"Application of Part IV of the Trade Practices Act to Local Government"

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Introduction

As you are no doubt all aware, from 21 July 1996 the *Trade Practices Act* 1974 ("the Act") was further extended under National Competition Policy. All States except Western Australia have enacted legislation conforming with the Competition Policy Reform Act, thus extending the ambit of the Act to now include many previously exempt business activities of Australian Local Governments.

The application of the Act is important for every one of you here today. A message that I want to impart to you today is that each local government is now going to be responsible for its the competition effects of its actions. The significance of the new coverage of the Act is that local governments now have to ensure that their legislation does not breach the Act and that its business organisations engage in fair trade practices. That said, the principles of the Act are nothing new for all local governments - many governments have been parties to contracts with corporations that are subject to the Act; furthermore, the provisions of the Act are basically common sense and basic fair trade principles.

Claire Thomas this morning, and Professor Fels, the Chairman of the Commission, two months ago have discussed with you the position of Local Government under the NCP Reforms. Today I am going to go into more detail about Part IV of the Act, in particular, its application to Local Governments.

Amendments to Trade Practices Act

Under the conforming legislation passed by Victoria late last year, any person, body or organisation is subject to Part IV of the Act. Therefore *local government authorities are subject to the Act.*

Amendments to the Act made by the CPRA have not altered the distinction between State and Territory "Crown" bodies and local authorities. New provisions have been inserted which applies the Act to State and Territory "Crown" bodies and which defines activities which do not amount to the carrying on of business.

Section 51 of the Act still operates to provide statutory exemptions. Any conduct that is specifically exempted from the Act by a State or Commonwealth law is outside the jurisdiction of the Act. However, legislation containing such an exemption must make an express reference to the Act.

A separate amendment exempts certain activities of local government bodies from Part IV. These activities are:

- the refusal to grant or the granting, suspension or variation of, licences (whether or not they are subject to conditions) by a local government body. A "licence" is defined mean a licence that allows a licensee to supply goods or services, or;
- a transaction involving only persons who are acting for the same local government body.

These amendments now be part of State and Territory law. These provisions were made at the request of local government so as to give a degree of certainty to some of its activities, so far as Part IV was concerned.

It remains to be seen what is the scope of the licensing exemption, but potentially it could be quite wide, protecting not only local government bodies themselves, but on the principle established by the High Court in the *Bradken* case, the licensees with whom they have dealt.

Provisions of the Part IV of the *Trade Practices Act*

Local government has not been immune from potential operation of Part IV in the past because of the operation of ss 75B and 76 (aiding and abetting or being knowingly concerned), notwithstanding that local government bodies may not be trading or financial corporations.

The question therefore arises whether the imposition of direct liability will make a great deal of difference. There do not appear to have been many instances of action taken against local government in respect of Part IV infringements in the past. An explanation for this could be that the local government activities in the main have not been inconsistent with Part IV.

The provisions of Part IV which may be of particular significance to local government are ss 45, 45A, 45D, 46, 47 and 48.

Before I discuss these sections, I will briefly diverge to a discussion of some fundamental principles of Part IV, the concepts of "substantial lessening of competition" and market definition.

Substantial lessening of competition and market definition

Focusing on the provisions in Part IV of the Act dealing with anticompetitive conduct, it is necessary to understand how the Commission interprets and enforces these provisions to gain an insight into how the Commission sees its role in relation to competition in broadcasting.

To generalise - there are always exceptions and variations - most anticompetitive conduct is prohibited if it has the purpose or likely effect of substantially lessening competition in a market.

Broadly speaking, a substantial lessening of competition occurs when market power has been achieved or enhanced as a result of certain market conduct.

Market is a crucial term. Competition does not occur in a vacuum. It occurs in a market and to assess whether competition has been substantially lessened in a market, one must determine the bounds of that market.

In this sense, market definition is but a tool to assess the degree of anticompetitive effect or market power. It cannot be assessed otherwise than by reference to a market.

However, being an analytical tool, it is important that it be defined correctly in order to achieve the appropriate result. Too broad a market definition, and the expected competitive outcome may be less that which actually occurs. At the other extreme, too narrow a definition may yield an expected competitive outcome greater than that which actually occurs.

