Memorandum	
To	[Partner]
From	Jason Feng
Date	XX
Subject	Research memo re whether State entities can 'carry on business' in the context of misleading or deceptive conduct laws

1. INTRODUCTION

1.1 [Client] has asked us to consider whether the law of misleading or deceptive conduct applies to government authorities. This is in the context of the [Project] where the [insert] (**State**) had made representations to [Client] during the tender process.

1.2 The key elements for the law of misleading or deceptive conduct to apply to the State are as follows:

1.2.1 whether the State is 'carrying on a business' for the purpose of section 2A of the *Competition and Consumer Act*;

1.2.2 whether the representations were misleading or deceptive; and

1.2.3 whether the representations were made 'in trade or commerce'.

1.3 You have asked me to consider if the first element (whether the State is 'carrying on a business') could be satisfied by reference to the existing case law.

2. EXECUTIVE SUMMARY

2.1 Although existing case authorities have generally found that government authorities are not 'carrying on business', there is potential for a claim by [Client] to satisfy the first element (whether the State is 'carrying on a business') based on the unique facts of the [Project].

2.2 In essence:

2.2.1 The relevant 'misleading or deceptive' representations appear to have been made in the course of the State carrying out the activity of issuing a request for tender and dealing with prospective tenderers.

2.2.2 The issue of whether the State's activity can be characterised as 'carrying on a business' is highly dependent on the facts of each particular case.

2.2.3 There are existing authorities suggesting that the conduct of the State in issuing a request for tender and in dealing with prospective tenderers is <u>not</u> an activity in 'carrying on business'.[1]

2.2.4 However, the factual background to those existing authorities are significantly different to the circumstances in the [Project].

2.2.5 Based on the factors identified in the case authorities that were used in determining whether a government authority's activity constitutes 'carrying on a business' (see Section

[1] *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337; *Corrections Corporation of Australia Pty Ltd v Commonwealth of Australia* [2000] FCA 1280; *Murphy v State of Victoria*

7 of this memo) – there is potential for the factual circumstances of the [Project] to satisfy the element of whether the State was 'carrying on business'.

2.2.6 **Next Steps -** In preparing this memo, there was insufficient time to explore the factual circumstances of the [Project] in detail. In order to better assess [Client's] claim, we should meet with the project / commercial team to consider how the factors set out in Section 7 of this memo could be applied.

2.3 A detailed legal analysis supporting the conclusions above is set out in the following Sections, which explore:

2.3.1 the statutory regime underpinning misleading or deceptive conduct claims (Section 3);

2.3.2 the general principles for determining whether government authorities are 'carrying on business' for the purpose of the statutory regime (Section 4);

2.3.3 what constitutes an 'activity' by the State (Section 5);

2.3.4 the existing case authorities where government authorities have been found to have been carrying, or not carrying, on business (Section 6); and

2.3.5 the relevant factors considered by the case authorities which are to be applied to each case's factual circumstances (Section 7).

3. STATUTORY REGIME

3.1 The law of misleading or deceptive conduct is set out as follows:

> "*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*."[2] (**MDC Provision**)

3.2 The MDC Provision is under a Commonwealth law. Although the State of South Australia is not bound by that Commonwealth law, it is bound by the *Fair Trading Act 1987* (SA) which codifies the Commonwealth law as a law of South Australia. In particular, section 22 of the *Fair Trading Act* states that:

> "*The application law of this jurisdiction binds (so far as the legislative power of Parliament permits) the Crown in right of this jurisdiction and of each other jurisdiction, so far as the Crown carries on a business, either directly or by an authority of the jurisdiction concerned* [i.e. the State].[3]

3.3 It is important to note that this provision (and its equivalent in the Commonwealth law) is intended to limit the Crown / Commonwealth / State's liability under the MDC Provision. In other words, the State will only be liable under the MDC Provision in so far as it is 'carrying on a business'.[4]

4. GENERAL PRINCIPLES FOR CARRYING ON A BUSINESS

4.1 There are three key principles in the existing case law that frame the discussion of whether the MDC Provision applies to the State:[5]

4.1.1 the activity in the course of which the impugned conduct occurs must properly be characterised as 'carrying on a business';

[2] Section 18, Schedule 2 of the *Competition and Consumer Act 2010* (Cth). This is equivalent to section 52A of the *Trade Practices Act 1974* (Cth), which preceded the *Competition and Consumer Act* and is the subject of some of the case authorities referred to in this memo.
[3] Section 22, *Fair Trading Act 1987* (SA). This is drafted similarly to Section 2A of the *Competition and Consumer Act 2010* (Cth) which has been examined by the existing case authorities.
[4] *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337.
[5] *Murphy v Victoria* (1997) 77 FCR 337 per Emmett J at 356: "*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 prot4ection when entering into other dealings with the Commonwealth*."

