

Application of the TPA to government

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General outline

■ Laying the foundation

- an introduction to the TPA, especially Part IV
- the principles governing the intersection of government activities & the TPA

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■ Understanding the practicalities

- when is the Crown carrying on business
- impact of the TPA on day-to-day activities

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General outline (cont)

- Introduction to the *Trade Practices Act 1974 (Cth)*
 - object
 - Part IV
 - limitations on scope
- Application to Crown: the 'standard' position
 - Crown immunity
 - derivative Crown immunity (*Baxter* decision)
- Impact of National Competition Policy
 - when the TPA applies / doesn't apply to government
 - governments creating their own exemptions
 - designing competitive markets



What is the TPA designed to achieve?

- In 1995, s2 inserted:

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.



Overview of the TPA

Covers a broad range of business conduct:

- Part IIIA: access to essential services
- **Part IV: competition provisions**
- Part IVA: unconscionable conduct
- Parts V, VA & VB: consumer protection
- Part VIIA: prices surveillance
- Part X: international liner cargo shipping
- Parts XIB & XIC: telco regime



Basic structure of Part IV

Part IV prohibitions generally grouped as follows:

- “per se” prohibitions (ss45, 47 & 48)
 - price fixing arrangements between competitors
 - market sharing arrangements between competitors
 - third line forcing
 - resale price maintenance
- “competition-tested” (or SLC) prohibitions (ss45 & 47, as well as s50 (mergers))

*These apply to arrangements
between at least 2 parties*
- misuse of market power (s46) – unilateral conduct



Basic structure of Part IV (cont)

- Per se conduct prohibited regardless of the effect on competition

For example, two local servos can be guilty of fixing the price of ice, even if several alternative suppliers in the area & consumers not adversely affected

- SLC conduct requires analysis of effect on competition

Basically the conduct must have a long-term effect on market structure. This will require at least one of the parties to be sufficiently 'big' and to have a significant role in the market. The conduct of one of the large supermarket chains might potentially SLC, but probably not the conduct of your local independent. Query the banks?



Basic structure of Part IV (cont)

- Misuse of market power involves a corporation:
 - with **substantial market power**
 - **taking advantage** of that power for
 - a **prohibited purpose**, i.e:
 - eliminating / substantially damaging a competitor
 - preventing entry into a market
 - deterring competitive conduct

Similar in many respects to SLC analysis – only parties who are sufficiently 'big' fall within s46



Part IV: summary of potential issues

Govt departments, agencies, entities could potentially:

- collude with competitors
- reach agreements that SLC, e.g. long-term exclusive supply agreements
- use market power to 'squeeze' out competitors / potential competitors

But this may not mean a contravention – depends upon the scope of Part IV



Exceptions to Part IV

Key limitation on operation of Part IV:

- Part VII (authorisation / notification)

immunity anyone can apply for



In addition, special rules for government:

- Crown immunity (including derivative Crown immunity), subject to Hilmer / NCP reforms
- s51





Crown immunity: general principles

- Doctrine of Crown immunity:
 - well established common law principle
 - Crown not bound by statute unless express statement or clear inference to the contrary
- When enacted, TPA contained no express statement binding Crown
- *Bradken v BHP* (HC, 1979): TPA does not apply to Crown given absence of express words / necessary implication





Derivative Crown immunity

- General principle: where Crown entitled to immunity, parties dealing with the Crown entitled to its shield otherwise Crown would suffer prejudice (*Bradken's* 'second limb')
- *ACCC v Baxter*:
 - State (health) purchasing authorities entering into exclusive 'bundling' arrangements with Baxter
 - held at first instance that Baxter's conduct contravened s46 (misuse of market power) & s47 (SLC)
 - BUT that Baxter entitled to derivative Crown immunity
- FFC upheld decision – matter then appealed to High Court
- HC judgment delivered yesterday





Baxter: the issues

ACCC submissions to HC:

- presumption that legislation does not affect government property has no application to TPA (by reason of terms & purpose of TPA) or should be strictly confined and only invoked for the benefit of executive government
- Baxter distinguishable from *Bradken* because:
 - it concerned pre-contractual conduct, not an existing contract
 - no relief has been sought against the Crown
 - the relief sought does not deny any government the benefit of a contract
- *Bradken* wrong or no longer represents Australian law in the construction of the TPA





Baxter: the issues (cont)

Baxter's & States' submissions:

- *Bradken* + 1995 amend'ts to TPA = when Crown not carrying on a business, TPA does not apply to Crown nor does it have an operation that would prejudicially affects Crown's interests in relation to transactions to which it is a party
- knowing of *Bradken*, States / Cth could have legislated otherwise when TPA amended in 1995
- breadth of relief sought would impact on Crown (i.e. touching on s47 conduct, as well as s46)



Baxter: the decision

- High Court held...