How does the Commission go about defining market boundaries?

At the outset, the Commission tends to view the concept of a market somewhat differently from the common perception of a market as a place for buying and selling a range of goods and services. This 'place' can be perceived as broadly as a country, for example 'the Australian market'. Local governments may find it feasible to obtain services from as far away as southern NSW, in which case the market may be defined as a Southern Australian market. On the other hand, if it is not feasible for a perishible good to be transported more than 100km, the geographical market may be much narrower.

The Commission takes a more technical view. Indeed, it must as market is a term-of-art specifically defined in section 4E of the *Trade Practices Act* to include '..... a market for those goods and services and other goods and services that are **substitutable** for, or otherwise competitive with, the first-mentioned goods or services'.

The key concept in this market definition is that of substitutability. As the Trade Practices Tribunal has observed on this point in the **Queensland Co-operative Milling Association (QCMA)** case (1976) ATPR 40-12 at 17247:

'A market is the area of close competition between firms, or, putting it a little differently, the field of rivalry between them.... ...within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another.

'....in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more", would there

be, to put the matter colloquially, much of a reaction? ...It is the possibilities of such substitution which sets the limits upon a firm's ability to "give less and charge more".'

Implicit in this nearly classic observation of a market is that products must be **closely** substitutable to be considered in the same market.

Substitutability involves matters of degree. In a broad sense, everything is substitutable. All types of food are substitutable. All forms of entertainment are substitutable - one may chose to go to the football rather than watch a movie on television. But that does not necessarily mean that all entertainment should be considered in the same market, nor should all foodstuffs.

The **Arnotts** case (1990) ATPR 41-061 is relevant in this respect. In this case, the Full Federal Court found that the relevant product market was biscuits. It did not include non-biscuit and other food products, although at times they are substitutes. Applying the test in the **QCMA** case, the Full Court observed that a rise in the price of tea would probably cause a few consumers to abandon tea for coffee. The fact is that tea and coffee are distinct beverages, for each there is a distinct demand. The fact that, upon some occasions, some consumers select one product rather than the other does not establish that the two products are 'substitutable'.

What is most relevant is whether a rise in price of one product causes a significant core group of consumers to shift their demand to another product. If so, the products are considered to be close substitutes and are thus likely to be in the same market - for close substitutes act as a competitive constraint on pricing and other behaviour of corporations in the same market - as defined in trade practices terms.

Section 45 - Anti-competitive Agreements

Prohibits agreements, arrangements and understandings which have the purpose or effect or likely effect of substantially lessening competition.

The section is more likely to be of relevance to local government bodies than the other provisions of Part IV since it is the provision against which policies of "buy local" and "preferred supplier status" could fall to be measured. These two policies have been identified as under threat from the National Competition Policy reforms. The policies involve giving a preference in commercial dealings such as purchasing and tendering for works to suppliers from within the local or regional area against those from outside.

There is an argument that, in pursuing such policies, an agreement, arrangement or understanding between a local government body and another person may have the potential to result in a **lessening in competition,** since some persons who might be interested in providing the goods or services are prevented from competing for anti-competitive reasons.

Note the "potentially or possibility". Whether implementation of one of these policies involved an infringement of s 45 would depend on many diverse factors of which the following are some:

- whether implementation was in pursuance of a law of the State or Territory which fell within a s 51 exemption, ie carrying out the policy was specifically approved or authorised by law;
- whether the practice was **authorised** by the TPC/ACCC on public benefit grounds;
- whether a "licence" was involved; or
- whether it could be said that the practice resulted in a substantial lessening of competition in a market.

Section 45 also forbids arrangements between competitors not to acquire goods or services from, or supply goods or services to, another person (a primary boycott). While this provision would apply to local government bodies, as to any other enterprise, no special implications are seen in its application.

Section 45A - Agreements that Fix or Maintain Prices

This in effect makes price fixing or price maintaining agreements per se unlawful without the need to prove a substantial lessening of competition

Local government bodies will become primarily liable should they engage in this type of behaviour. However, under the previous law they may not have escaped liability if the price fixing agreement was in conjunction with a trading or financial corporation.

