**ACCOUNTING AT THE TOP CONFERENCE 2004**

**Holiday Inn Esplanade**

**Darwin, 11 June 2004**

# DOES THE TRADE PRACTICES ACT 1974 APPLY TO GOVERNMENT?

**Bruce Brown**

**General Manager, Legal**

**Australian Competition and Consumer Commission**

## Introduction

According to the Australian Bureau of Statistics, in 2002-2003 'General Government' expenditure in Australia was in the order of $134,311 billion compared to Gross Domestic Product of $753,262 billion. In rough terms, this means that recognised government activity last year represented around 18% of economic activity in Australia. Substantial enterprises continue to be government controlled or owned, and they tend to be in key infrastructure or utility –type areas, or represent a near monopoly in the market where they operate. The most obvious examples are Australia Post and Telstra, but at the State and Territory level there are many more.

The sheer size of these agencies can be pretty daunting to not only consumers, but also contractors. A question the ACCC is receiving far more frequently these days is whether government or semi-government bodies can be held accountable under the *Trade Practices Act 1974* ( the Act).

In a nutshell; yes, the Act does have limited application to government, in terms of any business activities that it may undertake. The incidence with which the question is arising, however, has been increasing significantly in recent years as more and more government departments, agencies and business enterprises exercise what are ,in many respects quite often significant market power characteristics. Either because of their sheer size, or because historically they effectively had monopoly roles, and because they are being expected to operate in a commercial manner, they are more frequently going close to the line in their market practices.

The kinds of potentially anti-competitive activities that are more frequently coming to the attention of the ACCC in terms of complaints or to the courts in terms of private actions, are:

- Agencies using their market power to 'squeeze' out any competitors or prevent any potential competitors from entering a market;
- Agencies colluding to reduce the level of competition between themselves;
- Agencies using any residual regulatory powers they may possess as a means of limiting the inroads that private competitors may make into their markets.

Combined with this also is the phenomenon of private sector firms and quasi-governmental bodies trying to bring themselves within the 'Shield of the Crown' exemption that would apply to many government departments more frequently.

## 1. Background: Applicability of the Doctrine of Crown Immunity to the TPA

A basic principle of Australian Law is the doctrine of Crown immunity. Once referred to as the 'Shield of the Crown', the doctrine holds that the general provisions of an enactment do not affect the Crown or its emanations unless the Crown is specifically referred to as being bound by the enactment, or by clear inference it must be bound, because otherwise the intention of the particular enactment would be 'wholly frustrated'.

When first enacted in 1974, there were no express statements within the Act that its provisions were binding upon the Crown. And so, accordingly, the application of the Crown immunity doctrine meant that governments and government authorities were not bound by any part of the Act.

The applicability of this principle was affirmed in 1979 in the case of *Bradken Consolidated Ltd v Broken Hill Proprietary Co. Ltd.*[1] In *Bradken*, the High Court of Australia held that the Act did not apply to the activities of the Crown in right of the State (the Queensland Commissioner of Railways), because an intention to bind the Crown in right of the State did not appear by express words or necessary implication in the Act.

Over time, however, the Act has been progressively amended to make it applicable to more of the activities of government departments or authorities at both the Commonwealth and State/Territory level.

The first extension was made in 1977, following a series of recommendations made by the Trade Practices Review Committee ('the Swanson Committee'). Section 2A was added which, in broad terms, provided that the Crown in right of the Commonwealth – either directly or by an authority of the Commonwealth - was bound by the Act to the extent that it carried on a business. However, the section made no provision for the Act to bind the Crown in right of a State or Territory.

In October 1992, the Federal Government established the Independent Committee of Inquiry into National Competition Policy, chaired by Professor Fred Hilmer. The 'Hilmer Report' was released in August 1993, and provided the foundation for the introduction of a comprehensive competition policy in Australia.

A particular area of concern noted in the Hilmer Report was the applicability of the Crown immunity doctrine to government enterprises, which gave them a competitive advantage over private sector companies.

Many of the recommendations contained in the Hilmer Report were implemented by amendments contained in the Commonwealth *Competition*

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[1] (1979) 145 CLR 107.

*Policy Reform Act 1995* ("CPRA"). In particular,the following reforms in respect of Crown immunity were introduced:-

(a) Parts IV, VB and XIB of the Act apply to the Crown in right of each of the States and Territories insofar as they carry on a business (new section 2B);

(b) State and Territory government business enterprises (**'**GBEs) are subject to the equivalent of Part IV through the application by the States and Territories of the schedule version of Part IV (the States and Territories enacted legislation to apply the CPRA in order to achieve this).

