THE BUMPY PLAYING FIELD: GOVERNMENTS, COMMERCIAL ACTIVITY AND THE TRADE PRACTICES LEGISLATION

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Introduction

I must, at the outset, apologise for using the overworn playing field cliché, but I cannot think of another expression which attempts to capture the earnestly expressed desire on the part of government to be seen to be competing fairly in the market place. In Australia we have seen a very major effort, in the form of the Hilmer Report[1] and its implementation,[2] aimed at bringing about competitive neutrality, a process which is not yet finished. This effort has accompanied the headlong rush by government to commercialise, privatise, downsize and outsource just about everything. There has been, accordingly, a very significant rise in government commercial activities, the most prevalent of which has been outsourcing. It is true to say that many public servants (those that are left, that is) are now contract administrators.

In this paper I want to explore the aspiration of the so-called level playing field. On the face of it, it is an admirable aim: the government and government bodies should not be in a commercially advantageous position because of their government status over other players in the market. Nor should they be in any worse position — but this latter sentiment is rarely expressed. Level means level, whichever way you look at it.

The scope of the Hilmer reforms

The Hilmer inquiry was primarily focused on competition and the legislative implementation of its recommendations involved the way in which the *Trade Practices Act* 1974 (Cth) (TPA) Part IV (the competition provisions) would apply to government business activities. It is not clear why the inquiry was so narrowly focused because the first two items which the Committee was to have regard to in the terms of reference were:

(a) that no participant in the market should be able to engage in anti-competitive conduct against the public interest;

(b) as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership.

In this paper I want to concentrate on government procurement because this is by far the most significant government commercial activity. It includes not just the routine procurement of items and services for the government's own use but also the purchasing of services which are delivered directly to the public. So, contracting out is included in the concept of

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1 *National Competition Policy* (Report by the Independent Committee of Inquiry, chair Prof F Hilmer, 1993).

2 *Competition Policy Reform Act* 1995 (Cth) and a *Competition Policy Reform Act* in each State and Territory. Three inter-governmental agreements committed all governments to introduce various measures to ensure, so far as possible, competitive neutrality in relation to government business activities.

procurement. Items (a) and (b) above would appear to cover procurement (the government is a participant in the market) both in relation to possible anti-competitive conduct (Part IV of the TPA) and to other aspects of the TPA which impose standards of conduct (principally found in Part V). Even without the specific mention of "rules of market conduct" in item (b), legislatively imposed standards of conduct, such as the prohibition in trade or commerce on misleading or deceptive conduct found in section 52 of the TPA and its state and territory *Fair Trading Act* counterparts, are important components of competition policy because it is obviously unfair if such standards are binding on some market players and not others.

The Hilmer inquiry did not take such a broad view and, as already mentioned, concentrated almost exclusively on competition in its narrower sense of anti-competitive practices, such as misuse of market power, monopoly pricing behaviour and the effect on competition of the liability, or exemption from liability, to pay tax. A major concern was the position of government business enterprises, such as energy utilities, and other government business activity. The assumption underlying the Report appeared to be that governments engage in entrepreneurial activities in a major way. This may be so (though arguably less so as time goes on as governments privatise utilities and the like), but the very important activity of procurement was overlooked. Nor was the Report or its implementation concerned with aspects of the TPA other than Part IV. The consequence of these omissions is that in Australia we are now facing a very unlevel playing field in relation to government procurement activity. This will be discussed in detail further below. Before examining that, it is worth focusing on the more general question of whether the playing field is in fact level, quite apart from the narrow perspective of trade practices law.

Government commercial activity

The government is in a peculiar position when it engages in commercial activities. It may be subject to certain exemptions from the rules which apply to other market players (some, but not all, of which were the focus of the Hilmer reforms). These stem from crown immunity which still survives in some important areas. And yet government may be subject to greater burdens than apply to other market players. These come from various sources, including the possibility of public law remedies, not the least important of which is investigation by the Ombudsman,[3] duties to behave in accordance with higher standards of market behaviour than apply to private sector operators[4] and an overlay of legislative requirements found in finance legislation and the like.

The asymmetry of government contracts

Another source of disadvantage to the government is a very basic fact about governmental contracting. The principal remedy for breach of contract is damages and, to all intents and purposes, it is the only remedy in the types of contracts now under consideration, unless special measures are put in place to provide other remedies in the contract itself. The remedy of damages reflects contract's origins which grew out of the industrial revolution and the requirement of the law to respond to the needs of entrepreneurs in an increasingly sophisticated market place. For better or worse, the common law developed the remedy of

3 The extent to which government should be subject to public law remedies is a much-discussed and controversial topic which cannot be explored here. See N Seddon, *Government Contracts: Federal, State and Local* (1995) ch 7.