Section 45D - Secondary Boycotts

Prohibits persons acting in concert to prevent or hinder third persons from supplying goods or services to, or acquiring goods or services from, a fourth person, where at least one of the third or fourth persons is a trading or financial corporation.

The provision had potential application to local government before the amendments, and the amendments have not changed this where a secondary boycott is likely to substantially lessen competition. Where it does not substantially lessen competition, it is now covered under the *Industrial Relations Act*.

Section 46 - Misuse of Market Power

Prohibits a corporation which has a substantial degree of power in a market from taking advantage of that power for the purpose of

- eliminating or substantially damaging a competitor;

- preventing the entry of a person into any market or any other market, or;

- deterring or preventing a person from engaging in competitive

conduct in that or any other market.

The section is concerned with the protection of the competitive process, not necessarily with the protection of competitors per se. As the High Court observed in the *Queensland Wire case*,

... competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort and these injuries are an inevitable consequence of the competition s46 is designed to foster.

No suggestion has been made that local government bodies act or would wish to act in a way that infringed s 46 by using market power (assuming they have it) for one of the prohibited purposes. The application to them of s 46 should not have any special implications, but they will need to be mindful of their obligations under the section, as would any other prudent corporation, where they exercise market power.

To be in breach of s 46, the various elements it contains must be satisfied:

> **1** The relevant corporation must have a substantial degree of market power. Therefore first there must be a market as understood in law and economics.
>
> **2** There must be the required degree of market power.
>
> **3** Importantly that market power must have been used. If the particular action taken by a corporation which has market power is one that would have been taken under competitive conditions, the corporation cannot be said to have *used* its market power.
>
> **4** The mere use of market power is not enough. There must then be one of the specified anti-competitive purposes to its use. The use of market power for other purposes is not prohibited.

Two interesting related questions arise in the context of local government operations and s 46. First, where a council has a monopoly over the supply of a service facility, such as a council owned and operated sporting facility, a saleyard, an electricity supply line, does s 46 require the council to make the service/facility available to whoever seeks it? Second, where a council has chosen to undertake responsibilities such as road construction, or garbage collection with its own staff, could a potential supplier of those services claim that s 46 requires the council to throw open the provision of those services to competitors?

It is not possible to give a firm answer to these questions which will cover all fact situations. In the field of activities mentioned above, the facts of a particular case may fit within s 46, but broad statements that the section requires access to be given, or competitors to be allowed to share in the provision of council services are not correct. A further factor is the new exemption given to local government bodies in respect of licensing activities; in particular the exemption relating to the refusal to grant a licence.

Section 47 - Exclusive Dealing

This prohibits a situation where a corporation makes it a condition of supplying goods or services that the buyer must not take a competitor's goods or services or must take goods or services from a third person.

In the first type of exclusive dealing - for it to be illegal a substantial lessening of competition must be shown.

Where a requirement is that a third person's good or service be taken, it is not necessary to show that the practice will result in a substantial lessening of competition.

It is also important to remember that immunity can be obtained via **notification** for exclusive dealing conduct. I will discuss this further later.

Like s 45, this section is one where before the amendments a local government council could have been indirectly liable as a person involved in an infringement by a corporation.

To use an example of an instance where this section may apply to local government, consider a venue owned by a council that is hired out on the basis of using a caterer from a limited list supplied by the council. This arrangement would constitute exclusive dealing and be in breach of s 47(6) of the Act. Councils could overcome such a situation by engaging in direct contracts with caterers themselves and offer the facilities as a package deal.

Section 48 - Resale Price Maintenance

This prohibits the practice of a supplier requiring the person to whom it supplies goods or services not to sell those goods to someone else at less than a price set by the supplier.

The section not only prohibits corporations from engaging in resale price maintenance but also extends to prohibit persons from imposing resale price maintenance on corporations. Hence, it applied to local government bodies before the amendments made by the CPRA without any apparent difficulties.