4.1.2 the impugned conduct must be undertaken in the course of carrying on the business — it is not sufficient to establish that a Crown entity is carrying on a business, and that the conduct complained about is in some way connected with that business and therefore subject to the [MDC Provision]; and

4.1.3 it is not sufficient that the impugned conduct may be said to be connected in some way with a business to be conducted by the Crown at some time in the future.

4.2 In light of the above principles, the relevant discussion should consider the following:

4.2.1 what activity is the State involved in for the [Project] – this will be informed by the 'misleading or deceptive conduct' that [Client] alleges that the State engaged in as that conduct must be undertaken 'in the course of performing that activity';[6] and

4.2.2 what are the factors that determine whether an activity is characterised as "carrying on a business" (which will be informed by the existing case authority).

5. WHAT IS THE STATE'S 'ACTIVITY'

5.1 Subject to input from people that have a deeper understanding of the facts in the [Project], it appears that the alleged 'misleading or deceptive conduct' involves the State making certain representations to [Client] during the tender process for the [Project] (**MDC Representations**).

5.2 As such, to precisely determine the State's 'activity', it is relevant to consider whether there is a distinction between:[7]

5.2.1 the activity that is the subject of the tender process; and

5.2.2 the activity of the tender process itself.

5.3 In *Corrections Corporation*, His Honour Finkelstein J dealt with the tender process as if it could constitute a separate activity in itself.

5.4 On this basis, the relevant 'activity' is the State carrying out a tender process. This involves issuing a request for tenders and dealing with prospective tenderers in the course of that process. Although the tender process was to select a provider of facility management services for a public hospital, the relevant 'activity' at the time of the MDC Representations is limited to the tender process itself and not the operation of the [Asset] generally.

6. EXISTING AUTHORITIES RELATING TO 'CARRYING ON BUSINESS'

6.1 The term 'carrying on a business' is flexible and highly dependent on the facts of each particular case. This is recognised by the existing case authorities, as follows:

> "*It is necessary to bear in mind that the word "business" is an "etymological chameleon" that takes its meaning from the context in which it appears and from the purpose of the statute in which it is found—in the context of the CCA it is a wide and general word*" (at [47] and [48])

Statutory guidance

6.2 Although the statutory regime does not prescribe what constitutes 'carrying on a business', it also does not bar the State's activity from being characterised as 'carrying on a business'. In particular:

6.2.1 The word 'business' also includes a business that is not carried on for profit.[8]

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[6] Also note that '*the ambit of the business activities of the particular [State] enterprise must be examined to see whether the impugned conduct was engaged in as part of the carrying on of a business*' in *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152 per Sundberg J.

[7] Also cited with approval in *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152 per Sundberg J at [63].

[8] Section 4, *Competition and Consumer Act 2010* (Cth).

6.2.2 Without limitation, section 2C of the *Competition and Consumer Act* provides that the following activities are not 'carrying on a business':

(a) imposing or collecting taxes, levies or licences;

(b) granting, refusing to grant, revoking, suspending or varying licences whether conditional or not;

(c) transactions involving only government entities; and

(d) the acquisition of primary products by a government body under legislation unless the acquisition occurs because the body chooses to acquire the products or does not exercise its discretion not to acquire the products.

Cases where government is not carrying on a business

6.3 However, there is existing case authority that suggests that activities by the government such as inviting tenders to be submitted and dealing with prospective tenderers is not 'carrying on a business, as follows:[9]

6.3.1 In *JS McMillan*, the Commonwealth invited tenders to sell a particular government printing service. Although the operation of the printing service would be 'carrying on business', the tender to sell the assets of the printing service was not.