4 This is a complex topic but suffice it to illustrate here from the groundbreaking case of *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 in which Finn J held that a government body was obliged to behave as a "moral exemplar" and, specifically, was bound by a process contract when conducting a tendering process. So far, the imposition of contract on the tendering process has occurred only in public tenders. An attempt to argue for a similar contractual obligation in a private sector tender was unsuccessful in *Shivas v BTR Nylex Holdings NZ Ltd* [1997] 1 NZLR 318.

compensatory damages for failure to perform, rather than specific performance. The remedy of damages provided reasonable recompense to an entrepreneur whose expectations had been thwarted by a contract breaker. He or she could claim for lost profit or, if this was too difficult, for thrown away expenses. The key to claiming damages was that the victim of breach had to be able to prove in money terms what the breach had cost. If the plaintiff in a breach of contract action failed to prove this, then the court would award nominal damages.

If we turn to the use of contract by government, there is immediately a difficulty about damages. The same requirement — that loss must be proved — applies and this may be difficult or impossible in many types of government contracts. This is because the failure to perform cannot be measured in money terms. This may be a problem for the most mundane contract, such as delivery of furniture to the government. If it is delivered late, what loss to the government?[5] The same may apply to an item of defence equipment. When the government contracts to procure services to be delivered, not to itself but to its citizens, the problem becomes even more difficult. What loss to the government if a contractor provides a lousy service to job seekers?

The problem arises from the almost blind belief that contract is the answer to everything. Public administration experts, in my experience, do not know much about the law of contract and they blithely assume that, once the contract is in place, then all problems are solved. The fact is that the problems are only just beginning when the government decides to use the tool of contract for achieving public goals formerly performed directly by public servants. Contract, originally designed to serve the needs of entrepreneurs, has been commandeered to perform a task which it is not very well equipped to perform, at least in its basic form. There is immediately an asymmetry in the relationship between government and contractor, with the damages remedy being an adequate remedy for the contractor (who is out to make a profit in the normal entrepreneurial way) but sometimes a useless remedy for the government. This is another aspect of the uneven playing field that has received very little critical attention. It explains in part why stories are so often told of the government being a "soft touch" in the contractual relationship. If it is realised by contractors that the government has an ineffective remedy, then they will take advantage of that.

There are solutions to the problem. One of the notable features of contract is its adaptability. It is possible to draft anything into a contract (so long as it is not actually illegal) and the courts will attempt to give effect to the declared intention of the parties. Contract is an extremely flexible facilitator with few limits on what can be agreed to by the parties (unless, in areas such as consumer contracts of various kinds, legislation has intervened to limit the freedom of the parties). It is possible, therefore, to overcome the problem of lack of enforceability of government contracts by drafting into the contracts various devices for enhancing enforceability. The key to doing this effectively is to use "self-help" remedies, such as liquidated damages clauses, third party unconditional guarantees and the ability to withhold incremental payments in the event of failure to perform. All of this is possible but it requires a great deal of forethought and care. It therefore involves sometimes quite substantial transaction costs in the form of planning and tailor-making the contracts to fit the particular needs of government and then careful supervision by government personnel to ensure that the desired ends are achieved. In short, it involves the previously mentioned asymmetry costs. I suspect that these types of costs are not factored into the policy decision to contract out.

5 Some private sector contracts suffer from the same difficulty but the problem is much more prevalent in public sector contracts.

Hidden "costs" of government contracting

The shift from traditional public administration to contract has attracted a great deal of commentary and analysis. Here is not the place to investigate the many facets of government contracting and its consequences. It is, however, worth noting some features of government contracting which can broadly be described as "costs" in the overall assessment of whether it is sound policy to use contract as a tool of public administration. If all of these costs were properly taken into account, then it is at least arguable that the burden on the government party is so great that the decision to contract should be abandoned. They include the following:

- Because a contract can be made by a government using its executive power, contract is a form of *de facto* legislation without the same checks and balances that apply to laws passed by parliament.

- Contract may "lock in" both the present and future governments so that policy formulation and changes are fettered.[6]

- Contract, as a mechanism for carrying out government functions, is far less flexible than the traditional command and control model. Failure to perform precipitates delicate contract negotiations whereas under the traditional model the problem could be fixed by command.

