Productivity Commission Review of Section 2D of the Trade Practices Act 1974

Submission from Launceston City Council

LAUNCESTON
TASMANIA

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1. Summary

Local government by its nature tends to implement regulatory processes controlled by the legislation set by other sectors of government. As a result it relies on a licence and permit system to apply and enforce that regulation. Licences and permits apply to both commercial and non-commercial situations. However, licences and permits are non-commercial in nature being related to public policy considerations rather than any underlying market force.

Clear examples of such licences and permits are those applying to public health regulation (such as public assembly permits and food premise standards), and town planning regulation (such as development and building approvals).

It needs to be emphasised that the licence and permit system exists primarily to maintain minimum adequate standards across the community as a whole. The conditions attaching to licences and permits are the subset of specifications tying each application into the general community expectation and prevailing regulatory policies and requirements.

Compliance with the conditions of licences and permits will involve a cost either directly, or indirectly through curtailment of the degree of use of a property or business asset. Curtailment can include limits on the density of development, limits on trading hours, and limits on the range of activities allowable. These restrictions will apply to both commercial and non-commercial developments sought by both the public and private sectors.

The public benefit arising from such regulations may be difficult to quantify. Within the context of orderly community development, they may even be difficult to identify until there is a breakdown in the system. For example, it is commonly held that building permits exist to protect the developer from himself while planning permits exist to protect the community from the developer.

Such a statement may seem trite, but it covers the full range of issues including basic building safety, the health of the building environment, fire safety and control, minimisation of nuisance, avoidance of disputes, preservation of local amenity, prevention of overloading of existing support services, access to and from private property etc.

In the absence of regulatory licence and permit conditions, how will all these issues be addressed? Of course civil remedy through the courts is usually available and the "environmental nuisance" provisions of state environmental legislation are a possible course of action for aggrieved persons. Both mechanisms are adversarial in nature, costly, slow, and to some degree arbitrary.

Of concern to the Productivity Commission is whether the existence of licence and permit conditions can give rise to a trading advantage for local government. This paper will show that this is not the case. Local government does not have any regulatory powers over trading operations except through the town planning schemes and prevailing health and occupational safety legislation. As noted above those controls are imposed by the state to a large degree.

In both cases there are review mechanisms controlled at the state level which remove any scope for biased or inappropriate decision by the local government body. Indeed the various state equivalents of land use planning and resource management tribunals have developed a substantial body of case law ultimately backed by the Supreme Courts.

The existence of Section 2D of the Trade Practices Act provides an umbrella coverage for local government to apply conditions to its licences and permits in order to carry out the regulatory duties imposed upon it externally by state governments. It allows the development of classes of licence conforming to overall planning policy. It removes the uncertainty of jurisdiction and avoids individual and unnecessary litigation between neighbours.

In the area of public health control it imposes minimum acceptable standards of hygiene, quality, and practice to assure the maintenance of public health. In the absence of such mechanisms, will market control of say food suppliers rely solely on adverse public reaction to poisoning or deaths? As has been tragically demonstrated, food poisoning deaths will remove a producer or supplier from the market - but at an unacceptable price.

Section 2D maintains consistency between administrations, provides a known and reliable datum for interaction between local government and the public, and underpins the permit system established over many years and supported by the Court system. Its removal will create uncertainty, lead to a proliferation of civil law disputes, and significantly increase the administrative burden on the community as a whole.

2. Functions and Powers of Councils in Tasmania

As for the rest of Australia, local government in Tasmania is a creature of the State government. The functions and powers of the Launceston City Council are established and set by Part 3 of the Local Government Act 1993

PART 3 - LOCAL GOVERNMENT
Division 2 - Councils

Functions and powers of councils
20. (1) The council of a municipal area has the following functions:

(a) to formulate, implement and monitor policies, plans and programmes for the provision of appropriate services and facilities to meet the present and future needs of the community;

(b) to facilitate and encourage the proper planning and development of the municipal area in the best interests of the community;

(c) to manage, improve and develop efficiently and effectively the resources available to the municipal area;

(d) to develop, implement and monitor strategic plans for the development and management of the municipal area;

(e) to provide for the health, safety and welfare of the community;

(f) to represent and promote the interests of the community;

(g) to provide for the peace, order and good government of the municipal area.