## 2. Application of the TPA to the Commonwealth and Authorities of the Commonwealth – Section 2A

Section 2A states that:

2A(1) Subject to this section and section 44E, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

2A(2) Subject to the succeeding provisions of this section, this Act applies as if:

(a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and

(b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business,

were a corporation.

2A(3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

2(3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.

2A(4) Part IV does not apply in relation to the business carried on by the Commonwealth in developing, and disposing of interests in, land in the Australian Capital Territory.

The effect of s. 2A is that the Act as a whole applies to the Crown in right of the Commonwealth in so far as it carries on a business either directly or through an authority.

Notwithstanding that it may be bound by the Act, if the Crown in right of the Commonwealth breaches a provision of the Act then s. 2A(3) provides that the Crown will not be liable to pecuniary penalty or prosecution for an offence. However, a range of alternative remedies may still be pursued against the Crown, including injunctions and damages.

The protection against prosecution afforded by s. 2A (3) does not apply to an authority of the Commonwealth that is carrying on a business (typically a GBE). The authority will be liable for the full range of sanctions under the Act.

## 3. Application of the TPA to State and Territory Governments – Section 2B

As a result of the introduction of s. 2B into the Act by the CPRA on 20 July 1996, the exclusionary effect of *Bradken* no longer applies in relation to Parts IV, VB and XIB of the Act where a State or Territory is carrying on a business. That section provides as follows:

> 2B(1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:
>
> (a) Part IV;
>
> (aa) Part VB;
>
> (b) Part XIB;
>
> (c) the other provisions of this Act so far as they relate to the above provisions.
>
> 2B(2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.
>
> 2B(3) The protection in subsection (2) does not apply to an authority of a State or Territory.

The relevant provisions cover restrictive trade practices (Part IV), GST price exploitation (Part VB), and certain activities in the telecommunications industry (Part XIB). Section 2B notably excludes Part V of the Act (relating to consumer protection obligations) from application to the Crown in right of the States and Territories (unlike the Crown in right of the Commonwealth, which is subject to those parts). The primary reason for this is that all States and Territories have their own Fair Trading Acts, specific provisions of which have the effect of binding the Crown in right of the States or Territories in similar terms. In a practical sense therefore, State and Territory Governments and their authorities

are bound by consumer protection provisions similar to those set out under Part V of the Act.

As with the Commonwealth Crown, s. 2B(2) provides that the Crown in right of any State and Territory is exempt from prosecution or liability for a pecuniary penalty under the Act, but this exemption does not apply to State and Territory authorities. The Crown in right of a State or Territory is still liable, however, to action for other remedies under the Act, such as injunctions and damages.

As with the Commonwealth Crown and authorities of the Commonwealth, the apparent breadth of the applicability of the Act to State and Territory authorities is reduced by the fact that the Act is confined in its application to activities that are carried on in the course of a business.

## 4. Defining the Terms

Because it can be very important for an agency whether or not it is caught by the TPA, a significant amount of case law has built up around the key legislative terms in sections 2A and 2B.

### 4.1 'The Crown'

Typically, there will be very little issue with whether a conventional government department is an emanation of the Crown. The uncertainty that does arise tends to be in respect of agencies established by statute which carry on commercial activities, or which carry on commercial activities among a host of other governmental activities.

### 4.2 'Authority of the Commonwealth' / 'Authority' in relation to States and Territories

Section 4 of the Act defines an 'authority of the Commonwealth' to be:

(a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or

(b) an incorporated company in which the Commonwealth or a body corporate referred to in paragraph (a), has a controlling interest.

Section 4 defines an 'authority' in relation to a State or Territory (including an external Territory as:

(a) a body corporate established for a purpose of the State or Territory by or under a law of the State or Territory; or

(b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest.

Therefore, a GBE will generally be regarded as an authority of the Commonwealth, State or Territory. Included in the number of organisations that have been held by the Court to be an 'authority of the Commonwealth' for the purposes of s. 2A are: the Australian Telecommunications Commission (Telecom, now Telstra): *Tytel Pty Ltd v Telecom*[2] and the Australian Postal Corporation: *Suatu Holdings Pty Ltd v Australian Postal Corporation*[3].