- There are some serious "public" costs which are not acknowledged, such as the diminution of accountability to citizens who use contracted-out services and the blurring of the traditional lines of accountability to parliament and the people.

- The use of contract increases the risk of litigation.

- The use of contract increases the risk of loss of control over public expenditure because of informal contracting or because of variations to the original contract.

- Public servants have become contract administrators without adequate training or skills.

- The whole process is often hidden behind commercial-in-confidence claims.

This litany of pessimism is not to be taken as a statement that contracting out should not happen. In *some* circumstances in relation to *some* types of government objectives contracting out works well and saves taxpayers' money. The message is that it should be undertaken in a very discriminating way. In Australia this is not happening; instead we witness a Gadarene stampede driven by ideology and not by rationalism (despite the rhetoric).

I have strayed from the focus on the playing field, at least as it is traditionally discussed. I make no apology because the use of contract by government is not just about markets, efficiency and competition. It is, or should be, about a very large and complex cost-benefit equation taking into account such matters as public accountability and responsibility, transparency of government, citizen redress as well as the more usual factors of value for

6 The doctrine of executive necessity, which does allow governments to break contracts in limited circumstances, is in practical terms of very little help. It is often either politically or else reputationally unacceptable for the government to use this doctrine. By "reputationally" I refer to concern about international credit rating indicators.

money and efficiency. These larger factors are specifically recognised in one of the intergovernmental agreements which was part of the implementation of the Hilmer Report. The Competition Principles Agreement cl. 3(6) requires a cost-benefit analysis to be performed when deciding to what extent government business entities should have to comply with the various requirements designed to achieve competitive neutrality. The types of factors to be considered include "social welfare and equity considerations, including community service obligations" (cl. 1(3)(e)).

I return now to a more traditional area for inquiry in connection with the playing field and that relates to the way in which the trade practices legislation applies to governments in Australia.

Governments and the Trade Practices legislation

I include here the *Trade Practices Act* 1974 (Cth), the state and territory *Fair Trading Acts* which mirror important provisions of Part V of the TPA (including the all important section 52 which prohibits misleading or deceptive conduct in trade or commerce) and the state and territory *Competition Policy Reform Acts* which adopt the Competition Code[7] for each polity. It is here that a most extraordinarily bumpy surface is evident in so far as the application of this legislation to governments and government bodies is concerned.

"Carries on a business"

The difficulty stems from a provision in the legislation which attempts to deal with the problem of Crown immunity. In the TPA sections 2A[8] and 2B,[9] in each state and territory *Competition Policy Reform Act* section 13 and in the *Fair Trading Act* 1987 (NSW) section 3[10] the same formula is used, namely, that the legislation binds the crown in so far as it "carries on a business". The legislation itself provides some guide to what these words mean but mostly in negative terms.

The TPA section 4 defines "business" to include a business not carried on for profit and this definition is incorporated into the state and territory *Competition Policy Reform Acts* by subsection 3(2) of each Act which provides that a definition used in the *Trade Practices Act* applies in the state or territory *Competition Policy Reform Act*. The same definition of "business" is found in the *Fair Trading Act* 1987 (NSW) section 4(1).

In addition, the TPA sections 2C and 2D, mirrored in each state and territory *Competition Policy Reform Act* section 15, provide that carrying on a business does not include imposing or collecting taxes, levies or fees for licences, granting or revoking licences, agreements which are not contracts because they are between the same government legal entities and the acquisition of primary products by government bodies. The provisions also excludes from the concept of carrying on a business transactions involving the crown in right of the Commonwealth, state or territory and a "non-commercial authority", or transactions involving only "non-commercial authorities" of the Commonwealth, states or territories. A "non-commercial authority" is a single person who is not a trading or financial corporation.[11]

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7 The Competition Code is a slightly modified version of Part IV of the TPA found in Part XIA.

8 This section deals with the way in which the whole of the TPA binds the Commonwealth.

9 This section deals with the way in which Part IV (the competition provisions) binds the States and Territories. It is to be noted that Part V does *not* bind the States and Territories but they are bound by the mirror provisions of their own *Fair Trading Acts*.

10 The other State and Territory *Fair Trading Acts* apply to the Crown without the "carries on a business" qualification.