(2) In performing its functions, the council may do any one or more of the following either within or outside its municipal area:

(a) develop, implement and monitor programmes to ensure adequate levels of its accountability to the community;

(b) develop, implement and monitor effective management systems;

(c) develop, implement and monitor procedures for effective consultation between the council and the community;

(d) inform the community of its activities and provide reasonable opportunities for involvement in those activities;

(e) any other thing necessary or convenient.

(3) *[Section 20 Subsection (3) substituted by No. 34 of 1999, s. 9, Applied:30 Jun 1999]* A council may transfer to a single authority or joint authority –

(a) any of its assets or liabilities on any condition it determines; or

(b) any of its employees.

Within the context of the Commission's review of Section 2D, the discharge and enforcement of Council's functions expressed in items (1)b and (1)e is dependent upon Council's licensing powers and its ability to attach conditions to those licences. Furthermore, in the area of planning and development, those licences and their attached conditions, in the form of development permits, are the basis of the review processes established in the Tasmanian Resource Management and Planning Appeals Tribunal and the Supreme Court. Similar mechanisms are utilised in other states.

It is not unreasonable to say that much of the body of case law established in those jurisdictions is established on the development permit system. The permit system is based primarily on formal planning schemes (and supported/modified as the body of case law evolves) and is therefore not arbitrary. Nor is it

intrinsically commercial in nature, although it controls commercial as well as private and public developments in the same way.

While Planning Schemes ensure a consistent process of review, they are neither rigid nor inflexible. The initial review process is the consideration of the permit and any attached conditions by the elected body of the Council after due process of review by the community. Indeed, the authority of the permit is derived by the delegated authority of elected Aldermen under the Local Government Act 1993 and related State government resource planning legislation.

The development and review of the Planning Scheme itself is subject to the same process of community review and resolution of disputes in the courts. Council is neither the sole nor the final arbiter of its own Planning Scheme.

Authority for the issuing of licences and permits relating to public health and safety similarly arises from prevailing State legislation such as the Food Act 1995. This act itself has been subject to a regulatory impact review process as required under the national competition policy.

An important point to consider is that activities associated with Section 20 (1)b and (1)c are not discretionary activities by Council. They are compulsory and imposed upon local government by prevailing State legislation. There is no opt out clause available to local government.

The existence of these two classes of licence is primarily intended to serve orderly community development, public health, dispute resolution and minimisation of nuisance. They are not intended to be used in a direct or indirect way to restrict or discriminately influence commercial activities. The appeal processes and the huge body of case law underpinning them further ensure that direct or indirect restriction on commercial activities is prevented.

3. Regulatory Licensing activities of Council considered to have potential commercial impact

Launceston City Council undertakes the following regulatory and licensing activities:

Functional area	**Activity**	**Commercial?**
Approvals	Planning and Building permits	C and NC
Parking	Regulation of road reserves (probably	NC

	not a licence)	
Carr Villa cemetery	Monumental fee (probably not a licence)	NC
Swimming pools	Coach registration	C
Stock sales yard	Agents fees (probably a facilities rental)	C
Environmental Services	Several licence fees	C and NC
Waste Management	Trade waste permit – licence?	C
Infrastructure Assets Division	Competency panels (road reserve works)	C
Infrastructure Assets Division	Footpath cross-over permits	C and NC

Planning and building permits, and footpath crossover permits relate to development projects. Environmental Services licences generally relate to public assembly and public health.

The imposition of parking regulations arise from Council by-laws, The Tasmanian Traffic Act, and from application of the national road rules.

The fee for the erection of a head stone at cemeteries is more in the line of an administrative fee.

Registration of swimming coaches combines elements of facility hire and registration of competence.

Trade waste permits are more in the nature of administrative fees.

Competency panels involve pre-registration of competency to undertake certain types of works.

4. Governing legislation

Appendix 1 lists the major legislation impacting on local government and giving rise to regulatory duties involving licences and permits.

The principal Act controlling local government in Tasmania is the Local Government Act 1993.

In addition the Environmental Management and Pollution Control Act 1994 imposes a range of obligations on local government to prevent environmental nuisance.

5. By Law and Fees

Councils have the power to create by-laws and impose fees as set out in parts 11 and 12 of the Local Government Act:

PART 11 - BY-LAWS
Division 1 - General provisions

General power to make by-laws
145. (1) A council may make by-laws in respect of any act, matter or thing for which a council has a function or power under this or any other Act.

