COMMENT

JS MCMILLAN PTY LTD V COMMONWEALTH (1997) 147 ALR 419: THE TRADE PRACTICES LEGISLATION AND GOVERNMENT IMMUNITY

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INTRODUCTION

Despite the rhetoric of the level playing field and competitive neutrality when government commercial activities are the focus of attention, there are some serious gaps in the application of the trade practices legislation[1] to governments and government bodies. The problem stems from the sections in the relevant Acts which provide that the legislation binds the Crown in so far as it "carries on a business".[2] Until *JS McMillan Pty Ltd v Commonwealth*,[3] there had been no close attention paid to the meaning of these words in the context of this legislation.[4] The expression "carrying on a business" and similar phrases have been considered in a variety of other contexts[5] but these provide little guidance on the extent to which the trade practices legislation should bind governments.

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1 Included here the Trade Practices Act 1974 (Cth), the State and Territory Fair Trading Acts and the State and Territory Competition Policy Reform Acts.

2 Trade Practices Act 1974 (Cth), ss 2A and 2B, Fair Trading Act 1987 (NSW), s 3 and each State and Territory Competition Policy Reform Act, s 13.

3 (1997) 147 ALR 419.

4 In *Thomson Publications (Australia) Pty Ltd v Trade Practices Commission* (1979) 40 FLR 257 it was held that the Trade Practices Commission was not bound by the Trade Practices Act because it was not carrying on a business, without any discussion of what the crucial phrase *does* mean. In *National Management Services (Australia) Pty Ltd v Commonwealth* (1990) 9 BCL 190 it was held that the Commonwealth was not carrying on a business and so was not bound by the Act when involved in a building development for the provision of office space for Commonwealth purposes.

5 See N Seddon, *Government Contracts: Federal, State and Local* (1995) at 182-88 for a discussion of the case law.

In *McMillan* Emmett J of the Federal Court adopted a narrow meaning of the phrase and concluded that the Commonwealth was not carrying on a business when it was conducting a tender for the sale of surplus assets. As a result, despite a finding that the Commonwealth had engaged in misleading conduct in trade or commerce, contrary to the Trade Practices Act 1974 (Cth), s 52, the Commonwealth was held not liable. As will be seen below, what Emmett J had to say about the meaning of carrying on a business in relation to a sale of assets applied equally to government procurement. The consequence of this decision, if it is to hold sway, is truly alarming. Apart from the proposition that the Commonwealth is not bound by the Trade Practices Act in respect of most of its commercial activity (that is, procurement),[6] the decision means that the Hilmer legislative reforms[7] will be seriously eroded. This is because the Competition Policy Reform Acts all use the same form of words — "carries on a business" — in respect of how the legislation binds the Crown.

The Hilmer legislative reforms were concerned purely with competition law and not other aspects of the Trade Practices Act. It might be thought that, because competition law is usually concerned with business activities, a narrow interpretation of the words "carries on a business" would in any case cover most government commercial activity where anti-competitive conduct was alleged. This is not necessarily so. Two episodes in 1998 show that the issue could arise from ordinary governmental activities. During the waterfront dispute, it was alleged by Minister Reith that New South Wales was in breach of the Trade Practices Act when tugs were not provided for the berthing of ships. The details were hazy but it is possible that the allegation referred to a breach of s 45D of the Act (the secondary boycott provision). The other episode was an announcement by Premier Borbidge in the lead-up to the Queensland election that the government would award government contracts to Queenslanders in preference to outsiders. In each case, in order to prove a breach of the legislation, it would be necessary to show that the failure to provide tugs and the award of government contracts, respectively, were in the course of carrying on a business. It is certainly foreseeable that government commercial activity associated with procurement could be in breach of Part IV of the Trade Practices Act or the Competition Code[8] and yet no liability would follow if the *McMillan* interpretation prevails.

"CARRIES ON A BUSINESS"

Before examining the *McMillan* case, it is as well to set out what the legislation has to say about the phrase "carries on a business" and how it could be interpreted. In each Act where this concept is employed, "business" is defined to include business not

6 The same applies to the New South Wales government under the Fair Trading Act 1987 (NSW) which in s 3 uses the same form of words in providing for the extent to which the Act binds the Crown in right of New South Wales. All other Fair Trading Acts bind their respective Crowns without the qualifying words "carries on a business".

