT ARE THE ISSUES HERE?



Harper proposals only address part of the problem

# CARRYING ON A BUSINESS

- ▶ Sections 2A, 2B and 2BA apply the competition provisions to all tiers of government insofar as they "*carry on a business*"
- ▶ Case law has developed over last 20 years
- ▶ High Court in *NT Power Generation* (2004): is the conduct undertaken in the course of carrying on a business?
- ▶ Are the entity's activities sufficiently systematic and regular so as to be similar to the commercial activities which the private sector might engage in? (*Falls Investments* (2003))

# GOVERNMENT PROCUREMENT

- ▶ Do the procurement activities of government constitute "carrying on a business"?
  - » Procurement exception - line of cases have held that one-off sales of government assets do not involve the government carrying on a business: *McMillan* (1997), *Corrections Corporation* (2000)
  - » Correctness of decisions questions by Finn J in *GEC Marconi* (2003)
  - » Acquisition of diseased cattle: Falls Investments (2003)
  - » Authorisations granted by ACCC to various local councils undertaking joint procurement of services (e.g. waste management and recycling)

# THE PROBLEM IDENTIFIED BY HARPER

- ▶ Procurement and privatisation policies should not restrict competition unless:
  - » the benefits of the restrictions to the community as a whole outweigh the costs
  - » the objectives of the policy can only be achieved by restricting competition

# HARPER'S PROPOSAL

## ▶ Harper Review

- » Recommendation 24 is a step in the right direction
- » Fully implement the proposed Hilmer Review reforms in relation to the application of the CCA to government bodies
- » Full effects of recommendation will not be felt until cases are determined by the Courts
- » NZ experience shows still some fine lines to be drawn

# ANOTHER WAY?

- ▶ If the proposed *in trade or commerce* test is adopted, further litigation would be expected to ascertain the extent of the new test
- ▶ Consider rationale of Hilmer and Harper Reviews - government should be subject to the CCA
- ▶ Section 2C - defines what does not constitute "carrying on a business" or is not "in trade or commerce"
- ▶ Expand coverage of CCA to all government activity except for s 2C activities
- ▶ Section 51 and ACCC authorisations remain available

# THE PRIVATISATION QUESTION

- ▶ The trade or commerce changes are unlikely to address this issue
- ▶ History suggests the role is limited and sometimes non-existent when considering the sale or lease of government assets
  - » Victorian Wagering and Betting Licence - initial grant of statutory licence
  - » Port of Melbourne - CCA expressly excluded by statute
- ▶ Not just an acquisition issue but one of the conditions or terms of the relevant arrangement

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