Determining whether a statutory authority is an emanation of the Crown requires a consideration of the statute which established the organisation. The degree of autonomy that an entity has over its affairs is a significant factor in determining whether it is able to claim that it can take the benefit of Crown immunity. In some cases the statue will be clear, particularly where the organisation is still subjected to Ministerial or Departmental control. But in some circumstances it is difficult to determine the exact extent to which an entity is subject to control in terms of its day to day operations. For example, it might well be managed and controlled in accordance with directions given to it by a Department and receive its funding from the Government budget, but the day to day management of the entity may be removed from the Department's control. There is a strong tendency to regard a statutory corporation formed to carry on public functions as being distinct from the Crown in the absence of an express provision to the contrary: *Townsville Hospital Board v Townsville County Council*[4]. This was demonstrated in the case of *Kinross v GIO Australia Holdings Limited & Ors*[5]. In that case the Federal Court found that, while there is little doubt that the old GIO was a statutory body representing the Crown, there was a clear intent to separate the successor to GIO, GIO Australian Holdings Limited, from the Crown. The overwhelmingly commercial nature of the entity was decisive in determining the matter.

### 4.3 Factors for determining whether an 'entity' represents the Crown

In general terms, in determining whether an entity is the Crown in right of the Commonwealth/State/Territory, a number of factors have been considered by the courts. These include:

(i) The constituent statute of the entity - to determine if the legislature sought to confer Crown status upon it;

(ii) The function of the entity;

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[2] (1986) 67 ALR 43.

[3] (1989) ATPR 40-937.

[4] (1982) 149 CLR 282

[5] (1995) ATPR 41-402 at 40,436

(iii) The measure of control that the Crown exercises over the entity. If, for example, an entity has a significant degree of autonomy over its activities, it may be deemed not to enjoy Crown immunity: *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*[6]. Factors that the Courts have taken into account in determining the measure of control that the Crown exercises over the entity include:

- Whether the entity has control over the make-up of its board;
- The extent to which the board exercises discretion in engaging in particular activities;
- Whether the entity holds property on behalf of the government;
- Whether the entity must follow government policy; and
- The reporting requirements of the entity.

More frequently nowadays, it is also possible for an entity to be held to possess immunity for some of its activities, but not for others: *Townsville Hospitals Board v Townsville City Council*[7].

In *NT Power Generation Pty Ltd v Power and Water Authority*[8], Mansfield J considered the following factors relevant in determining that a regulatory body (the NT Power and Water Authority - PAWA) was an emanation of the Crown in right of the Northern Territory:

- The CEO and employees of the body were public servants;
- The CEO of the body, and the body itself were subject to Ministerial direction;
- The body was used by the Northern Territory Government as a means of implementing government policy;
- The body's functions were regarded as being functions of government carried out on behalf of the Northern Territory government;

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[6] (1979) 145 CLR 330.

[7] (1982)149 CLR 282.

[8] [2001] FCA 334

- The body was exempt by statute from local government rates, charges and taxes; and

- The body also had a statutory role as a regulator under the *Electricity Act* of the NT.

It was argued in that case that, as the Electricity Act which controlled the activities of PAWA did not specifically state that it was entitled to Crown immunity and stated that it must act in a commercial manner in its affairs and dealings, the entity should not be entitled to Crown immunity. After balancing the above factors, the Federal Court found that PAWA was in fact an emanation of the Crown in right of the Northern Territory and that the TPA only applied to it to the extent that it was carrying on a business (as required by s. 2B).

Although in most instances it will be clear whether a department or authority is part of the Crown, there have been a few other cases where the question of whether a particular organisation is actually 'the Crown' has been ventilated.

Examples of cases in which public sector bodies have not been found to be part of the Crown include:

- State Superannuation Board of Victoria – *State Superannuation Board of Victoria v Trade Practices Commission* 150 CLR 282 (the Board was instead found to be a financial corporation within the meaning of the TPA. In relation to its mortgage investment activities the Board was not an instrumentality of the Crown and was bound by the TPA);

- National Tennis Centre Trust and the Victorian Arts Centre Trust – *Paul Dainty Corp Pty Ltd v National Tennis Centre Trust* (1990) 22 FCR 495.