11 Trade Practices Act 1974 (Cth), s 2C(4).

These exclusions from what constitutes "carrying on a business" are not exhaustive and it is therefore possible to argue that other activities do not amount to carrying on a business.[12] A further exemption relates to the granting or refusing to grant licences by local government or transactions involving only persons who are acting for the same local government body.[13]

It is worth noting in passing that, as a result of the provisions just described, in-house bids for government work are not covered by the legislation. Perhaps some would consider that the inclusion of an in-house bid does not represent a fair competition because of this exemption alone (quite apart from the fact that no contract can eventuate if an in-house bid is successful).

A limited interpretation of "carries on a business"

The crucial words "carries on a business" in the trade practices legislation have not been the subject of very much judicial consideration,[14] certainly not in a way which provides any guidance as to how the words apply to what might be thought of as ordinary government "business", namely procurement. This gap in our understanding of the meaning of these words has now been partly filled by what was said by Emmett J in *JS McMillan Pty Ltd v Commonwealth*.[15] Before examining this case, it is worth pondering what these crucial words *could* possibly mean.

The evident purpose of the words is to ensure that any residual crown immunity is removed and so a wide interpretation of the words "carries on a business" would be warranted. Thus "business" means the business of government.[16] This would cover any commercial activity of government, including the most important of all in terms of dollar value, procurement and contracting out by government for ordinary governmental purposes. A wide interpretation was adopted by the House of Lords in *Town Investments Ltd v Department of the Environment*[17] when it had to consider the expression "for the purposes of a business carried on by [a tenant]" in connection with the leasing of premises by government for the use of public servants. "Business" was defined to include "a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate ..." Taking a purposive approach to the legislation (which was aimed at controlling commercial rents as an anti-inflation measure), it was held that the use of premises by public servants was a "business tenancy" and therefore covered by the legislation.

A difficulty arises with this wider interpretation because the phrase in the trade practices legislation includes the indefinite article — "carries on *a* business" — and so it might be argued that the section only applies to a discrete business rather than to business generally. The same form of words arose in the *Town Investments* case but caused no problem. As Lord Diplock put it:

> My Lords, it has been said that Roger Casement was hanged by a comma and ... that John Keats's mind was "snuffed out by an article". I think that in exercising the functions of government the civil

12 Ibid s 2C(2).

13 Ibid s 2D.

14 See N Seddon *Government Contracts: Federal, State and Local* (1995) para [5.10].

15 (1997) 147 ALR 419.

16 *See Re Australian Industrial Relations Commission; ex parte Australian Transport Officers Federation* (1990) 171 CLR 216 at 226 in which the High Court said that it was appropriate to talk of "the business of government".

17 [1978] AC 359.

> servants of the Crown are all engaged in carrying on a single business on behalf of the Crown ... I do not see why the presence of an indefinite article affects the matter ...[18]

Opposed to this wide interpretation, the words "carries on a business" could be given a narrower, and perhaps more natural or common sense, meaning. It is somewhat awkward to describe ordinary government commercial activity carried out for achieving governmental purposes as carrying on a business. Further, if it was parliament's aim to remove Crown immunity it could have done so without any qualifying words (as has occurred in all the State and Territory *Fair Trading Acts* except that of New South Wales). The narrower interpretation recommended itself to Emmett J in the *McMillan* case.

The case involved selling by tender the assets of the Australian Government Publishing Service (AGPS). McMillan represented a consortium of bidders. It was informed that it had not been placed on the short list because its bid was non-conforming. McMillan considered that the Commonwealth had been misleading (contrary to TPA section 52) in the way it had conducted the tender process and immediately sought an injunction (under TPA section 80) to stop the process. It then sought a reinstatement order from the Federal Court.[19] Emmett J held that the Commonwealth had engaged in misleading conduct in the way that it dealt with McMillan's bid but he went on to hold that the Commonwealth was not liable because it was not carrying on a business when selling AGPS assets.[20] What Emmett J had to say in the course of his consideration of the crucial words also applied to government procurement.[21] He made the point that a government agency, when purchasing services or goods for ordinary day-to-day purposes, could not be said to be carrying on a business. He conceded that there are some activities of government entities or units which could be said to be carrying on a business and he instanced the former AGPS itself which was a business publishing and printing unit within the now disbanded Department of Administrative Services. It is important to note that, according to Emmett J, both ordinary procurement and sales of government assets did come within the words "trade or commerce" which are found in section 52 itself. The expression "trade or commerce" has been given a very liberal meaning in section 52 cases and there is no doubt that negotiations for, and entry into, a contract is "in trade or commerce". As the legislation stands at present, it is necessary in an action against the government that the activity or conduct complained of should be both in trade or commerce (a relatively easy hurdle to clear) and in the course of carrying on a business (a less easy hurdle to clear).