7 F Hilmer, M Rayner and G Taperell, *National Competition Policy: Report by the Independent Committee of Inquiry* (1993) implemented by the Competition Policy Reform Act 1995 (Cth) and a Competition Policy Reform Act in each State and Territory.

8 This is a slightly modified version of Part IV and is found in Part XIA of the Trade Practices Act 1974 (Cth) and has been adopted in each State and Territory.

carried on for profit.[9] In addition, there are provisions in both the Trade Practices Act and in the State and Territory Competition Policy Reform Acts which spell out what does *not* constitute carrying on a business.[10] They 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 exclude 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] 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, but that is by express provision rather than as a result of misconceived drafting.

None of this assists in telling us what "carries on a business" *does* mean in the context of governmental activities. Given the policy objective behind including a specific section in legislation to make clear the extent to which a government or government body is bound by the legislation, namely, to ensure that any residual Crown immunity is removed, it might be justifiable to give the words "carries on a business" a wide interpretation. It would follow that "business" means the business of government.[14] This would cover any commercial activity of government. Such an interpretation was adopted by the House of Lords in *Town Investments Ltd v Department of the Environment*[15] when it had to consider the expression "business tenancy" which was defined as one where the premises are occupied by the tenant "for the purposes of a business carried on by him". "Business" was also 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

9 Trade Practices Act 1974 (Cth), s 4(1) definition of "business". In each State and Territory Competition Policy Reform Act, s 3(2) provides that a definition used in the Trade Practices Act applies in the State or Territory Competition Policy Reform Act.

10 Trade Practices Act 1974 (Cth), ss 2C and 2D and provisions to the same effect found in s 15 of each State and Territory Competition Policy Reform Act.

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

12 Ibid s 2C(2).

13 Ibid s 2D.

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

15 [1978] AC 359.

covered by the legislation.[16] Lord Diplock was of the view that by itself the word "business" was broad enough.[17] The definitions used in the relevant legislation merely reinforced the broad interpretation which he had adopted. One argument which he dealt with was whether it made any difference in this case that the words "a business" were used as opposed to just "business". The Court of Appeal had said that the government may be in "business" but it was not in *a* business. Lord Diplock was not impressed with this verbal distinction.[18] This argument is relevant to the expression used in the trade practices legislation which talks of carrying on *a* business, rather than carrying on business.

The crucial words could, on the other hand, be given a narrower, and perhaps more natural, meaning. If one asks in a common sense way whether, for example, government procurement for ordinary governmental purposes could be described as carrying on a business, the answer would be that it could not. Although it is difficult to articulate with precision the difference between business activity and day-to-day government purchasing (and selling of surplus assets), it is arguably straining the meaning of the words to say that government commercial activity for ordinary governmental purposes is carrying on a business. It does have the hallmark of repetition which is characteristic of business activity and it does not matter that the activity is not carried on for profit (because of the definition of "business" mentioned earlier). And yet, applying an objective test, one might conclude, in the absence of any purposive approach to the legislation, that most government commercial activity does not come within these words. At any rate that is the interpretation which commended itself to Emmett J in *McMillan*.

The interpretive technique of turning to the parliamentary debates to gain some insight into the meaning of the words offers no assistance in this case, the Minister merely referring in the second reading speech to the Act applying to "all business undertakings of the Commonwealth Government and its authorities".[19]

THE *MCMILLAN* CASE

The case arose out of the proposed sale of various assets and businesses associated with the break-up and disposal of the Australian Government Publishing Service (AGPS). The applicants (McMillan) were a consortium of Canberra's major printers. The tender process involved a Request for Tender (RFT), the creation of a short list and then a best and final offer. McMillan was excluded from the short list on the basis that it was non-compliant in failing to accept without reservation two clauses (10.5 and 10.7) in the RFT. McMillan promptly obtained an injunction to stop the tender process. It is worth noting that this is, as far as I know, the first time that s 80 of the Trade Practices Act has been used to stop a tender.