- Royal Prince Alfred Hospital (Sydney) – *E v Australian Red Cross Society & Ors* (1991) ATPR 41-085. Although the case has been overtaken by CPRA amendments, the decision is instructive. A former patient sued the Royal Prince Alfred Hospital (along with the Red Cross Society) for misleading and deceptive conduct under section 52 TPA when he contracted AIDS from a blood transfusion with contaminated blood that he received at the hospital. The court noted that the Central Sydney Area Health Service had been established by enactment to take over the responsibility of running the hospital in 1986. The hospital's trading activities were significant, even though it was a 'public' hospital (amounting to $18 million in revenue in 1985 alone) and the corporation running the hospital was not subject to any significant executive control under its establishing enactment, having only 10 of its 22 directors appointed by the Government.

### 4.4 'Carrying on a Business'

In practice, a major factor in determining whether section 2A or 2B applies in particular circumstances is whether the Crown or the authority of the Crown is

carrying on a business. The terms 'carries on a business' and 'business', are not defined comprehensively in the Act. The only guidance in the Act is provided by s. 4(1), which states that a business includes a business not carried on for profit.

Deciding whether the Crown or an authority of the Crown is carrying on a business is a question of fact that requires an analysis of the activities of the particular entity. The Courts have provided some guidance as to what is meant by 'carrying on a business' for the purposes of section 2A (and 2B) of the Act, as follows:

- Activities involving repetition and regularity in the performance of a succession of acts, rather than the effecting of a solitary transaction.
- Commercial activities (such as selling goods and services, entering into transactions, and entering into financial negotiations) on an on-going basis.
- An isolated transaction will not generally indicate the carrying on of a business unless it is the first of a number of transactions.
- Involvement in the procurement of supplies for conducting exclusively governmental activities does not constitute the carrying on of a business.

Courts have found that government entities were not 'carrying on a business' in relation to their relevant activities in the cases of *JS McMillan Pty Ltd v Commonwealth*[9] and *Thomson Publications (Aust) Pty Ltd v Trade Practices Commission & Ors*[10].

*JS McMillan Pty Ltd v Commonwealth* involved a challenge to a tender for the sale of a Commonwealth printing business on the basis that the Commonwealth had engaged in misleading conduct. The Federal Court held that because the tender process was administered by the then Department of Administrative Services whose officers had nothing to do with the Australian Government Printing Service (which was carrying on a business), it was seen as a 'once off' decision by the Commonwealth to close the Government printer and dispose of plant and equipment, and not the Commonwealth 'carrying on a business'.

In *Thomson Publications,* the Federal Court held that the Trade Practices Commission was an instrumentality of the Crown, performing the regulatory functions entrusted to it under the TPA and was not carrying on a business in the sense that is required by the Act.

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[9] (1997) ATPR 46-175

[10] (1979) ATPR 40-133.

In summary, where the Commonwealth or an authority of the Commonwealth is involved in a commercial enterprise it will generally be seen to be carrying on a business for the purposes of section 2A of the Act.

### 4.5 Activities which do not amount to a Business - Section. 2C

Greater certainty is provided in the Act for what does not amount to carrying on a business. Section 2C sets out a non-exhaustive list of activities that do not amount to carrying on a business by the Crown or an authority of the Crown for the purposes of ss. 2A and 2B:

**Activities that are not a business**

2C(1) For the purposes of sections 2A and 2B, the following do not amount to carrying on a business:

(a) imposing or collecting:

(i) taxes; or

(ii) levies; or

(iii) fees for licences;

(b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions);

(c) a transaction involving:

(i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of the Commonwealth or an authority of a State or Territory); or

(ii) only persons who are all acting for the same authority of the Commonwealth; or

(iii) only persons who are all acting for the same authority of a State or Territory; or

(iv) only the Crown in right of the Commonwealth and one or more non-commercial authorities of the Commonwealth; or

(v) only the Crown in right of a State or Territory and one or more non-commercial authorities of that State or Territory; or

(vi) only non-commercial authorities of the Commonwealth; or

(vii) only non-commercial authorities of the same State or Territory;

(d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:

(i) the body chooses to acquire the products; or

(ii) the body has not exercised discretion that it has under the legislation that would allow it not to acquire the products.

2C(2) Subsection (1) does not limit the things that do not amount to carrying on a business for the purposes of sections 2A and 2B.

2C(3) In this section:

"acquisition of primary products by a government body under legislation" includes vesting of ownership of primary products in a government body by, an authority of the Commonwealth or an authority of a State or Territory; legislation;

**"government body"** means the Commonwealth, a State, a Territory;

**"licence"** means a licence that allows the licensee to supply goods or services;

**"primary products"** means:

(a) agricultural or horticultural produce; or

(b) crops, whether on or attached to the land or not; or

(c) animals (whether dead or alive); or

(d) the bodily produce (including natural increase) of animals.