> "*The conduct of the Commonwealth in issuing the request for tender and in dealing with prospective tenderers was not activity engaged in in carrying on the business which has hitherto been carried on by the Commonwealth, in the guise of the [Department of Administrative Services], under the name AGPS. The conduct complained of is that of officers of the Commonwealth who have had nothing to do with the day-to-day operations of the AGPS. It is conduct quite divorced from the carrying on of that business."*[10]

6.3.2 In *Corrections Corp*, it was found that operating detention centres (as required by statute) and dealing with tenders for services to manage those centres did not amount to carrying on a business.

> "*In this case, by the Request for tenders and the processing of the proposals that were submitted in response, the Commonwealth was* ***seeking to find an appropriate person who would provide it with services*** *at its detention centres; however, it was not itself attempting to trade in goods or provide any services. So* ***it would always be difficult to characterise the tender process as a business. It is in any event difficult to see how the process of selecting a person to provide services to the Commonwealth can be described as conduct that has a commercial flavour****, when looked at from the point of view of the Commonwealth. As in J S McMillan Pty Ltd, the conduct is quite distinct form any business.*"[11]

6.3.3 In *Sirway Asia*, procurement of china by the Department of Defence for use by the military was not carrying on a business.

> "*The applicant offered no evidence that the respondent was carrying on the business of trading in or acquiring chinaware in industrial quantities other than the fact that the Department called for tenders, accepted tenders and entered into the [Standing Offer Agreement] and acquired large quantities of chinaware…."*[12]

6.3.4 In *Murphy v Victoria*, the State of Victoria had initiated a tender process for the construction of a tolled motorway as a PPP. In the course of the procurement process, it was alleged

[9] Also cited with approval in *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152 per Sundberg J at [56].
[10] *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337 per Emmett J at 356-357.
[11] *Corrections Corporation of Australia Pty Ltd v Commonwealth of Australia* (2000) FCR 448 per Finkelstein J at 452-453.
[12] *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152 per Sundberg J at [59].

that the State had made certain 'misleading or deceptive representations' to the public in relation to the cost and benefits of the motorway. Although the Victorian Supreme Court of Appeal remitted the matter to a trial judge on the basis that the State's representations could be misleading or deceptive, it also set out the following dicta (as extracted):

> "*For example, if a government were proposing to construct a non-commercial public hospital as part of a State taxpayer funded health care project, it could hardly be thought that government representations to the public as to the supposed benefits of that hospital would have any commercial flavour about them. On the other hand, if a government were proposing to set up, say, a telephone or internet service provider to sell telephonic and internet services to the public, either alone or in partnership with a commercial organisation, it is difficult to see why government representations to the public about the supposed benefits of the service would not be of a commercial or at least partly commercial nature."*[13]

Further, the Court of Appeal did not disagree with the trial judge's observation that:

> "*Nevertheless, the authorities make clear that representations made to tenderers within the context of a tender process, and while dealing with tenderers, do not constitute conduct in the course of carrying on a business, even if the thing tendered for will constitute a business once operational.*"[14]

6.4 Additionally, there is further authority that indicates the following activities are also not to be characterised as 'carrying on a business':

6.4.1 leasing and developing a site for the purpose of establishing Cabinet and Ministerial offices.

> *"The plaintiff's claim based on this Act depends inter alia on characterising the Commonwealth's role in the development of the Phillip Street site as carrying on a business. The evidence establishes that the Commonwealth required five floors of the new building on the Phillip Street site for the purpose of providing Cabinet and Ministerial offices. The Commonwealth's role in the development was carried on through the Department of Administrative Services. There is nothing to suggest that in relation to the development of the site the Commonwealth was engaged in a trading or commercial activity which could appropriately be characterised as carrying on a business."*[15]

6.4.2 managing a national park.[16]

6.4.3 providing police and corrective services.[17]

Cases where the government has carried on a business

6.5 The authorities that have held that the government was involved in activity that constituted 'carrying on a business' are rather limited and do not generally relate to participation in tender processes. Notable examples include:

6.5.1 the State of NSW through the Ambulance Service of New South Wales by providing ambulance services at sporting events and first aid training for reward.[18]

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[13] *Murphy v State of Victoria* [2014] VSCA 238 (Nettle AP; Santamaria JA; Beach JA)..
[14] *Murphy v Victoria* [2014] VSC 404 per Croft J at [61].
[15] *National Management Services (Australia) Pty Ltd v Commonwealth (1990)* 9 BCL 190 (McLelland J).
[16] *Easts Van Villages v Minister Administering the National Parks and Wildlife Act* (2001) ATPR (Digest) 46-211.
[17] *Hamod v State of NSW* [2001] FCA 157.
[18] *Paramedical Services Pty Ltd v The Ambulance Service of NSW* [1999] FCA 548.