16 Ibid at 383-5 per Lord Diplock (with whom Lord Edmund-Davies concurred), at 401 per Lord Simon of Glaisdale, at 402 per Lord Kilbrandon. Lord Morris of Borth-y-Gest dissented.

17 Ibid at 384.

18 Ibid at 385.

19 H Reps Deb 3 May 1977, vol 105 at 1477. This was the occasion of amending the Act by adding s 2A, the general provision which deals with removing the Commonwealth's possible immunity. The other provisions were introduced by the Competition Policy Reform Act 1995 (Cth).

The relevant clauses in the RFT provided that the successful tenderer would in essence step into the shoes of AGPS in respect of current work but no information was given to the bidders about the terms (including price) on which AGPS was providing the services. McMillan accordingly felt that it could not unequivocally accept clauses 10.5 and 10.7 and that an acceptance of these clauses without reservation would be commercially dishonest. McMillan claimed that it had been given an assurance that it would be put on the short list and that it had not been warned that a failure to accept the clauses unreservedly would result in automatic disqualification.

Emmett J found that no assurance was proved that McMillan would be put on the short list. He went on to hold that the RFT indicated in other parts some flexibility in the assessment of bids. There was nothing to indicate that strict compliance with clauses 10.5 and 10.7 was essential. He held that the Commonwealth engaged in misleading conduct in excluding McMillan from the short list on the ground of non-compliance.

Emmett J then considered whether there had been any reliance by McMillan on the conduct of the Commonwealth and found that, had McMillan understood that strict compliance with clauses 10.5 and 10.7 was necessary, they would have modified their bid. The loss or damage suffered by McMillan was the loss of a chance to be short listed. Although this was "almost impossible to quantify" Emmett J was prepared to order under the Trade Practices Act, s 87 that McMillan be placed on the short list.[20]

However, as already indicated, Emmett J held that the relevant conduct was not in the course of carrying on a business. On this question, Emmett J accepted that the Commonwealth was carrying on a business through AGPS when AGPS provided services to Commonwealth departments (even if it did so at a loss).[21] The sale of AGPS assets and businesses was, however, entirely different, a sale in fact conducted by another part of the Commonwealth. Although a sale of an asset came within trade or commerce (as required by s 52), it did not constitute carrying on a business, according to Emmett J.

His Honour examined the meaning of these crucial words. The expression presupposes "a course of conduct involving the performance of a succession of acts and not simply the effecting of one solitary transaction."[22] However, mere repetitiveness is not sufficient. System and regularity are involved though they are not by themselves necessarily sufficient.[23] The fact that the Commonwealth regarded a particular agency or body as a business unit might be a factor which influenced the decision whether or not that body was carrying on a business. There is a distinction between activities which are "purely governmental or regulatory" and those which entail carrying on a business. This led to the proposition that, although AGPS as a *provider* of services was

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20 Section 87 provides for a wide range of remedies including an order "as the Court thinks appropriate" (s 87(1A)).

21 (1997) 147 ALR 419 at 436-7. It should be noted that an agreement between two different arms of the same legal entity (the Commonwealth) does not constitute carrying on a business because the Trade Practices Act, s 2C(1)(c)(i) provides that business does not include "a transaction involving only persons who are all acting for the Crown in the same right". AGPS was a unit within the Department of Administrative Services and was not a separate legal entity from the Commonwealth.

22 *Smith v Capewell* (1979) 142 CLR 509 at 517 per Gibbs J.

23 Drawing on Barwick CJ in *Hungier v Grace* (1972) 127 CLR 210 at 217.

carrying on a business (as already noted), the government agencies which *used* these services were not carrying on a business but, instead, were simply engaged in purely governmental activities.[24] It is here that the implications of this case are most profound because the proposition that a government agency as a user of services for ordinary governmental purposes is not carrying on a business means that procurement generally is excluded from the reach of the legislation.