2C (4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is "non-commercial" if:

(a) it is constituted by only one person; and

(b) it is neither a trading corporation nor a financial corporation**.**

*4.5.1 Collection of Taxes, Levies or Licence Fees – S. 2C(1)(a)*

Although the collection of fees, taxes and levies does not constitute carrying on a business, the subsequent investing of these funds by the collecting entity may, in some circumstances, amount to carrying on a business. Where

investment activities are merely ancillary or incidental to core activities which are exclusively governmental, there is a strong argument that the investment does not constitute the carrying on of a business.[11]

The mere fact that a government entity or authority collects levies pursuant to a legislative power does not automatically enable it to avoid claims that the Act applies to all of its activities.[12]

*4.5.2 Granting or Refusing to Grant a Licence – Section 2C(1)(b)*

One area more frequently arising for consideration under the Act is whether, in particular circumstances, a government entity or authority issuing a licence or collecting a fee for the licence can fall within the exemption provided by s. 2C (1)(a) or (b).

For most purposes a licence is defined in law as being a permit to do something which would, without the licence, be unlawful[13]. However, under s. 2C (3), what constitutes a licence for the purposes of the section is defined more narrowly as something that 'allows the licensee to supply goods or services'. Some ordinary licensing arrangements may not fall within this narrow definition. This will depend upon who grants the licence, to whom it is granted, and the terms upon which it is granted.

For example, an entity may issue a tourist with a permit (for a fee) to travel over or camp upon restricted land controlled by that entity. This kind of permit would not be a licence for the purposes of s. 2C, and so the entity issuing or refusing to tissue the licence may be subject to the TPA in respect of that activity. In contrast, a permit that authorised a commercial tour operator to take tour groups onto the same restricted land for the purpose of conducting leisure fishing, is likely to be deemed a licence for the purposes of s. 2C (because it would authorise the tour operator to provide services), and so the entity may not be found to be subject to the TPA in respect of that part of their activities.

**4.6 '(In) So Far As'**

Both sections 2A and 2B include the phrase 'so far as the Crown carries on a business'. This provides for the situation where a Crown entity is carrying on both a government (eg regulatory) function and a business function.

In such a case, only the entity's business functions will be subject to the Act. For example, where a Government owned business sells goods to the public, it

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[11] *Chief Commissioner of Stamp Duties (NSW) v Woollahra Municipal Council* (1993) 30 NSWLR 280.

[12] See for example *FAI General Insurance Company Ltd & Anor v Workcover Corporation of South Australia & Ors* (1998) ATPR 4-639.

[13] *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525.

is likely to be carrying on a business. However, entering into a contract for the purpose of publishing information on certain aspects of its activities is likely to be considered a non-commercial regulatory activity, and therefore not subject to the Act.

A good recent practical example of this was in the case of *Village Building Company Ltd v Canberra International Airport Pty Ltd& Ors (No 2)*[14] . In this case, Village owned development land under the southern part of a 'corridor' of aircraft movements to and from Canberra Airport. The company applied to have the land re-zoned for residential purposes. CIA opposed the re-zoning, mainly because it had a master plan for the airport which contained a noise exposure forecast ('ANEF') for the airport surrounds. Air Services Australia ('ASA') controlled the flight paths into and out of the airport and is also responsible for endorsing ANEFs for their accuracy. CIA's opposition included the circulation of material to influence community and government decision-making in matters of land use and planning. Village initiated proceedings against CIA and ASA for a breach of s. 52 TPA. ASA was required to recover costs for its ANEF endorsement procedures. Village alleged that the technical endorsement procedures undertaken by ASA involved carrying on a business, and that the endorsement ASA had given in respect of Canberra Airport was misleading or deceptive. The Federal Court held that ASA were not carrying on a business in regard to their ANEF endorsement activities, mainly because it was a statutory duty. The fact that the Minister had required ASA to cost recover for the exercises did not alter the conduct from being a statutory requirement under the Air Services Act. Accordingly, ASA was covered by Crown immunity in respect of its ANEF endorsement activities.

Persons dealing with the Government in relation to the actual conduct of business will have the same protection as when dealing with a private trader who is carrying on such a business, but will not have protection under the Act when entering into other dealings with the Government[15].