(2) By-laws under this Part may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the by-laws.

PART 11 - BY-LAWS
Division 3 - By-laws in respect of certain matters

Fees and licences
168. A council may make by-laws prescribing –

(a) fees, charges and rents in relation to a service, works, undertaking, property, matter or thing; and

(b) the purposes for which, and the conditions on which –

(ii) a service, product, commodity or information may be given by the council; and

(c) the manner in which applications may be made for permits, licences, authorities and registrations; and

(d) the fee payable for the permits, licences, authorities and registrations and for their renewal.

PART 12 - SPECIAL POWERS
Division 7 - Fees and charges

Fees and charges
205. (1) In addition to any other power to impose fees and charges but subject to subsection (2), a council may impose fees and charges in respect of any one or all of the following matters:

(a) the use of any property or facility owned, controlled, managed or maintained by the council;

(b) services supplied at a person's request;

(c) carrying out work at a person's request;

(d) providing information or materials, or providing copies of, or extracts from, records of the council;

(e) any application to the council;

(f) any licence, permit, registration or authorization granted by the council;

(g) any other prescribed matter.

(2) A council may not impose a fee or charge in respect of a matter if –

(a) a fee or charge is prescribed in respect of that matter; or

(b) this or any other Act provides that a fee or charge is not payable in respect of that matter.

(3) Any fee or charge under subsection (1) need not be fixed by reference to the cost to the council.

Section 145 enables by-laws to be enacted with respect to the functions and powers of Council. Those functions and powers are externally imposed by the State.

Section 168 enables the establishment of fees covering permits, licences, authorities and registrations, and their renewal.

Section 205 enables Council to set fees generally.

Enforcement of the collection of fees is generally supported in the prevailing legislation giving rise to the regulatory licence requirement. The loss of power to impose a fee will not remove the imposed duty to continue to regulate an activity. Removal of section 2D may place in jeopardy the legality of licensing activities which potentially impact on the supply of goods and services if an “authority vacuum” is created.

The more appropriate mechanism for a review of these types of licensing activities is the legislation review process agreed to by the state governments. Following this due process will remove the dangers associated with a “system wide cut” following a repeal of Section 2D.

Whether local government would lament a reduction of its externally imposed regulatory duties is debatable. However, local government remains the poor relation in government revenue raising capability and relies on the greater part of its funding from rates – a general levy on the ownership of property.

It must be recognised that, while licence fees in total may be a small part of Council general revenue, they remain a substantial part of the financial resource base for regulatory departments themselves. Licence fees are transparent and met the user pays principle. Their loss would severely impact on the ability of local government to meet its imposed regulatory duty. Abolition of licence fees

would lead to an increase in rates ie an increase in property related taxation and a loss of transparency.

For Launceston City Council, fees and charges relating to its combined planning, building and plumbing regulatory activities amount to 30.5% of the total operational budget for the area for 2001-02. In the area of environmental and public health, fees contribute 9.7% of the operational budget in 2001-02. Ironically this contribution has fallen some 18% with the loss of approximately 100 small food businesses in Launceston City alone following the introduction of the goods and services tax.

Absorbing regulatory costs back into the rates base, with the loss of program transparency and accountability, may well lead to a loss of economic efficiency as the apparent pool of funds available increases in the eyes of the regulator. This would be a retrograde step undoing much of the attempt to introduce business management concepts into local government.

6. Internal services and consequences for the commercialisation process

The discussion paper prepared by the Productivity Commission appears to place an undue emphasis on the provision of internal services by local government. The role of the Productivity Commission in seeking economic efficiency generally is accepted. However, it remains the responsibility of elected Aldermen to ensure best value for money in the operation of their Councils.

A similar duty and prerogative applies to the boards of private companies. Launceston City Council strongly rejects any argument that it or other local government bodies should be subject to trading conditions less favourable than those applying to the private sector.

The fundamental legal principle that one cannot contract with one's self must apply to the operations of local government to the same degree as it applies to the private sector. The Productivity Commission has neither charter nor mandate to seek to amend contract law or any other part of the common law.

Under the national competition policy, governments generally have been forced to apply sound business principles and competitive behaviour to a substantial part of their operations. This has resulted in the implementation of the commercialisation process to business activities with a potential final outcome of corporatisation or privatisation.