The implications of the *McMillan* case

If the narrow meaning of the words "carries on a business" persists in later cases, the implications are startling.

Misleading conduct

The *McMillan* case itself shows that the Commonwealth is not bound by the TPA (specifically section 52 in that case) in respect of most of its commercial activities, that is, procurement of goods and services for governmental purposes and sales of government assets. Similarly, the New South Wales government is not bound by its own *Fair Trading Act* in the same way.

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18 Ibid at 385.

19 The action was based on the TPA s 52. Under s 87 a court has very wide remedy powers and Emmett J would have ordered that McMillan be placed back on the short list had he not found that the Commonwealth was not bound by the Act.

20 (1997) 147 ALR 419 at 438.

21 Ibid at 437.

This means that a contractor to either government is bound by the all-important misleading conduct provision but that the government party is not.[22]

Competition law

The *McMillan* case also has implications for competition law, that is the law found in the TPA Part IV and the Competition Code. As already mentioned, all the competition provisions, whether applying to the Commonwealth under the TPA,[23] the states and territories under the TPA[24] or each state and territory under its own *Competition Policy Reform Act* bind the crown in right of the various polities only in so far as each carries on a business. It might be thought that it is in the nature of competition law that it could only apply to business activities and so the qualifying words do not provide any significant exemption to governments. In other words, the circumstances in which competition law would be most likely to apply would be to entrepreneurial activities and not to ordinary procurement. This certainly appeared to be the assumption behind the Hilmer recommendations, though nothing explicit was said on this score. If anti-competitive conduct could occur in ordinary procurement and sales of government assets, then the Hilmer reforms are seriously flawed if the *McMillan* interpretation of "carries on a business" is adhered to.

It is not difficult to imagine circumstances where conduct which would be in breach of Part IV of the TPA occurs in the course of ordinary government procurement or sales. In the lead-up to the 1998 Queensland election, then Premier Borbidge announced that government contracts would be awarded to Queenslanders in preference to outsiders. If this policy had been followed through then a legal challenge to the award of a particular Queensland government contract would run into difficulties because it could be argued that the award of a contract for ordinary government procurement was not in the course of carrying on a business and so the government would be exempt from the operation of Part IV of the TPA or its own *Competition Policy Reform Act*.

Exempt parties

The *McMillan* interpretation means that there is a significant area of exemption in relation to the applicability of the trade practices legislation to governments and some government bodies. The exemption extends to all those entities which can claim the shield of the crown. This exemption extends to the nine Australian polities[25] and those statutory corporations which can claim to be the Crown for immunity purposes.[26]

There is also the bizarre possibility that the exemption could be claimed by *private* sector bodies to which government tasks have been contracted out. This follows from two sources. First the TPA itself in section 2A, the crucial section which deals with the extent to which the Act binds the Commonwealth, covers not just the Commonwealth but also Commonwealth authorities which are defined in section 4 to include a company in which the Commonwealth

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22 There is a further anomaly in Queensland because the *Fair Trading Act* remedies for misleading conduct are confined to "consumers" as defined. This means that, although the Queensland Crown is bound by the *Fair Trading Act* 1989 (Qld), it is in effect not bound by the misleading conduct section (s 38) in respect of procurement because the supplier to the government is not a "consumer". Only when the Queensland government is *selling* and the purchaser is a "consumer" as defined will the government be bound — a narrow compass for the application of the legislation.

23 *Trade Practices Act* 1974 (Cth) s 2A which applies the whole of the TPA to the Commonwealth.

24 *Trade Practices Act* 1974 (Cth) s 2B.

25 There are in fact ten: the Commonwealth, the States, the two Territories and Norfolk Island.

26 The law on which statutory corporations can, and cannot, claim Crown immunity is complex and contradictory: see N Seddon *Government Contracts: Federal, State and Local* (1995) paras [4.6]-[4.8].

has a controlling interest. Secondly, a case which is currently[27] before the High Court, *Woodlands v Permanent Trustee Co Ltd*[28] has extended Crown immunity to companies contracted to the New South Wales government for the implementation of the ill-fated HomeFund scheme, a supposedly low-interest loan scheme for low income borrowers. Borrowers who had fallen foul of the scheme alleged that the government and the companies had engaged in misleading conduct in breach of the TPA section 52 in promoting and implementing the scheme. The New South Wales government is not bound by Part V of the TPA (where section 52 appears). The companies argued that they were also immune from the operation of section 52. The Full Federal Court agreed.