An example of where resale price maintenance has occurred in practice is that of a local Council produced local history photographs to sell to tourists. The Council encouraged book shops to stock the book and not to sell it below a specified retail price. This conduct does constitute resale price maintenance. However there may be some *public benefits* associated with the conduct such as the preservation of local heritage. In this situation **authorisation** may be an option.

Section 50 - Mergers or Acquisitions

This prohibits mergers and acquisitions which have the effect or are likely to have the effect of substantially lessening competition in a substantial market for goods or services.

The section potentially applied to local government bodies before the CPRA reform in that it prohibited "persons" from acquiring shares or assets in corporations. No special implications for local government are seen in the wider application of the section to local government.

Authorisation

This is an area that I wish to emphasise and which will be of great importance to local councils.

Conduct which is at risk of breaching certain provisions of the *Trade Practices Act* can be 'authorised', which provides protection from legal action by the Commission or any other party. Authorisation is granted only where *benefits to the public resulting from the conduct outweigh any countervailing anti-competitive detrimen*t. Authorisation can be granted to the following types of conduct:

- contracts, arrangements, understandings or covenants that substantially lessen competition (s 45);
- agreements that fix or maintain prices (s 45A);
- secondary boycotts (s 45D);
- anti-competitive exclusive dealing (s 47);
- resale price maintenance (s 48); and
- mergers leading to a substantial lessening of competition (s 50)

but **not** for:

- misuse of market power (s 46).

The Commission's statutory function in considering an application for authorisation is to apply one of the two tests , depending on the conduct in question.

- For agreements that may **substantially lessen competition**, the applicant must satisfy the Commission that the agreement results in a benefit to the public that outweighs any anti-competitive effect.
- For primary and secondary boycotts, third line forcing, resale price maintenance and mergers, the applicant must satisfy the Commission that the conduct results in a **benefit to the public such that it should be allowed to occur.**

Notification

Exclusive dealing conduct (except for third line forcing) gains immediate and automatic immunity from legal proceedings under the Act when notification of it is given to the Commission. Immunity for third line forcing comes into force at the end of the prescribed period from time to time the Commission receives notice.

For third line forcing notifications lodged on or before 30 June 1996 the prescribed period is 21 days. After that the prescribed period will be 14 days.

That immunity remains unless revoked by the Commission. It cannot be revoked unless the Commission finds that:

- the conduct (other than for third line forcing) substantially lessens competition within the meaning of s 47 of the Act; **and**
- any public benefit flowing from the conduct is outweighed by the lessening of competition.

In the case of third line forcing, immunity cannot be revoked unless the Commission finds that they public benefit from the conduct does not outweigh the public detriment from the conduct.

Public Benefits

Both the Commission and the Tribunal have recognised the following factors as public benefits:

- fostering business efficiency, especially when this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- promotion of competition in industry;
- promotion of equitable dealings in the market;
- growth in export markets;
- development of import replacements;
- economic development, eg of natural resources through encouraging exploration, research and capital investment;
- assistance to efficient small business, eg guidance on costing and pricing or marketing initiatives which promote competitiveness;
- industrial harmony;
- improvement in the quality and safety of goods and services and expansion of consumer choice; and
- supply of better information to consumers and business to permit informed choices in their dealings.

The issues considered in relation to public benefit are also likely to be examined in the context of public detriment where the effect of such elements result in a cost, rather than a benefit, to the public. Other anti-competitive detriment may take the form of:

- a reduction in the number of effective competitors - buyers and sellers;
- increased restrictions on entry; and
- constraints on competition by market participants affecting their ability to innovate effectively and conduct their affairs efficiently and independently.

Summary

The overall conclusion that can be drawn is that the extension of the Part IV prohibitions to local government by way of State and Territory laws will certainly expose this sector to provisions that previously did not apply, or were only of indirect application.

Particularly with the new exemption in mind which will exclude licensing and intra body activities from the Part IV rules, it is difficult to see that legitimate activities of the council should be adversely affected. The Commission cannot categorically state whether the activities of local governments breach the Act, although it may be able to say that a larger council such as the Brisbane City Council, would be more at risk that a smaller one.