### 4.7 Potential abuse of market power – two examples.

Two examples demonstrate just how pervasive the application of the TPA can be – even to government agencies that people might ordinarily would not be caught by its operation. An example of this a few years ago involved the Australian Bureau of Meteorology, who the Commission alleged were misusing their market power for anti-competitive purposes in an attempt to deter a New Zealand competitor from entering the market for the provision of specialised meteorological services.[16] After court-sponsored mediation, the Bureau agreed to provide access to information in its possession.

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[14] [2004] FCA 133

[15] *JS McMillan* op.cit per Emmet J.

[16] The ACCC instituted proceedings in the Federal Court in December 1995 and the settlement took place in May 1997.

Another example, which did not get to Court, involved the National Gallery of Australia ('NGA'). In 2002, the ACCC received information to the effect that the various official State, Territory and Commonwealth art galleries were reaching agreements at their regular government meetings to not bid against each other for specific paintings at major art auctions, in order that the prices would not be pushed up. In particular, we had information about an agreement purportedly reached in respect of a painting by the noted colonial artist John Glover, which involved the NGA and the Tasmanian Museum and Art Gallery. If the information proved to be correct, and the NGA was bound by the TPA, then its conduct might have amounted to a breach of section 45, which prevents contracts or agreements that affect competition in some way – on the basis that the prices that might otherwise be achieved at open art auctions for these paintings might be depressed.

Ultimately, the ACCC decided to take no further action in this matter and so no adverse conclusion should be reached about NGA, but what is of interest is the procedure we went through to determine whether the NGA was bound by the Act.

In reaching the conclusion that the NGA was bound by the TPA in respect of its business activities, a major factor was that almost $9 million of its $41.5 million in revenue came from trading activities, which included sales and fees for special exhibitions. The buying (and selling) of major works of Australian art would play a critical part in the development of its capacity to make revenue from its trading activities. Another major factor was that, under its establishing enactment, the controls of the Executive Government over its affairs were exceptionally limited.

### 4.8 Falls Investments – the High Tide

One recent case demonstrates the difficulties that can arise as a court struggles to determine where the dividing line may lie, and with 'what the justice of the facts may demand'.

The Falls family ran an extremely successful cattle stud at Malton in New South Wales. In 1992, the NSW Department of Agriculture's policy was to completely cull any herd in which any evidence of Bovine Johne's Disease was found and to pay full compensation to the owners. A small number of the Falls family's herd were found to be infected. The facts are relatively complicated and there were disputes surrounding the evidence but, essentially, the family gathered all their cattle (including many that had been agisted nearby) ready for slaughtering. This meant that the overwhelming number of uninfected cattle quickly came into contact with infected cattle. In the meantime, the Department had changed its policy on compensation (and many officers within the department knew that this change was going to occur long before it did occur), and would only pay compensation for cattle that were officially tested positive and title passed to the department before they were destroyed. The Falls family were only compensated for that small number of cattle known to have been infected before the intermingling. They sought compensation from the NSW Government under a number of causes of action, for the damage they

suffered by reason of the NSW Agriculture Department not proceeding with its proposal for total depopulation and compensation - in particular from the intermingling of its agisted herds with their small infected herd. One of the causes of action was for misleading representations under the NSW *Fair Trading Act*. Not surprisingly, the NSW Department of Agriculture claimed that they had Crown immunity. The judge at first instance rejected their Crown immunity argument on the basis that:

- the department was doing an activity which could be done by a private trader; that is, the buying and selling of cattle; and

- the activity was conducted with a degree of system, continuity and repetition, even though the department had only made three such payments.

The department appealed, however, and on appeal the Full Court of the NSW Supreme Court overturned the original decision on this point, with the Chief Justice stating:

> …it is not possible to characterise the conduct in question in these proceedings as 'carrying on a business' or as having been engaged in 'trade or commerce'. To take one aspect of the scheme of compensation – namely the mechanism for offsetting residual value of slaughtered cattle against the compensation otherwise payable – and thereby characterise the process as a whole, as Palmer J did (*at first instance*) is not, in my opinion, correct. The governmental character of the process remains not only the dominant but, in my opinion, the sole characterisation of the process.[17]

Nevertheless, the case was remitted back to Palmer J for reconsideration.

## 5. Liability of Local Governments - Section 2D

Before the implementation of the National Competition Policy reforms the application of the Act to local government had been in some doubt. However, it is likely that most local government bodies would have been subject to the Act in relation to their business activities.