6.5.2 various government entities involved in broadcasting and postal services (e.g. the Australian Telecommunications Commission and the Australian Broadcasting Commission).[19]

Dependence on factual circumstances

6.6 Although these authorities do not appear favourable to our present case, it is also important to note that:

6.6.1 the term 'carrying on business' relies on the particular facts in each case; and

6.6.2 the particular facts of the [Project] may be distinguishable from the above cases.

6.7 By way of example, the circumstances in *Salvation Army v Commonwealth* appeared broadly analogous to *Corrections Corp* (in that both concerned the operation of detention centres). However, His Honour Jagot J in *Salvation Army* did not apply the decision in *Corrections Corp* on the basis that particular facts distinguished the cases, as follows:[20]

> "*It also follows from all that I have said that it may be the case that the decision in Corrections Corporation is ultimately distinguishable. There is at least one* ***critical factual difference*** *between that case and the present matter.*
>
> *…*
>
> *As the Salvation Army submitted, while the Commonwealth contends that it is a purely or inherently governmental function for services to be provided by one nation state to another, the pleading certainly leaves open a different characterisation of the Commonwealth's activities; namely, the Commonwealth acting as the head contractor, as well as operator and/or manager of the regional processing centres in circumstances where there is no governmental obligation for it to do so.*
>
> *…*
>
> *Ultimately however,* ***the true character of the activities of the Commonwealth, it seems to me, is one that can be determined only by reference to all of the facts*** *and not on an application to strike out part of a pleading."*

7. FACTORS TO CONSIDER RE WHETHER THE STATE IS 'CARRYING ON A BUSINESS'

7.1 In considering whether the State's activity involving the tender process can be characterised as 'carrying on a business', it is helpful to refer to the following factors identified in the existing case law, as follows:[21]

7.1.1 For activities to constitute 'carrying on a business', the activities must be undertaken in a commercial enterprise or as a going concern.[22] The activities must constitute trade, or commercial transactions or engagements.[23] A business activity is an activity which takes place in a business context and which, of itself, bears a business character.[24]

[19] *J S McMillan Pty Ltd v Commonwealth* (1997) 77 FCR 337; *Tytel Pty Ltd v Australian Telecommunications Commission* (1986) 67 ALR 433; *Suatu Holdings Pty Ltd v Australian Postal Commission* (1989) 86 ALR 532; *Sun Earth Homes Pty Ltd v Australian Broadcasting Commission* (1990) 98 ALR 101.

[20] *Salvation Army (New South Wales) Property Trust v Commonwealth of Australia* [2015] FCA 674 per Jagot J at [24] – [28].

[21] *Murphy v State of Victoria* [2014] VSCA 238 at [46] (Nettle AP; Santamaria JA; Beach JA).

[22] *Corrections Corporation of Australia Pty Ltd v Commonwealth* (2000) 104 FCR 448, 451, [12] (Finkelstein J); *Saitta Pty Ltd v Commonwealth* (2001) 162 FLR 35, 39, [28] (Beach J); *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152, [51] (Sundberg J); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 445, [90] (Finn J); *Roads and Maritime Services v Devine Marine Group Pty Ltd* [2013] NSWSC 1467, [133] (Stevenson J).

[23] *Durant v Greiner* (1990) 21 NSWLR 119, 128 (Rolfe J); *Fasold v Roberts* (1997) 70 FCR 489, 524 (Sackville J); *Paramedical Services Pty Ltd v Ambulance Service (NSW)* (1999) 217 ALR 502, 517, [86] (Hely J).

[24] *Paramedical Services Pty Ltd v Ambulance Service (NSW)* (1999) 217 ALR 502, 517, [86], [88] (Hely J); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 445, [90] (Finn J); *Markit Pty Ltd v Cmr of Taxation (Cth)* [2007] 1 Qd R 253, 257, [30] (Muir J).