Section 2D has provided and continues to provide a partial safety net during this transition process. Removal of its protection will fatally damage the impetus of commercialisation and the achievement of economic efficiency as Councils

retreat behind the common law protection of remaining single legal entities and the practical protection of doing nothing.

Furthermore, the move to strategic alliancing, the development of regional authorities or associations, and the preparedness to share resources may be severely curtailed if local government becomes liable to unfettered challenge under the Trade Practices Act. Some may think such challenge is desirable. The reality is that the inability of Councils to co-operate (be it real or perceived) will continue the unnecessary duplication of resources. The uncertainty produced by the ability of unrelated parties to undertake speculative actions under the auspices of the Trade Practices Act may dampen the enthusiasm of local government to create separate legal entities though joint ventures.

This concern is not isolated to the undertaking of business activity by Councils. In Tasmania, major infrastructure development spanning several local government areas is enabled and assisted by the formation of Joint Planning Authorities under the Major Infrastructure Development Approvals Act 1999. Major infrastructure developments in Tasmania are commercial in nature. What will be the position of Councils constituting the joint planning authority, the state government, and the private sector developer of the projects if the licensing powers enabled under section 2D are removed or proved invalid?

What is the position of liability – is it joint or several? Will the private sector commit to large scale capital investment in the absence of planning schemes and the relatively consistent approach to the resolution of dispute by appeals tribunals and the Supreme Court? Can large projects proceed if all property related disputes are subject to common law resolution on an individual case basis?

Furthermore, does the existence of planning and development permits constitute a bestowed monopoly for the private sector provider of infrastructure developments of national standing? The answer is clearly no. Economic reality itself shows that states and regions cannot support duplication of large scale developments at the market level. Third party access legislation also provides some protection for later proponents of similar schemes.

The reassurance of the then Assistant Treasurer that "… certain forms of government activity, such as … licensing … are unlikely ever to be legally construed as 'business' …" is comforting but does not guarantee certainty. The courts will test that; the issue of concern to local government must remain the probable high cost of defending a challenge – be it speculative or not. Local government associations, like their constituent councils, are both poorly resourced and poorly placed to defend such challenges. It is unlikely that the state and commonwealth governments will rush to their aid even though they have created the legislation that local government is obliged to implement and defend.

7. Local supplier preference

The question of local supplier preference is somewhat academic. In Tasmania, the Local Government Act at section 346 requires the calling of competitive tenders for the supply of goods and services exceeding $50,000. This figure has not been periodically adjusted for inflation nor for the introduction of the goods and services tax.

Competitive tendering requirements under section 346 don't allow local preference to be taken into account for these contracts. Factors favouring local suppliers such as resident skills and geographic proximity are assessed transparently through assessment processes and weighed as part of an overall tender score. This is not a form of local preference policy but a commercial assessment of tender value.

There is scope for pre-selection of minor service providers under the quotation system – although there are in built checks such as the requirement to obtain multiple quotes. Such pre-selection processes should be subject to periodic review to ensure that the best market intelligence is available during the decision process – but it is unlikely that such small transactions will interest many providers outside a relatively small geographic area.

The Productivity Commission notes that economic pressure is already forcing local governments to move away from local supplier preferences. Economic efficiency may well provide an economic advantage for Australia as a whole but the loss of local industry directly effects local government in two ways.

Local suppliers are also local ratepayers. Their staff are often ratepayers also. Loss of the ratepayer base places financial pressure on Councils. Failure to use local supplier may feed back into the loss of rate base. This is augmented by the combined effects of population base and resulting decline in property values. The Commission's argument draws the system boundary too far from the Council's sphere of influence and interest to have any real meaning.

Councils do not have regulatory or licencing powers which are directly commercial and able to disadvantage a private supplier. The quarry example is less than realistic and is refuted by the Launceston City Council (certainly within the Tasmanian context).

In Tasmania, the operation of quarries requires a licence or permit from the state's mines department. If the scale of operation of the quarry is large enough, it is subject to approval by the state department of the environment. Occupational health and safety issues are subject to both state and commonwealth legislation.

The principal licensing or permit process available to local government is the planning process which has been described above. A Council developing or operating a quarry is subject to the same planning and permit process as the private sector and is subject to the same appeal processes. This example cited by the Commission does not support its argument and appears to be misleading.

