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Global Forum on Competition

COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT

Contribution from Australia

-- Session V --

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PUBLIC PROCUREMENT ADVOCACY

-- Australia --

1. The Australian Competition and Consumer Commission (the ACCC) has developed an extensive education and advocacy programme for government officials involved in public procurement.

2. This paper discusses the experiences of the ACCC in seeking to promote greater awareness of competition issues amongst procurement officials. It focuses, in particular, on the ACCC's recent advocacy initiatives in relation to cartel conduct. It also highlights the importance of having an integrated compliance programme, which includes a mix of education, advocacy and enforcement action, to promote awareness of the obligations of businesses to comply with the *Trade Practices Act 1974*.

1. Public Procurement in Australia

3. In Australia the principles which apply to the Commonwealth in respect to public procurement are set out in the Commonwealth Procurement Guidelines¹ (CPGs). The CPGs establish the core procurement policy framework and articulate the Australian Government's expectations for certain Commonwealth departments and agencies (agencies) and their officials, when performing duties in relation to procurement.² The Commonwealth Department of Finance and Deregulation is responsible for administering the Commonwealth's procurement policy framework.

4. The CPGs define procurement in the following way:³

Procurement encompasses the whole process of acquiring property or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.

5. The core principles which apply to procurement under the CPGs are:

- Value for Money;
- Encouraging Competition;
- Efficient, Effective and Ethical Use of Resources;

¹ A copy of the CPGs is available at <http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/index.html>.

² Australia's state and territory governments operate their own separate public procurement frameworks. These frameworks are determined on a state-by-state / territory-by-territory basis.

³ Commonwealth Procurement Guidelines (December 2008), p. 3.

- Accountability and Transparency.

6. Competition is a key element of the Australian Government's procurement policy framework. It enhances value for money, the core principle underpinning Australian Government procurement. Effective competition requires non-discrimination in procurement and the use of competitive procurement processes.

7. The Commonwealth procurement policy framework is non-discriminatory. All potential suppliers should have the same opportunities to compete for government business and be treated equitably based on their legal, commercial, technical and financial abilities. Equitable treatment of suppliers enables business to be conducted fairly, reasonably and with integrity.

8. Procurement methods must not discriminate against potential suppliers due to their degree of foreign affiliation or ownership, location or size. The property or services on offer must be considered on the basis of their suitability for their intended purpose and not on the basis of their origin.

9. The procurement process itself is an important consideration in achieving value for money. Participation in a procurement process imposes costs on agencies and potential suppliers and these costs should be considered when determining a process commensurate with the scale, scope and relative risk of the proposed procurement.

2. ACCC Compliance Initiatives

10. The ACCC is Australia's national competition regulator. It is responsible for administering the *Trade Practices Act 1974* (the Act), including by educating Australian consumers, businesses and governments about their trade practices rights and responsibilities. The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Act and the state/territory application legislation.

11. The ACCC has actively engaged with procurement officials across all levels of government to alert them to the issues and risks that may arise in relation to cartel conduct. In particular, the ACCC has focused on:

- Risks for government;
- The law in Australia;
- Procurement design;
- Detection tips;
- Deterrence tips;
- Do's and don'ts in public procurement.

12. In 2005 the ACCC launched its first specific compliance programme for procurement officials. The primary objective of this programme was to alert officials on how to detect possible cartel activity in the procurement process. The material released by the ACCC provided guidance to officials on how to detect the warning signs of cartel conduct.

2.1 Consultation with Procurement Officials

13. The ACCC compliance programme was developed with the benefit of advice and information provided by officials directly involved in Commonwealth procurement. The ACCC conducted extensive consultation with a range of procurement officials, including the Commonwealth Department of Finance.

14. The ACCC also undertook a number of trial seminars with the draft material to determine whether the guidance was appropriate and would achieve the desired outcomes.

2.2 Education Material

15. The central component of the ACCC's compliance programme was a multi-media CD-ROM which was provided to public sector procurement agencies, as well as private companies involved in procurement. In developing this material, the ACCC was able to draw on the experience of the Canadian Competition Bureau and the United States Department of Justice, Antitrust Division.

16. The CD-ROM was interactive and allowed procurement officials to access a variety of different levels of information. This information included: how to identify cartel activity; the process for reporting suspected cartel or bid-rigging behaviour; the statutory provisions; and what a person should do if a cartel operation is suspected. The CD-ROM also included a checklist for procurement officials to determine whether or not there is any suspected cartel activity.