In order to understand this decision it is necessary to go back to a case which was one of the principal reasons for the Hilmer inquiry. In *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*[29] it was alleged that the Queensland Commissioner for Railways and private sector companies had made contracts in breach of Part IV of the TPA. It was held that the Queensland Commissioner for Railways, a statutory corporation enjoying crown immunity, was exempt from the operation of the TPA.[30] It was also held that any company contracting with the Commissioner was also exempt because it would be impossible to apply the legislation to the company without it applying equally to the immune Commissioner. This argument, which provided "derivative" immunity to private sector companies, depended on the impossibility of applying the legislation to one party to a contract without it affecting the other party. This argument is particularly applicable to contracts in which there are alleged infringements of competition law.

In *Woodlands* what was termed the "second leg" of *Bradken* was re-examined to see whether it extended to the circumstances of the companies contracted to the New South Wales government. The key to the argument was whether *Bradken* was limited to those circumstances where it was impossible to apply legislation to one party without it, at the same time, affecting the other party or whether *Bradken* stood for some wider principle. When the allegation concerns misleading conduct by a party contracted to the government it is possible to apply the law to that party without it affecting the government. The Full Federal Court nevertheless decided that the companies should enjoy "derivative" immunity. This was in the nature of an agency argument: if the company is in effect the government's agent then it has derivative immunity. But this is *not* agency in the ordinary private law sense where the government is the principal and the company is the agent acting for and on behalf of the principal. Instead, the precept is that the company is in effect an "arm" of the government for the purpose of implementing the government-initiated scheme. The Court acknowledged that if a company engaged in misleading conduct as part of an independent initiative, then the company would not be able to claim derivative immunity.

The implications of this decision, if not reversed by the High Court, are extraordinary. One would have thought that the concept of crown immunity was withering away but the effect of this decision is to enlarge crown immunity in an era when all sorts of private entities are carrying out contracts for governments. If the *Woodlands* view persists, a vast number of companies and individuals will be brought within the shield of the crown.

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27 This paper was written in August 1998 because I had to write it before going overseas. It may be that the following discussion has become redundant by the time this paper is delivered. I certainly hope so.

28 (1996) 139 ALR 127.

29 (1979) 145 CLR 107.

30 This was because s 2A only deals with how the Act binds the Commonwealth. The High Court concluded that s 2A does not extend to the States and Territories simply as a matter of interpretation. This is still the case.

Solutions

We go back to the problem of the effective partial exemption of Crown bodies from the operation of the trade practices legislation. What can be done about it? One way of dealing with this would be to change the legislation. We have an admirable precedent to follow in the form of the New Zealand *Fair Trading Act* 1986 which provides in section 4(1) that "this Act shall bind the Crown in so far as the Crown engages in trade" and section 5(1) provides "This Act applies to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade". "Trade" is defined in section 2 to mean

> any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

This definition would clearly cover ordinary government procurement or disposition of surplus assets.

However, the problem in Australia is that to bring about this change ten pieces of legislation would have to be amended, that is the TPA, the state and territory *Competition Policy Reform Acts* and the New South Wales *Fair Trading Act* 1987. It seems unlikely that this is going to happen. The solution then lies with the judiciary who, it is to be hoped, will follow neither the *McMillan* case nor the *Woodlands* case.

Conclusion

This paper has ranged widely and, it might be thought, has strayed from the central them which was to investigate the notion of the level playing field in connection with government commercial activities. The most important of these activities in terms of dollar value and in terms of the effect on citizens and, dare I say, democracy, is government procurement which includes contracting out. I conclude that it is never possible for government to operate on a level playing field with the private sector and that is as it should be because government has peculiar responsibilities. The idea of the level playing field embraces not just the advantages that government enjoys but also the extra burdens under which it must operate. The extra burdens tend to be ignored in the cost/benefit exercise which ought to be undertaken when making a decision whether or not to contract out a particular function. There may well be a case for not contracting out once the full equation is assessed.

This is not to say that the aspiration of the level playing field should not be pursued: it is appropriate in relation to those activities which are close to the kinds of activities engaged in by the private sector. It is also appropriate to ensure that the government does not have an unfair advantage by being exempt from legislatively imposed standards of market conduct. The Hilmer reforms have gone some way in smoothing out the playing field. The task is by no means finished and what remains to be done is by no means easily accomplished.