One area of special interest to local government (and indeed to both states and the commonwealth) is that, as “owners” of road reserves, Councils are particularly sensitive to the access of other parties to road reserves in order to undertake works. The laying of pipes and cables by both statutory authorities and private sector developers is of concern given the risk of substandard work and potential rectification costs or disputes over liability.

The removal of the non-feasance rule amplifies the concern greatly given the almost incalculable public liability now attaching to public access to public roads. It is not only essential but reasonable that road owners including local government limit access for works to appropriately experienced and qualified contractors. The existence of guarantees and insurance covers is insufficient reassurance for local government given the frequency of default and failure by both contractors and their insurers.

Should the removal of section 2D make it impossible to pre-register such contractors, the financial consequences for local government are significant. Again there is no opt out clause for local government. While the private sector can choose to cease trading when risks become unmanageable, local government is neither free to go broke nor to cease trading. State governments and the commonwealth become invisible when local government talks of surrendering assets to them. Apart from tollways, the private sector has no interest in the intrinsically loss making exercise of building and maintaining local and minor roads.

8. Section 2D exemption, Section 51 authorisations and legal duty of honest behaviour

The Launceston City Council does not accept arguments that the existence of Section 2D immunity provides any screen for dishonest or questionable behaviour when dealing with suppliers of goods and services.

Where such acts occur, they remain illegal acts and the Council and all effected parties have recourse to both statutory, common law, and criminal code remedies.

Section 2D provides a consistent basis for both the private and public sectors. Given the increasing trend to uniformity in regulatory practices across Australia, Section 2D implicitly authorises the licence and permit systems.

What then of Section 51 authorisations? It is clear that they do provide an alternative. But that alternative is constituted by a mechanism that considers each application on a case by case basis, provides little or no ability to reach a decision applying to a class of applications in general, and is slow and subject to the bureaucratic process.

Section 51 authorisations are individual, are not an intrinsic right of the applicant, and potentially arbitrary and inconsistent across a range of related cases.

The existence of Section 2D minimises the administrative overhead – the approval and appeal processes exist and work. Section 51 authorisations must maximise the administrative overhead as each application is considered separately.

The Commission's paper raises the issue of local government falling under the State umbrella for continuing protection under Section 2C. This may be technically correct given State governments create local governments. But the reality is somewhat different. State and local government do not negotiate as equals given the disparity in their resource bases and the power of state governments to direct local government to undertake regulatory duties.

Often the two levels of government may have differing political outlooks and affiliations. Once again there is no opt out clause for local government to break the relationship.

Local government has repeatedly called for some level of constitutional recognition. It may be tempted to believe that the removal of its recognition through Section 2D to be further evidence of its lack of recognition.

9. Response to other issues raised

The following section contains additional comment on issues raised in the Commission's discussion paper which have not been dealt with above.

Some comment must be made on misuse of market power and the use of pricing mechanisms to discourage or prevent certain practices. The use of a Section 51 authorisation in New South Wales to discourage large scale movements of commercial waste between local government areas probably was a good use of this mechanism.

But there are several corollaries which might best be covered by the licensing and permit powers enabled by Section 2D. Can a solid waste disposal facility operated by a Council reasonably refuse to take certain types of waste not proscribed by state government regulation but which are highly undesirable at its facility? Can the Council use pricing mechanisms as an alternative and what is

the role of the ACCC in forcing Council to operate without restriction on what waste it accepts?

Council may be reluctant to accept waste types because of volume concerns, intractability, leachate and other environmental reasons, or offensive odours near residential areas. In the absence of permits, can the local government service provider say to the generators of waste that enough is enough and that the generator must accept the financial responsibility for the management of the waste?

In Tasmania, the state government has developed a waste minimisation policy which is binding on local government. Local government can only respond by prohibition and pricing mechanisms to meet that policy.

10. Notes on Public Benefit considerations and the Tasmanian Economy

National competition policy agreements parameters for assessing public benefit

In November 1996, the National Competition Council released its paper entitled "Considering the Public Interest under the National Competition Policy". The paper made a number of observations including (verbatim):

- A central feature of the National Competition Policy is its focus on competition reform in the public interest. In this respect, the guiding principle is that competition, in general will promote community welfare by increasing national income through encouraging improvements in efficiency.

- Despite this focus on increased competition, governments have some flexibility to deal with circumstances where competition might be inconsistent with the weighting placed by the community on particular social objectives.