17. In addition to the CD-ROM, the ACCC developed guidelines for procurement officials on cartel conduct.

18. The material also contained a short video presentation from ACCC Chairman, Graeme Samuel, outlining the importance of detecting cartels in public procurement.

2.3 Presentations & Seminars

19. The initial roll out of the ACCC's procurement strategy included over 50 presentations by ACCC staff, at all levels, to procurement officials from Commonwealth, state and local governments. Importantly, a number of these seminars were delivered to national and state conferences for procurement officials.

2.4 Advocacy

20. In addition to the educational aspects of the compliance programme, the ACCC wrote to Commonwealth Government Ministers and the Premiers and Chief Ministers of each of Australia's states and territories. The purpose of this was twofold. Firstly, to seek support for the ACCC's education and compliance programme at a high level within each Government. This support was received from all Governments.

21. The second purpose was to request all Governments to examine their procurement frameworks and introduce measures requiring officials to take into account competition laws when designing their procurement policies and guidelines. This proposal had mixed results with only some government agencies introducing measures to deal with cartel conduct.

2.5 Investigations and Litigation

22. As a result of the initial procurement compliance programme, the ACCC received various reports from procurement officials identifying activity which may breach competition laws. Whilst there were

some investigations as a result of these reports, none of these have led to enforcement action by the ACCC to date.

3. Review of Procurement Compliance Programme

23. In 2007 the ACCC reviewed and updated its compliance programme, and developed a DVD which was sent to Chief Financial Officers in 23 Commonwealth agencies. Unlike the initial roll-out of the programme, the ACCC did not undertake the same extensive presentations and seminar series to educate procurement officials. One of the reasons for this was pending court action in the Baxter⁴ case.

4. Baxter Case – Derivative Crown Immunity

24. The ACCC took these proceedings following a complaint from a medical practitioner that exclusivity agreements between the government and Baxter Healthcare Pty Ltd (Baxter) limited the choice of treatment which would best meet the needs of their patients requiring dialysis.

25. The ACCC alleged that Baxter had entered into long-term, exclusive, bundled contracts with state purchasing authorities (SPAs) which tied the supply of sterile fluids to the supply of peritoneal dialysis products. It claimed that bundling all sterile fluids and peritoneal dialysis products in this way amounted to exclusive dealing in breach of section 47 of the Act, and that Baxter had taken advantage of its substantial market power in sterile fluids to structure the terms on which it offered to enter into the contracts.

4.1 Federal Court Decision

26. On 16 May 2005 the trial judge, Justice Allsop, handed down judgment applying a line of judicial authority based on the High Court's decision in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*⁵ (Bradken). This authority provided that where the Crown enjoys immunity from the Act (which was not contested in the case), this immunity should extend to corporations with which the Crown deals, where the application of the Act would interfere with the proprietary, contractual and/or other legal interests of the Crown (known as derivative Crown immunity). Applying this authority, Justice Allsop held that the Act did not apply to either Baxter's contracts with the SPAs or its other conduct.

27. But for the existence of Crown or derivative Crown immunity, Justice Allsop said he would have found that Baxter had committed one breach of section 46 and a number of breaches of section 47 of the Act.

28. The ACCC appealed the decision on the basis that Justice Allsop had incorrectly held that the Act did not apply to Baxter's conduct.

4.2 Full Federal Court Decision

29. On 24 August 2006 the Full Federal Court handed down its decision, holding that Justice Allsop's finding on the Crown immunity issue was correct.

30. The Court made the following observations about the possible implications of its decision:

⁴ *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581 (16 May 2005) available at <http://www.austlii.edu.au/au/cases/cth/FCA/2005/581.html>.

⁵ [1979] HCA 15 (5 April 1979) available at <http://www.austlii.edu.au/au/cases/cth/HCA/1979/15.html>.

It is one thing to exempt the executive government from legislative prohibition as to conduct... It is another to have a substantial area of commerce in which restrictive practices can be carried on by all those dealing with a government, perhaps to the disadvantage of the public purchasing authority, but also to the detriment of other suppliers and consumers.

31. The ACCC sought special leave to appeal the decision to the High Court and, on 29 August 2007, the High Court upheld the appeal, finding that the Act applied to Baxter's conduct. The High Court was of the view that:⁶

The construction urged by the respondents imposes a very extensive qualification upon the Act's object of promoting competition and fair trading in the public interest, in the name of the protecting of the capacities of the Crown, a qualification strikingly at odds with the way the Act deals with governments when they themselves carry on a business.

