
Week 1 – Introduction

In 1992, the PM appointed an Independent Committee of Inquiry (Hilmer Committee) to inquire into a national approach to competition policy. They identified two main categories:

1. Exemptions that arose without any assessment of particular costs or benefits flowing from them
2. Exemptions that only applied after an assessment had been made of the particular circumstances, such as authorisations.

Direct Application to Corporations, Persons and The Crown

The limitations placed on the Commonwealth Parliament's legislative power in the Australian Constitution restrict the field of application of the CCA. Additional reliance by virtue of s6(2) of the CCA is placed on other heads of constitutional power, namely:

1. The overseas trade and commerce power;
2. The interest trade and commerce power;
3. The territories power;
4. The executive power of the Commonwealth; and
5. The incidental power.

“Corporation” is defined in s4(1) of the CCA to mean a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraphs (a), (b) or (c).

“Financial Corporation” is defined in s4(1) to include:

body corporate that carries on as its sole or principal business the business of banking other than State banking not extending the limits of the State concerned or insurance.

In *Hughes v Western Australian Cricket Association (Inc)* the Western Australian Cricket Association was a trading corporation since a substantial part of its current activities were of a trading character involving the provision of goods and services to its members and members of the public.

The following entities have been held to be trading corporations:

- The Biloela Rodeo Association Inc, on the ground that it was providing entertainment for reward;
- The Red Cross on the ground that it earned substantial income from its shops, stalls and running courses, and the Royal Prince Alfred Hospital, a State statutory corporation
- A small trade association which operated on the basis of voluntary labour and organised annual trade fairs as a major activity
- A statutory corporation

The leading exposition on the meaning of “financial corporation” is contained in the reasons of the High Court majority in *State Superannuation Board v TPC*:

Like the expression “trading corporation” the words “financial corporation” are not terms of art; nor do they have a special or settled legal meaning. They do no more than describe a corporation which engages in financial activities, or perhaps is intended to do so. The nature and the extent or volume of the corporation’s financial activities needed to justify its description as a financial corporation do not call for much discussion in the present case. A finance company is obvious example of a financial corporation because it deals with finance for commercial purposes, whether by way of making loans, entering into hire purchase agreements or providing credit in other forms, and this activity is undertaken for the purpose of carrying on some other business.

Application of Act to Commonwealth and Commonwealth Authorities – Section 2A

(1) Subject to this section and sections 44AC, 44E and 95D, 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.

(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.

(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.

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

(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.

Application of Act to States and Territories – Section 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 V;

(b) Part XIB;

(c) the other provisions of this Act so far as they relate to the above provisions.

(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.

(3) The protection in subsection (2) does not apply to an authority of a State or Territory.

The purpose of s2B is to deny the Crown in right of the States and territories and authorities of the State and Territories, Crown Immunity in so far as it carries on a business.

Two tests are relied upon to determine whether an entity is a manifestation of the Crown – the incorporation test and the control test. According to the incorporation test, the fact that the legislature has decided to create a separate body for the performance of a particular activity is an indication that the corporation is not the Crown.

According to the control test, an entity is a manifestation of the Crown if a Minister of the Crown exercises de jure control over it. The directors had the usual functions and duties and there was nothing to suggest that the directors were under a duty to obey directions from PAWA or NT Government.

The High Court states in *Townsville Hospitals Board v Townsville City Council*:

All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them. It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention.

Whether a particular activity are “business” activities is not found by defining a market and asking what the government entity does in it, but rather, by looking at the nature of the activities itself.

The CCA and Reform Act will apply:

- If the impugned conduct itself amounts to carrying on a business; or
- The conduct is engaged in during the course of a business; or
- The conduct in some way advanced the business or protects the business from competition.

It is first necessary to ask whether the local government body is an “authority of the State”. In *Stack v Brisbane City Council* it was held that the Brisbane City Council was an authority of the State. Its functions were State governmental functions which the State has delegated to it in State legislation. If the local government body is an authority of the state, it is then necessary to ask whether it represents the Crown in right of the State in relation to the activity in question.

Included in the Hilmer Committee’s second main category of exemption based on the assessment of the particular circumstances are the following five processes:

1. Specific notation or authorisation by an independent body;
2. Exception by specific provision of the CCA itself;
3. Exception by regulation made under the CCA;
4. Specific exception by other Commonwealth Act or regulation; and
5. Specific exception by State or Territory Act or regulation.

Section 51(2) of the CCA provides exceptions or special treatment to a variety of arrangements that would otherwise infringe Part IV.

Section 51(2)(a) provides that in determining whether a contravention of Part VI has been committed, regard shall not be had to any act done in relation to a contract, arrangement or understanding to the extent that it relates to specific working conditions of employees.

Section 51(2)(b) provides that in determining whether there has been a contravention of Pt VI regard shall not be had to any provision of a contract or service, or of a contract for the provision of services, “being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise in which he or she may engage during or after the termination of the contract”.

Section 51(2)(e) the provision of the contract must be ‘solely’ for the protection of the purchaser in respect of the goodwill, of the business. Thus, if the provision is too wide in terms of business covered, its geographical ambit or duration, the exemption will not apply and the purchaser may challenge it either under the common law doctrine of restraint of trade or ss45 or 47 of the CCA.

Section 51(2)(c) provides an exception with respect to any provision obliging a person to comply with approved standards of “dimension, design, quality or performance prepared or

approved by Standards Australia International Limited or by a prescribed association or body.”

Section 51(2)(g) contains a similar exception with respect to provisions of export agreement if full particulars of the provision are furnished to the ACCC within 14 days of the making of the contract. An export provision is one that “relates exclusively to the export of goods from Australia or to the supply of services outside Australia”.

Section 51(2A) provides that in determining whether a contravention of Part VI has occurred, regard shall not be had to acts done in concert by users or consumers of goods or services against the suppliers of those goods or services.

Week 2 – Fundamental Competition Concepts

1. What is meant by market?
2. What is meant by market share?
3. What is meant by competition?

Competitive Process

“Every modern economy has a set of rules designed to ensure that the competitive process is not undermined by the anti-competitive behaviour of firms, whether acting collusively or individually” – Hilmer Committee, *Report of the Independent Committee of Enquiry into National Competition Policy*.

Queensland Wire Case: “the essential notions with which s46 is concerned and the objective which the section is designed to achieve are economic not moral ones. The notions are those of markets, market power, competitors in a market and competition. The objective is the protection and advancement of a competitive environment and competitive conduct.”

Part IV – overview

Division one: Cartel Conduct

Division two:

- S45 – anti-competitive arrangements, collusive behaviour or cartel behaviour, including price fixing and collective boycotts
- S46 – misuse of market power
- S47 – deals with vertical non price restraints, collectively called exclusively dealing
- S48 – (and Part VIII) resale price maintenance
- S50 – mergers and take-overs

Regulation of Competition

Common law addresses rights of competitors, whereas legislation (Competition and Consumer Act 2010) addresses the process of competition

Why regulate?

“The object of this Act is to enhance the welfare of Australians through the **promotion of competition and fair trading** and provision of consumer protection” – s2 CCA.

→ Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interests of **economic efficiency while accommodating situations** where competition does not achieve economic efficiency or conflicts with other social objectives. – Hilmer Report

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

Competition = efficiency

Competition policy is based on the view that in general, competitive markets lead to more efficient allocation of resources than do markets in which either buyers or sellers have significant market power. Such markets also promote technical efficiency (the effectiveness with which resources within a firm are utilised) and dynamic efficiency (the speed at which firms respond to changing problems and opportunities) ... when firms are unable to increase