- The inclusion of subclause 1(3) in the Competition Principles Agreement reflects the desire of governments to make clear their point of view that competition policy is not about maximising competition *per se*, but about using competition to improve the community's living standards and employment opportunities.

- The goal of economic efficiency will often be central in defining whether a benefit to the public arises, although its absence does not mean that there are not other benefits.

- Australian policy makers have left defining the 'public interest' for trade practice purposes to case-by-case assessment rather than trying to be

proscriptive. In this respect, anything deemed to be of value to the community could be judged to be in the public interest.

- The Competition Principles Agreement explicitly recognises that the benefit to the community from some pro-competitive reforms may not justify the costs.

Section 1(3) of the competition principles agreement

To address wide-spread public concern that the proscriptive and universal application of the National Competition Policy would severely limit the power of Australian governments to implement their legitimate social objectives through specific programs based on legislation, the Competition Principles Agreement contains subclause 1(3) set out below:

> **Subclause 1(3)**
> "Without limiting the matters that may be taken into account, where this Agreement calls:
> **a)** for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
> **b)** for the merits or appropriateness of a particular policy or course of action to be determined; or
> **c)** for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> **d)** government legislation and policies relating to ecologically sustainable development;
> **e)** social welfare and equity considerations, including community service obligations;
> **f)** government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
> **g)** economic and regional development, including employment and investment growth;
> **h)** the interest of consumers generally or of a class of consumers;
> **i)** the competitiveness of Australian business; and
> **j)** the efficient allocation of resources."

There are several important considerations arising from the inclusion of subclause 1(3):

- it provides governments with a consistent approach to assessing whether the commitments to reform contained in the intergovernmental agreements threaten desired social objectives

- unlike applications for authorisations under Section 51 of the Trade Practices Act which rely on legal precedent, subclause 1(3) of the Competition Principles Agreement has no legal form. In effect there is no limitation placed upon the scope of or definitional aspects of 'public benefit', 'public interest', 'public', 'benefit', or 'interest'

- quite independently of the legislative review process, the present scheme of authorisation and notification under the Trade Practices Act, allows the Australian Competition and Consumer Commission to 'authorise' certain voluntary conduct where it assesses that the public benefit from the conduct in question exceeds the anti-competitive detriment

- there is no conflict between the application of subclause 1(3) after due and transparent consideration, and the present system of authorisations and notifications under the Trade Practices Act.

Again it is stressed that the interpretation of the terms 'public benefit', 'public interest' and their constituent words are not limited to case law precedent arising from actions under the Trade Practices Act.

Council considers itself free, if indeed not obliged, to take into full consideration the social and economic objectives of the Tasmanian Government's agenda for social equity, local government development and regional development.

As an agent of the Tasmanian Government, whose sovereign powers are limited to the State and Territories of Tasmania, Launceston City Council has no mandate or right to accept the Productivity's Commission assumption that its deliberations on public benefit should result in a "benefit" case from the point of view to the Australian economy as a whole. It is obliged to concentrate its investigation to maximise the benefit to Tasmania alone taking fully into account the legitimate social objectives of its two levels of elected government.

A state perspective within a national framework

Public benefit is very much a grey area as, at present, there are no clear and uniform definitions at the state or national level of what constitutes a public good or benefit. There are no legislated definitions.

It is important to remember that Tasmanian consumers face substantially different market conditions compared to the mainland population centres arising from:

- restricted access to large mainland suppliers of goods and services due to the cost or physical difficulty of transport across Bass Strait

- higher input costs associated with commodities sourced from the mainland
- absence of economies of scale arising from small market demands and production levels
- generally lower levels of income further disadvantaged by generally higher prices on everyday needs and staples
- a relative paucity of market intelligence services compared to the mainland and the difficulty of adapting mainland services to the Tasmanian context
- the economic predominance in terms of social and community well-being of individual industrial facilities or agricultural sectors which arises from a relatively small and narrow industrial and commercial base
- many small communities scattered over relatively complex distribution routes.
- Tasmania is Australia's most decentralised State with the majority of the population living outside the capital city
- Tasmania is suffering a major human resource dislocation as traditional areas of heavy industry disappear leaving a serious imbalance between accumulated and existing work force skills and reducing labour demands requiring substantially different skills.