Recent Developments in Litigation

Amendments in the area of penalties highlight the significance of the Act and its role in promoting competition and ethical business conduct. Courts are embarking on a trend of awarding higher penalties than has been the case in the past. The highest fine possible under the old fine structure was $250,000. The recent reforms have seen fines increased to a maximum of $10 million per offence for companies, and to $500,000 for individuals in respect of breaches of the competition laws contained in the Act. In addition, penalties for offences against the fair trade and consumer protection provisions have doubled to a maximum fine of $40,000 for an individual and $200,000 for a corporation.

Previously the Commission could never get more than its $250,000 even if it proved multiple offences and theoretically became entitled to a higher fine. However, the Federal Court has awarded a series of penalties over the last two years which substantially exceed previous levels, showing a reversal of the previous trend. For example:

- TNT/Ansett/Mayne Nickless - $16.3 million;
- Holland Stolte/Leighton/Multiplex - $1.7 million;
- Simsmetal/Normet Industries - $572,500; and
- Toyota Dealers - $644,000.

All of these penalties were based on the old scale of penalties that applied before the Act was amended in 1993.

The Commission recorded its most significant win ever last year where penalties exceeding $20 million were awarded against three premixed concrete suppliers and several of their executives for price fixing conduct in the Brisbane, Gold Coast and Toowoomba areas. These penalties were awarded under the new scale of fees and reflect the seriousness with which the Courts consider this type of conduct.

Recent trends also indicate that the Courts are more prepared to hold individual executives responsible for infringements of the Act. There is an increasing expectation by the Courts, and the public in general, that corporate managers should be personally accountable if they engage in unfair or anti-competitive conduct which places themselves and the company at risk under the Act.

Very often companies are seeing these days the pointlessness of resisting where the Commission has a strong case. They are more readily withdrawing their defences. Additionally, the Courts are more sympathetic to the idea that penalties in these cases can be negotiated between the Commission and business before they are presented to the Court to determine if they are reasonable. It has no objections any longer to the parties presenting it with suggested penalties.

On the consumer protection side also there have been significant developments:

- The AMP case, settled in February 1995, involving misleading deceptive conduct saw refunds to customers of $50 million, provision of $100,000 for a community education television program and a contribution to the Commission's costs.
- A 1992 case involving the sale of life insurance to several thousand aborigines resulted in refunds to policy holders wishing to discontinue their policies, the establishment of a $700,000 trust fund to advance Aboriginal education, and the preparation of an influential report on insurance and superannuation which has subsequently effected marketing practices in that industry.
- The Commission received s87B undertakings late last year from Buyers Network International, a mail order company that made misleading statements about a proofreading book. The undertakings included an offer to give full refunds to the 9000 consumers who purchased the book priced at $25 (a total cost of up to $225,000).
- Numerous Telstra and Optus corrective advertising actions have also signalled the importance of Part V of the Act.

These trends are regarded by the Commission as a watershed in the history of trade practices law in Australia, as it marks the coming of age of competition law as a law requiring the utmost serious compliance by all corporations, large and small.

As you can see, early policy initiatives aimed at unjustifiable protection, national competition policy reforms, increased fines under the Act, and higher fines imposed by the Courts for breaches of the competition provisions of the Act, are all part of an irreversible movement to make our economy more competitive.

I believe it is not going too far to say that the resultant culture of competition arising from these initiatives is a necessary prerequisite if Australian industry is going to be able to compete in the global marketplace. That global marketplace will present Australian business with both a competitive challenge and competitive opportunity.

Compliance

Having covered the provisions of the *Trade Practices Act*, the next step is to consider how you can prevent breaches occurring. A company is responsible under the *Trade Practices Act* for the conduct of employees undertaken with actual or apparent authority of the company, for example false or misleading representations made by staff for the purpose of making a sale. Councils should therefore take all reasonable steps to inform relevant staff of the provisions of the Act so as to avert misconduct by staff.

While the implementation of a compliance program represents good business sense, recent increases in penalties for breaches of the Act are also a compelling reason for adopting and maintaining a compliance program.