Baxter: the decision

Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ:

- all relevant conduct unilateral or pre-contractual
- principles re (derivative) Crown immunity to emerge from *Bradken* are “principles of statutory construction” and statute has since changed
- to extend immunity in these circumstances would be contrary to the object of the TPA

“[I]t is wrong to conclude that [the TPA] operates to preserve unfettered the contractual capacities of the Crown, to the extent of withholding the application of the Act from conduct by non-government parties in response to an invitation to tender”



Baxter: the decision (cont)

Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ:

- "The premise that the Act would not apply to [Baxter] in relation to the formation or performance of the contract is unwarranted"
- "It is one thing to read the Act so as not to divest the Crown of legal rights. It is another thing altogether to read the Act as giving an executive government... a freedom not enjoyed when the government itself is carrying on business, from any impact of laws enacted for the promotion of competition and fair trading in the public interest. And it is even more unlikely that that freedom extends to all persons dealing with that executive government."



Baxter: the decision (cont)

Other judgments

- Kirby J agreed with majority, but unhappy with Crown immunity applying to States at all
 - States are distinct entities created by statute (the Constitution) – treating them as manifestations of the Crown is a “legislative fiction”
 - (Case not argued in this manner; certain procedures not followed which meant case could not be put like this, even following prompting during HC hearing)
 - Kirby J queried ACCC concession that SPAs not carrying on a business
- Callinan J dissented: *Bradken* still good law (essentially agreed with States’ submissions)



Baxter: the decision (cont)

Impact on States' activities (preliminary views only):

- "many statutes, and [the TPA] in particular, may produce the consequence that making or performing a contract is illegal for one party but not for the other" – reinforced by s4L (severability)
- where TPA captures one party but not the other, s4L will determine the relief (note – s4L recently considered by HC in *SST Consulting v Rieson* and given v broad interpretation by majority) – may result in contracting parties seeking a degree of protection from States
- if States really concerned, they have other options (s51)



National Competition Policy: impact for government

NCP resulted in several key legislative & policy developments:

- Crown (Cth, States & Territories) bound by TPA to varying degrees
- amendments to operation of s51
- acknowledgment of govt's role in designing competitive markets



Application of TPA to govt

- Section 2A(1): entire Act (subject to minor exceptions) binds the Commonwealth
- Section 2B(1): Parts IV, VB & XIB bind States / Territories
- Section 2BA: Part IV applies to local government bodies
- Note:
 - each of 2A, 2B & 2BA apply only to extent that relevant entity “carries on a business” – section 2C provides a series of carve outs
 - Cth / States not subject to pecuniary penalties, but relevant conduct can be enjoined / contracts declared void



Section 51

- Section 51(1)(b) provides an exemption from Part IV for:

“anything done in a State, if the thing is specified in, and specifically authorised by” an Act / regulations pursuant to an Act

- Exemption power subject to numerous limitations in s51(1C)
- Conduct Code Agreement restricts Cth & States' ability to use s51



Section 51 in action: VicForests

- Transitional issue arising from reduced access to logged timber
- Certain licensees consequently participated in a “Voluntary Licence Reduction Program” (i.e. buy-back scheme)
- VicForests planned to auction / tender further licences, but wanted to exclude participants in buy-back scheme
- Issue: “[the] exclusion of parties from tenders could be seen to be inconsistent with Pt IV...” (2nd Reading Speech)



Section 51 in action: VicForests (cont)

Govt took advantage of s51 process

- Section 86A inserted into *State Owned Enterprises Act 1992*:

(1) For the purposes of Part IV of the Trade Practices Act 1974 of the Commonwealth and the Competition Code, any act or thing done by or in relation to VicForests, or any director or officer on behalf of VicForests, that is specified in subsection (2) as an act or thing or kind of act or thing to which this section applies, is specifically authorised if the act or thing or kind of act or thing is done with the consent of the Treasurer.

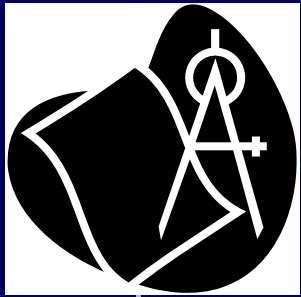
- ...cont



Section 51 in action: VicForests (cont)

- (2) This section applies to the following acts or things or kinds of acts or things—*
- (a) tendering or auction processes for the allocation and sale of timber resources;*
 - (b) a contract, arrangement or understanding entered into in connection with the allocation or sale of timber resources;*
 - (c) giving effect to a contract, arrangement or understanding of the kind referred to in paragraph (b);*
 - (d) any thing done in connection with a process, contract, arrangement or understanding of the kind referred to in paragraph (a), (b) or (c).*





Designing competitive markets

- As a more general outcome of NCP, governments now recognise the role they have in designing competitive markets
- Practical implications:
 - reducing regulatory interference in operation of markets (e.g. shopping hours)
 - setting up competitive licensing systems
 - competitive neutrality obligations



Thanks!

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