Australia's population is concentrated in the mainland capitals (particularly Sydney, Melbourne, Brisbane, Adelaide and Perth) and these cities have complex and highly integrated market systems. They are stable to market disturbances because of their size, integration, and complexity. At the level of many small businesses there is true competition (albeit that, in the retail sector, competition is severely distorted by the economic and market preponderance of the "big 3" supermarket chains) . The individual consumer is relatively mobile given the diversity and density of work opportunities and the active market for housing purchase and sale.

It is not possible to extend policy and economic principles developed for such markets directly to Tasmania without risk of serious disturbance, instability and adverse regional economic impact. Given the close linkage of consumers' well-being in Tasmania to the well-being of their immediate social and economic community, adverse impacts at the regional level will immediately and seriously disadvantage the Tasmanian consumer. Furthermore the low price and demand for housing in Tasmania limits the mobility of its consumers with many excluded from (capital city) mainland work opportunities by the wide gap in capital values of real estate often exaggerated by an inability to sell their Tasmanian property within a reasonable timeframe.

It is clear that the development of the national competition policy has focused on the market situation applying to the bulk of Australia's population i.e. the mainland eastern seaboard and its capital cities. Indeed, its authors had a duty to do so. It is not likely that it has overly focused on the needs of small rural communities and less economically integrated towns as found in Tasmania.

Furthermore, it is unlikely to have taken into account the special needs of a State economy that is generally very narrowly based.

The Tasmanian rural economy is characterised by a combination of small business and a small number of large industries. Many of the larger industries tend to be either a duopoly or monopsony in terms of their purchased inputs such as labour or primary produce. The capital facilities of many of those large industries also tend to be old and, to some degree, technologically obsolete compared to mainland and overseas competitors.

Because of the decentralised nature and low population density of Tasmania, the small business sector operates more on the basis of single service providers, or a limited oligarchy rather than on the basis of true competition.

Effective competition depends on the longer term survival of at least two, and in an oligarchicly-based economy, a number of providers of similar or interchangeable services. It is not unreasonable to argue that there is generally a minimum sustainable size of both the service provider and the demand for that service for business to continue on a sustainable basis.

The principal problem in the Tasmanian context is the low population base. While consumers may demand competitive services, they may not represent a minimum sustainable market either individually or as a group. In such a situation, there exists a demand level at which competitive provision of services does not provide any economic benefit to consumers because any intrinsic benefit is outweighed by the economic inefficiencies arising from diseconomy of scale caused by unnecessary market fragmentation.

In such cases, consumer protection may be best provided by regulation rather than the apparent short term competitive advantages from a series of unavoidable and disruptive market failures. The recurring rise, failure and subsequent fall of under-resourced businesses attempting to supply services to inadequate demand does not represent competition; it represents economic mismanagement. At the social and personal level it represents tragedy.

In the absence of competition, a regime of sustainable service provision is possible albeit, at times, at a price marginally above that experienced in large economically diversified markets. Any marginal increase in price is reflective of economic diseconomy of scale rather than excess supplier surplus arising through absence of competition. This proposition is more than adequately demonstrated by the level of supermarket pricing in Tasmania compared to the mainland.

This does not mean that the consumer is safe from unscrupulous pricing practices from a business in a (near) monopoly situation in a small market. Indeed, in a geographically widely dispersed oligarchy there remains a severe

risk that undesirable business practices may arise through lack of (accessible) competition or market knowledge. While electronic commerce may overcome the barriers of isolation, many day to day services remain in the domain of localised delivery.

The existence of regulation, backed by a responsible ACCC, remains the consumer safeguard in this situation. The perception that there may be resulting economic inefficiencies arising from the existence of the regulation may be false and misleading. Any loss of consumer surplus in reality arises from the inherent diseconomy of scale of supplying a market demand which is smaller than the natural market unit measure.

Council is firmly of the view that there exists a market size and degree of sophistication below which unfettered application of competitive principles is not only unwarranted but is also counter productive. It believes that the Tasmanian economy cannot sustain the full application of the national competition policy. Council does not accept that Tasmania should be economically punished for its demography and relative isolation.

The Tasmanian economy may be physically isolated from the remainder of Australia, yet it is still very much part of, and affected by, the national economy. The behaviour and practices of the major retail chains, and the dominance of mainland producers heavily influence its fortunes. In a totally deregulated environment, within the national industry and economic contexts, it remains a very small tail on a very large dog.