7.1.2 The expression ‘carry on a business’ signifies a course of conduct involving the performance of a succession of acts with system and regularity, not the effecting of a solitary transaction.[25] The less commercial the character and objectives of an organisation, the greater the degree of system and regularity required to establish that it carries on a business.[26]

7.1.3 On the other hand, mere repetitiveness is insufficient. It does not necessarily follow that one who engages in transactions of the same kind systematically or regularly is carrying on a business in those transactions (e.g. regular deposits into a bank account). Absence of a system and regularity might deny that a business is being carried on but their presence does not necessarily establish that it is.[27]

7.1.4 There is a distinction between those functions of a government which are purely governmental or regulatory and those functions which entail the carrying on of business.[28] To carry on some part of ‘the business of government’ is something different from carrying on a business in the relevant sense.[29] In this context, the fact that the [Project] was carried out as a PPP does not necessarily mean that the project has sufficient 'commercial flavour' to be characterised as 'carrying on a business', in contrast to being part of 'the business of government'.

7.1.5 The carrying out of a function of government in the interests of the community, such as the performance of a statutory function (including one in respect of which fees may be charged), is not the carrying on of a business.[30] That the purpose of the activities is the provision of governmental services will tend against a conclusion that they amount to the carrying on of a business.[31] This memo has not investigated whether the provision of public hospitals is a statutory function.

7.1.6 There must be present some element of commerce or trade such as a private citizen or trader might undertake.[32]

8. MOVING FORWARD

8.1 In preparing this memo, there was insufficient time to explore the factual circumstances of the [Project] in detail. To the extent that the circumstances in our case align with the factors set out above, there may be an argument that the law of misleading or deceptive conduct applies to the State.

8.2 In order to better assess [Client’s] claim, we should meet with the project / commercial team to consider how the factors set out in Section 7 of this memo could be applied.

8.3 If it appears that the present facts do align with the relevant factors, we will need to consider:

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[25] *J S McMillan* (1997) 77 FCR 337 at 354 (Emmett J); *Fasold v Roberts* (1997) 70 FCR 489, 524 (Sackville J); *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152, [52] (Sundberg J); *New South Wales v RT & YE Falls Investments Pty Ltd* (2003) 57 NSWLR 1, 34, [131] (Hodgson JA); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 445, [90] (Finn J).

[26] *Fasold v Roberts* (1997) 70 FCR 489 at 525 (Sackville J); *Paramedical Services Pty Ltd v Ambulance Service (NSW)* (1999) 217 ALR 502, 518, [86] (Hely J); *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152,[52] (Sundberg J).

[27] *S McMillan Pty Ltd* (1997) 77 FCR 337, 354; *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152, [52] (Sundberg J); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 445, [90] (Finn J); *Markit Pty Ltd v Cmr of Taxation (Cth)* [2007] 1 Qd R 253, 257, [30] (Muir J).

[28] *S McMillan Pty Ltd* (1997) 77 FCR 337, 355 (Emmett J); *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152, [53] (Sundberg J).

[29] *Markit Pty Ltd v Cmr of Taxation (Cth)* [2007] 1 Qd R 253, 257–258, [32] (Muir J), quoting from *Town Investments Ltd v Department of the Environment* [1978] AC 359.

[30] *Sirway Asia Pacific Pty Ltd v Commonwealth* [2002] FCA 1152, [53] (Sundberg J), citing *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579, 585; *New South Wales v RT & YE Falls Investments Pty Ltd* (2003) 57 NSWLR 1, 34, [134] (Hodgson JA); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 445, [90] (Finn J); *Markit Pty Ltd v Cmr of Taxation (Cth)* [2007] 1 Qd R 253, 257, [30] (Muir J).

[31] *New South Wales v RT & YE Falls Investments Pty Ltd* (2003) 57 NSWLR 1, 34, [129] (Hodgson JA); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 454, [90]; *Markit Pty Ltd v Cmr of Taxation (Cth)* [2007] 1 Qd R 253, 257, [30] (Muir J).

[32] *New South Wales v RT & YE Falls Investments Pty Ltd* (2003) 57 NSWLR 1, 34, [131] (Hodgson JA); *Village Building Co Ltd v Canberra International Airport Pty Ltd (No 2)* (2004) 134 FCR 422, 445, [90] (Finn J); *Markit Pty Ltd v Cmr of Taxation (Cth)* [2007] 1 Qd R 253, 257, [30] (Muir J).

8.3.1 whether the representations were misleading or deceptive;

8.3.2 whether the representations were made 'in trade or commerce';

8.3.3 the applicable limitation periods.