Clause 7 of the *Competition Principles Agreement,* ('CPA') executed on 11 April 1995 by the Commonwealth and all the States and Territories, provided that the signatories would apply the competition principles to their local government sectors.

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[17] State of New South Wales v RT & YE Falls Investments Pty Ltd (2003) 57 NSWLR 1, Spigelman CJ at p. 5.

Section 2D was introduced into the Act by the CPRA in July 1996. It provides a limited series of exemptions for local government bodies in respect of Part IV of the Act:

> 2D (1) Part IV does not apply to:
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> (a) 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; or
>
> (b) a transaction involving only persons who are acting for the same local government body.
>
> 2D (2) In this section:
>
> **"licence"** means a licence that allows the licensee to supply goods or services;
>
> **"local government body"** means a body established by or under a law of a State or Territory for the purposes of local government, other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.

It is therefore clear that post July 1996, the TPA applies to local government, subject to the exceptions provided for in section 2D.

## 6. Derivative Crown Immunity

As a result of government outsourcing and tendering processes, it is becoming more common for the government to employ the services of a third party or subsidiary to perform tasks that, historically, may have been carried out by a Department. It is possible for private companies to receive the benefits of Crown immunity in certain circumstances. This hotly argued principle is known as derivative Crown immunity. It holds that if a government is a party to an arrangement and would be immune from the provisions of the TPA in respect of its involvement, then any private company who is also party to that arrangement may also be entitled to Crown immunity.

The Commission is of the view that derivative Crown immunity arises only in very narrow circumstances where the relationship between the Crown and a private company is such that the Crown would be significantly prejudiced by a refusal of Crown immunity to a private company.

Whether derivative Crown immunity ought to be available to private companies contracted to government is an important policy issue that stands at the centre of contemporary practice government contracting.

As outlined earlier, in the case of Bradken, the Queensland Commissioner for Railways was found to be exempt from the operation of the Act as the Crown in right of the State. As a necessary adjunct to that finding, the majority of the Court held that any company contracting with the Commissioner was also exempt because it would have been impossible to apply the Act to the company without applying it equally to the immune Commissioner. Therefore, in order to avoid prejudicing the interests of the Commissioner, (and thereby the Crown) both parties were held to be immune. The principle of derivative Crown immunity is sometimes described as the second limb of the *Bradken* decision.

The issue of derivative Crown immunity was considered by the Full Federal Court in *Woodlands & Anor v Permanent Trustee Company & Ors*[18] (the *"Homefund case").* This litigation arose from a NSW Government scheme to provide fixed interest home loans to low income earners. The Government used private sector companies as finance providers. A number of the borrowers found that the capital sum owing on their home loans was increased rather than reduced by their monthly repayments. The borrowers brought a class action against the NSW Government and the companies in the Federal Court, seeking review of the contracts, and alleged misleading and deceptive conduct under the TPA and the *Fair Trading Act 1987 (NSW).* The Full Court appeared to take the decision in *Bradken* further, and held that the companies contracted to the NSW government were able to claim the same immunity as the government itself. This was in effect an agency argument – that the company was an arm of government for the purpose of implementing the government initiated scheme.

However, the Court also made it clear that the use in *Bradken* of words like "interests" and phrases like "prejudicially affected" for Crown immunity to attach to a person who is not "the Crown" or a transaction to which the Crown is not a party, the legislation must significantly prejudice the Crown; for example, by restricting actions it would otherwise be free to undertake or diminishing the value of its property. It is not enough that the interests of the Crown will be indirectly affected by the application of the statute[19].

The decision of the Federal Court is only of persuasive value because on appeal, the High Court[20] decided that the Federal Court should not have answered the derivative immunity question and considered it inappropriate to answer the question itself. However, the Court decided that it was not required to consider *Bradken*, but appeared to reject the *Bradken* approach to Crown immunity on the basis that the presumption underlying the approach was no longer reflective of modern government practices.[21] While it did not specifically

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[18] (1996) ATPR 41-509.

[19] Per Wilcox, Burchett and OlneyJJ at p42,383.

[20] *Bass v Permanent Trustee Company Limited* (1999) ATPR 41-682.

[21] Per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ ibid. at 42,721.

overrule *Bradken,*the Court's comments are likely to be of persuasive value to inferior courts when they are considering matters raising similar issues. In light of this, the ACCC believes it is less likely that the second limb of *Bradken* will apply to non-Crown parties.

A practical example of the significance of the derivative crown immunity principle is found in the previously mentioned recent case that the ACCC took against Health Care of Australia and senior members of the AMA in Western Australia.