Appendix 1

a) Public Health

Food Act

Description	Charge	Legislative Authority
Food Premises Registration	$60.00 or for business commencing after Jan 1 $30.00	Food Act 1998 Sec 55(2)(c)
Food Operator Licence		Food Act 1998 Sec 64(2)(c)
Food Renewal of-registration	$60.00 per annum	Food Act 1998 Sec 60(2)(c)
Food Operator Licence Renewal		Food Act 1998 Sec 69(2)(c)

Accreditation of Food Handler and Renewal of Food Handler Accreditation	Not yet charged as no guidelines have been set		Food Act 1998 Sec 73(2)(c) Sec78 (2)(c)
Temporary Food Premises Registration and Operator Licence	Charities 0-1 Week 1week -2 Mths 2-6 months 6-12 months	No Charge $15.00 $30.00 $60.00 $100.00	Food Act 1998 Sec 55(2)(c) And Food Act 1998 Sec 64(2)(c)

Public Health Act 1997

Description	Charge	Legislative Authority
Place of Assembly	$60.00	P/H Act 1997 Sec 75(2)(c)
Renewal of Place of Assembly Licence		P/H Act 1997 Sec 81(2)(c)
Public Health Risk Premises Registration	$30.00	P/H Act 1997 Sec 96(2)(c)
Public Health Risk Premises Re-registration		P/H Act 1997 Sec 101(2)(c)
Public Health Risk Operator Licence	$30.00	P/H Act 1997 Sec 105(2)(c)
Public Health Risk Operator Re-Licence		P/H Act 1997 Sec 110(2)(c)
Regulated System Registration	$30.00 per system on a premises and to a maximum of $90.00	P/H Act 1997 Sec 114(2)(c)
Regulated System Re-registration		P/H Act 1997 Sec 121(2)(c)
Supplier of Private Water Registration	$60.00	P/H Act 1997 Sec 134(2)(c)
Place of Assembly Specific Event	$60.00	P/H Act 1997 Sec 75(2)(c)

Plumbing Regulations

Description	Charge	Legislative Authority
Formal On-site Disposal Systems	$100.00	Plumbing Regulations Sec 8 (g)

Approval In Principle (OSDS)	$60.00	Local Government Act 1993 Sec 205
Rural Subdivision Assessment	$60.00 per lot	Local Government Act 1993 Sec 205

Other Fees

Description	**Charge**	**Legislative Authority**
Water/Food sample analysis	Cost of analysis plus $50.00 per hour + GST	Local Government Act 1993 Sec 205
Approval of Water Cartage Tanks	$50.00 per hour + GST	Local Government Act 1993 Sec 205
Hawkers Licence	$500.00	Local Government Act 1993 Sec 205
Inspection of Premises and reports	$50.00 per hour + GST	Local Government Act 1993 Sec 205
Removal of Abandoned Vehicles	$55.00	Contract arrangements

b) Planning and Building

Permit/licence	**Empowering Legislation**	**Empowering Regulation**	**Fee**
Building			
Requirement for building permit	Local Government (Building and Miscellaneous Provisions) Act 1993, Sec 45(1)	Building Regulations 1994 Reg 6; Sch 1 Part 1	
Evidence that fees have been paid		Building Regulations 1994 Reg 21(1)(k)	Set under Sec 205 LGA

Plumbing

Requirement for plumbing permit	Local Government (Building and Miscellaneous Provisions) Act 1993, Sec 50(1)	Plumbing Regulations 1994 Reg 4(1)	
Evidence that fees have been paid		Plumbing Regulations 1994 Reg 8(1)(g)	Set under Sec 205 LGA

Planning

Requirement for planning permit (including subdivision)	Land Use Planning and Approvals Act 1993 Sec 51(1A)	Set under Sec 205 LGA

Regulatory Impact Statements

Both the Food Act 1998 and the Public Health Act 1997 were the subject of Regulatory Impact Statements.

This obviously means that the financial impacts were public before the Acts came into force.

Authorities

Under the Public Health Act 1997 Sec 12 the Director may approve qualifications of an environmental health officer who is to be appointed under Sec 11 of the Act.

Food Act Sec 3
"Authorised Officer" means (b) an environmental health officer

Food Act Sec 19
(1) A council, within its municipal area it to –
    (a) take adequate measures to ensure that the provisions of this area are complied with;
(2) A council is to carry out any function under this Act in accordance with any relevant guidelines.

Local Government Act 1993 Sec 63(1)(a) allows council to appoint officers.