32. Baxter would therefore be liable for penalties, injunctions and other sanctions (to be determined by the Full Federal Court on remittal⁷).

4.3 Implications of the Baxter Case

33. Following the Federal Court and Full Federal Court decisions in Baxter, the ACCC was concerned that Crown immunity may pass through to businesses involved in cartel conduct if a bid was submitted for a government tender. However, the High Court's decision confirms that the Act *will* apply to collusive practices in the context of government procurement.

4.4 Procurement Outreach Programme

34. The Baxter case was significant in that it removed any uncertainty that collusive practices involving Government tenders would be subject to the cartel provisions under the Act.

35. Following the High Court's decision, the ACCC trialled a new education and advocacy approach for public procurement. The trial programme commenced in the state of South Australia and following its initial success was implemented nationally.

36. The trial programme involved extensive consultation and liaison with state and local government entities, including over 70 presentations by ACCC staff. In addition to these presentations, an ACCC Outreach Officer was specifically tasked to liaise directly with these government entities, focusing on education and advocacy for procurement reform.

37. The ACCC also updated its guidelines for procurement officials on cartel conduct to reflect the decision in Baxter, and pending commencement of the new criminal cartel regime.⁸

38. In April 2009 the ACCC released a new guidance publication for procurement officials: "*Cartels: deterrence and detection — a guide for government procurement officers*".⁹

⁶ *Australian Competition and Consumer Commission v Baxter Healthcare* [2007] HCA 38 (29 August 2007), at para 74. The decision is available at: <http://www.austlii.edu.au/au/cases/cth/HCA/2007/38.html>.

⁷ *See Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2008] FCAFC 141 (11 August 2008) available at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html>.

⁸ New laws criminalising cartel conduct came into effect in Australia on 24 July 2009. More information about the new criminal cartel regime is available at: <http://www.accc.gov.au/content/index.phtml/tag/cartels/>.

39. During the four years following the release of the ACCC's compliance programme, the ACCC did not bring any bid-rigging case to court. However, in 2009 this changed when the ACCC instituted proceedings against American-based company, DRS C3 Systems¹⁰ (DRS), for alleged market sharing in the international military defence training systems industry.

40. The conduct relates to an alleged agreement between DRS and another company that DRS would withdraw from a proposed procurement for an air combat manoeuvring instrumentation system, conducted by the Australian Government. The case is ongoing.

41. Whilst the DRS case is an important step in highlighting anti-competitive conduct in the public procurement sector, a more recent investigation into the construction sector in the state of Queensland has had a more significant impact in raising public awareness of the economic harm of bid-rigging, especially amongst government Ministers.

42. The ACCC commenced legal proceedings on 21 September 2009 alleging that three construction companies¹¹ engaged in price fixing and misleading or deceptive conduct in tendering for government construction projects in Queensland. The alleged conduct involved the exchange of cover prices (a practice referred to in the building industry as "cover pricing") for the construction of a school, rail facilities and an airport refurbishment.

43. As the conduct covers a wide range of government tenders, this case has significantly raised awareness of the risks of cartel activity within the public procurement sector.

5. ACCC – Lessons Learnt from Public Procurement Outreach Programmes

44. In the course of implementing our compliance programmes, the ACCC has learnt that to successfully achieve our compliance objectives, particularly with respect to public procurement, it is necessary to have a mix of strategies and approaches. For example, education and advocacy messages (while necessary) will not be successful in raising awareness about the economic harm associated with bid-rigging for government tenders, or in preventing breaches of the law, without strong enforcement action.

45. In the ACCC's experience it is necessary to have an integrated approach, which includes:

- Enforcement of the law, including resolution of possible contraventions, both administratively and by litigation;
- Encouraging compliance with the law by educating and informing both businesses and officials involved in procurement about their rights and responsibilities under the *Trade Practices Act 1974*; and
- Developing ongoing and effective partnerships with other government agencies to implement these objectives.

⁹ The guide is available at: <http://www.accc.gov.au/content/index.phtml/itemId/869010>.

¹⁰ *ACCC v DRS C3 Systems, Inc* NSD588/2009.

¹¹ *ACCC v T F Woollam & Son Pty Ltd & Ors* QUD236/2009.