Benefits to Business

It is not always recognised in public discussion that the Act brings important benefits to business. These benefits will extend to Local Governments to the extent that they operate as businesses. It is not just the Commission that conducts litigation. Over half the litigation under the Act is initiated by business against business. In addition many of the cases we deal with concern business to business relationships. They concern matters where there is some kind of detriment to other businesses. Take some of the price fixing cases that we have been involved in. In the freight case, for example, all the customers were business people who benefited from our involvement in regard to that price fixing arrangement. In the CSR-McKay Refined Sugar case we considered the joint venture to be anti-competitive and opposed it on authorisation. Following that there was a significant price war. That price war would not have affected consumers going into the supermarket and occasionally buying a bag of sugar. The main beneficiaries were actually the soft drink makers, the confectionary manufacturers and the biscuit makers. They got a significant benefit from that decision and it was actually passed onto consumers as well because the CPI was reduced by 0.4 in the first quarter after the price war.

A lot of other cases that the Commission gets involved in are really disputes between business. It is partly in recognition of the point that I have just made, but for other reasons also that the business community actually supports the Trade Practices Act even though at times individual businesses feel uncomfortable when it may be applied to them.. There has been strong business support for not only the preservation of the Act but for its extension into new areas.

Local Government as a Purchaser of Goods and Services

Local government is a major acquirer of goods and services, and as such, has long been able to utilise the provisions of the *Trade Practices Act* where it is affected by conduct in breach of the Act.

With the National Competition Policy program and the *Trade Practices Act* having application to all business undertakings, it is suggested that City Councils use the provisions of the *Trade Practices Act* where it can, either by taking its own action or by referring it to the Commission. The Commission will continue to look at conduct in regional Australia and would welcome any information that is of relevance.

The recently finalised concrete case illustrates the costs to local governments, of anti-competitive behaviour by other firms in a market. It also highlights the importance of having a law such as the Act to combat such practices and protect market participants and consumers who are adversely affected by anti-competitive conduct.

How can the Commission assist Local Government

The Commission is a very open agency and is more than happy to help the community, both in education, strategic enforcement and other related matters. The Commission has offices in all State capitals, Townsville, Darwin and Tamworth and is very keen to develop links with local government. Anyone who has any queries, should contact their nearest Regional Director or the National Office in Canberra; however local issues are best handled at the local level. Our Melbourne office is available for any future queries you may have for the Commission.

The Commission's Regional Directors travel into the regions on a regular basis, and would be more than happy to discuss matters with you. It is often local government authorities who know best what is happening in their regions, in terms of any anti-competitive conduct or other conduct that may be subject to Trade Practices law and which needs remedial action.

It is not the usual practice of the Commission to take matters to court immediately, so you should not be overly concerned that if you report matters the council will be involved in a complicated, expensive court case. Anti-competitive conduct is a cost to society and needs to be eradicated, and the Commission will do that, but using a number of strategies from education to enforceable undertakings and ultimately to litigation where other strategies fail or where that is the most appropriate alternative in the circumstances.

Whilst it is not possible to regularly speak to every Council in Australia, the Commission will continue to liaise closely at the national level with the Australian Local Government Association and at local levels with either local government or Shire associations. The Australian Local Government Association and the Commission are working on guidance papers for local government and the Commission will also publish its own paper.

It is not the Commission's role to give legal advice, but the Commission will provide guidance and assistance to the extent that it can and if it feels that private legal advice is needed in any particular circumstance it will also advise. The Commission would not encourage local governments to incur legal costs at the outset. It is more than happy to discuss matters in general, but it may be more appropriate to take legal action in a particular instance, ie, in collusive tendering cases where damages will be sought as the Commission cannot obtain damages in relation to anti-competitive conduct.

The final message that I would like to leave with you today is that Local Governments **are** caught by the reforms to the *Trade Practices Act*. However, this is no cause for alarm as some local government activities may not be in breach of specific provisions of Part IV of the *Trade Practices Act* if they are not involved in trade or commerce.

In conclusion, I would just like to mention that the Commission is ready, willing and able to work with industry and local governments who comply with the principles of the Trade Practices Act and engage in fair trade practices. On the other hand, we are equally willing to work against industry that will not.