The words "in so far as" in s 2A were regarded as crucial and limited the activities which could be said to constitute carrying on a business. Just because an arm of the Commonwealth (such as AGPS) could be said to be carrying on a business did not mean that the Commonwealth as a whole was carrying on a business.

> I consider that that expression signifies that the Commonwealth is to be bound only where the conduct complained of is engaged in, in the course of carrying on the business. In other words, persons dealing with the Commonwealth in relation to the actual conduct of a 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 when entering into other dealings with the Commonwealth. That appears to me to be consistent with the reason for the introduction of s 2A as explained by the Minister on the Second Reading of the Bill for the amendment which introduced s 2A (Australia, House of Representatives, *Debates* 3 May 1977, p 1447).[25]

His Honour went on to consider whether the Commonwealth was in the business of selling assets.

> While some entities might be thought to engage in the business of selling capital assets, it was not contended by McMillan that the Commonwealth is engaged in a business of selling assets. A once off decision to cease engaging in the activities of AGPS, to dispose of the plant and equipment relevant to those activities, to undertake not to engage in those activities in the future and, in the capacity of client, to invite private enterprise to take on those activities, is not conduct in the carrying on of a business ...[26]

Emmett J indicated that he was not happy about the result of the litigation but pointed out that it was for the Parliament to determine the extent to which the Trade Practices Act binds the Commonwealth. "One might harbour a wish that in the circumstances, the Commonwealth would remedy the effect of the conduct which I have found misleading. However, it is not bound to do so."[27]

In fact Emmett J's wish was fulfilled through a unique form of alternative dispute resolution. A Dr John Hewson interceded on behalf of McMillan and managed to persuade the Commonwealth to restore McMillan to the short list.[28] Whilst this outcome must be welcomed, it unfortunately precluded the possibility of an appeal which might have shed some further light on the meaning of the words "carries on a business".

CONCLUSION

It is to be hoped that the words "carries on a business" which at present very substantially limit government liability under the trade practices legislation will be re-

24 (1997) 147 ALR 419 at 437.
25 Ibid at 438.
26 Ibid.
27 Ibid.
28 McMillan was not subsequently awarded the contract.

examined. A wider interpretation is perfectly possible, with respectable precedent to justify taking a purposive approach to the expression "carries on a business" in the context of government commercial activities. It could not have been intended that the Trade Practices Act as a whole would only bind the Commonwealth in respect of its comparatively rare entrepreneurial activities and not at all in respect of its normal and very significant commercial activities, namely, procurement for ordinary governmental purposes (and sales of surplus assets). Similarly, it could not have been intended that the competition provisions of the legislation should bind State and Territory governments in relation only to their entrepreneurial activities.

One solution would be to delete the "carries on a business" qualification from the legislation, but this would require amendments to nine pieces of legislation.[29] If it should be feared that deleting these words would expose governments to liability in respect of activities never intended to be covered, this would be a groundless fear. The provisions found in Part V of the Trade Practices Act, including the all-important s 52 which prohibits misleading conduct, are all premised on the relevant conduct occurring "in trade or commerce" and so, for example, the provision of inaccurate information by the Commonwealth in respect of, say, pensions would not come within the legislation. On the other hand ordinary government contracting is "in trade or commerce", as Emmett J made clear in the *McMillan* case. Nor would there be unexpected consequences if the words "carries on a business" were removed for the purpose of competition law because prohibited anti-competitive conduct, as set out in Part IV and in the Competition Code, is always in connection with commercial activities.

It is worth noting how the New Zealand Fair Trading Act 1986 binds the government. Section 4(1) provides "this Act shall bind the Crown in so far as the Crown engages in trade". "Trade" is defined in s 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.

Nevertheless, it seems unlikely that a wholesale amendment will be made to the Australian legislation which has been put in place as a result of a major effort in a Commonwealth-State cooperative scheme.

The better solution, then, is in the hands of the judges. They can quite properly give the crucial words a wide meaning so as to accord with the evident purpose behind the provisions which were meant to ensure that governments could no longer hide behind Crown immunity.

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29 If the Fair Trading Act 1987 (NSW) were also amended (see above n 6) then ten pieces of legislation would have to be amended.