The Western Australian government had sold one of its public hospitals to Mayne Nickless Ltd, which for the purposes of this case was trading as Health Care of Australia. Part of the agreement was that Health Care had to undertake to, effectively, continue to provide all medical services required by public patients and not to charge them fees, and they would effectively be reimbursed for this service by the State government. Health Care had negotiated with the WA branch of the AMA to set terms of engagement (including the fixing of fees) for doctors. The ACCC had a concern that this was a price fixing arrangement which breached section 45 TPA and so we launched proceedings against the company and a number of senior executives of the AMA branch. Health Care argued that it had the benefit of derivative Crown immunity, and the court upheld this submission, primarily because the terms of section 5A of the *Hospitals Act* of WA imposed a duty on the Minister for Health to provide hospital accommodation and services for the public, and also empowered him to discharge these duties by 'making arrangements on such terms' as he thinks fit. Accordingly, because the relevant agreement related to the fees to be set for doctors practising in the area of provision of public health services, Health Care was effectively making an agreement that the Crown would have been able to make.[22]

In the recent case of *NT Power Generation Proprietary Limited v Power and Water Authority and Ors*[23], the Full Federal Court considered an appeal in relation to whether, among other issues, a company which was a wholly owned subsidiary (Gasgo Pty Ltd) of a body which was found to have Crown immunity (PAWA), was itself entitled to claim derivative Crown immunity. Justice Mansfield at first instance decided that gGasgo was not an emanation of the Crown in right of the Northern Territory on the basis that it was not apparent that the Northern Territory Government intended it to perform functions on its behalf. However, using similar reasoning to the Full Federal Court in the *Homefund case*, Mansfield J found that Gasgo was entitled to claim derivative Crown immunity as if immunity was not available, the interests of the Crown in right of the Northern Territory would be prejudiced.

On appeal, the majority (Lee and Branson JJ) upheld the decision of Mansfield J on this issue. However Finkelstein J dissented on the grounds that Gasgo

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[22] *ACCC v The Australian Medical Association (WA Branch Inc ) & Ors* [2003] FCA 686.

[23] [2002] FCAFC 32

was only entitled to claim derivative Crown immunity if it was established that PAWA was entitled to claim Crown immunity. Finkelstein argued that the decision to allow PAWA to claim Crown immunity should be set aside.

On 12 September 2003, NT Power Generation Pty Ltd was granted special leave to appeal to the High Court on the basis that the Full Federal Court erred in holding that, although by reason of section 2B of the TPA and section 14 of the Competition Policy Reform (Northern Territory) Act 1996, section 46 of the TPA and clause 46 of the Schedule version of Part IV of the Reform Act bound PAWA so far as it carried on a business, section 46 and clause 46 did not apply to the subject of the proceedings and that as a consequence of this error, the Full Court erred in finding that section 46 and clause 46 did not apply to Gasgo. The ACCC intervened in this hearing, as it did in the Full Federal Court hearing and made submissions on the extent of the derivative Crown immunity question. The High Court has reserved its decision.

The issue to be resolved is whether 'carrying on a business' and the Competition laws are to be interpreted as applying to all the activities of a Government agency which is carrying on a business or only to the specific activities of that agency which involve the carrying on of a business.

## 7. Section 51 Exceptions Power

Section 51(1) of the Act provides a mechanism whereby statutory exemption can be given to prohibitions under Part IV of the Act that would otherwise apply to the activity. The exemption must be specifically authorised or approved by a Commonwealth or State Act, or by a Territory law, or any regulation under such enactment, and it has to expressly refer to the Act to be effective. Some of these exemptions may relate to activities undertaken or regulated by the Crown in right of a State or Territory, or the Commonwealth, or an emanation thereof.

Any exemption made by regulation can only be effective for a period of two years.

Clause 14.2 of the *Conduct Code Agreement* requires that where such an exempting law has been enacted or made, the relevant State or Territory government must send written notice of the legislation to the Commission within 30 days thereof.

Pursuant to section 51(1C) (f) of the Act, the Federal Treasurer may table in the Commonwealth Parliament regulations which effectively override any such exemption. But if such regulations are tabled more than four months after the notice was sent to the Commission, the regulations must be accompanied by a report from the National Competition Council on the competition effects of the legislation.

The Commission is required to provide a cumulative list of exempting legislation in its annual report, but it also provides a progressively updated list in its ACCC Journal throughout the year.