

**SUBMISSION FROM LAKE MACQUARIE CITY COUNCIL**  
**REVIEW OF SECTION 2D OF THE TRADE PRACTICES ACT 1974**

Section 51 of the Constitutions Act 1902 provides in part:-

1. There shall continue to be a system of local government for the state under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the state that are from time to time subject to that system of local government.
2. The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be determined by or in accordance with laws of the legislature.

The New South Wales Local Government Act 1993 clearly states at chapter 5, that all functions of council come from statute, either from the Local Government Act or another act.

Chapter 7 of this Act specifies the regulatory functions of council whilst the service functions of council are shown at chapter 6.

**SUBMISSION:**

That the present Section 2D of the Trade Practices Act 1974 be deleted and:

- A. Local government be recognised as an authority/agent of a State /Territory Government.
- B. Local government be exempted from the provisions of Part 1V of the Trade Practices Act by specific mention in Section 2C of the Trade Practices Act.

Having made the above submission the following comments are made:

1. All the functions of council are specified in and specifically authorised by an Act of Parliament or a Regulation made under such act.
2. The licensing decisions of council should be considered in four distinct categories:-
  - a) Decisions relating to regulatory functions.
  - b) Decisions relating to service functions.
  - c) Decisions made relating to the direct supply of goods or services to council.
  - d) Commercial undertakings of council.

**With regard to a) :-**

Council has little or no discretionary powers with regard to the licensing decisions made concerning the regulatory functions that it administers. Decisions are made on pre determined criteria established by external statutory bodies. These criteria result from an Act of Parliament or the Regulations pertaining to such Act. It is also difficult to conclude that these decisions represent business activities. This point of view would appear to be supported by the Rockdale Municipal Council case. (page 18 of issues paper.)

**With regard to b) :-**

The licensing decisions made concerning the service functions of council could be considered a grey area under the present Section 2D of the Trade Practices Act.

These functions entail for example:-

1. The setting of fees and charges for the use of council facilities. The setting of discretionary fees and charges could appear to represent a business activity which competes in the market place for a similar business activity. It is a fact that many fees and charges set by council are lower than the commercial rate. This however is in consideration of the community obligation placed on council to make such facilities available to the whole community. These functions are delegated to council under the Local Government Act and should be seen as such. Having said this, this view would appear to be supported by the Rockdale Municipal Council case and, the Section 51 decision made on tipping fees. (page 18 of issues paper.)

2. The rezoning of land could in some instances be construed as a restriction of trade.

e.g. A new L.E.P may rezone residential land to environmental protection land.

This has the effect of reducing the demand for such land and the market value of such land.

It should be remembered once again that rezoning decisions are made having regard to legislation, in this case, planning guidelines, threatened species legislation, the environmental protection Act etc.

This function should be considered a function of government not a trading activity.

From an overall perspective it is difficult to rationalise the fact that local government is considered to be a trading entity when the whole function of local government is subject to statute.

Council makes decisions on behalf of the community, in conjunction with the community. Draft decisions of council are placed on public display. Submissions on draft decisions are received and duly considered before a final decision is made. Decisions made by council have regard to the social, environmental and economic impact they will have on the community as a whole.

The plans finally adopted by council will be subject to approval by Planning NSW and will, if approved, be subject to statute.

It is suggested that National Competition Policy Legislation is an appropriate vehicle to challenge these decisions of council.

**With regard to c) :-**

Concerns regarding these decisions would appear to be directed toward:-

1. Local preference policy

The supply of direct goods and services to council is formalised. Not only are the Local Government Act Tenders Regulations applied but an internal quotations policy is strictly adhered to. This policy is enumerated below:-

Amounts of \$ 1.00 to \$ 2000.00 No quotations required.

Amounts of \$ 2001.00 to \$ 7000.00 3 verbal quotations required

Amounts of \$ 7000.00 to \$30000.00 3 written quotations required.

Amounts of \$30000.00 to \$99999.00 advertised for open quotation.

This policy could be seen, depending upon interpretation as either restricting trade or enhancing trade for amounts of less than \$30,000.00. Local trade could be favoured for convenience as well as local preference, yet it could be argued that the policy is allowing greater numbers of persons to quote thus enhancing trade.

Application of such policies vary greatly from council to council. Smaller councils justify the use of such policies on the grounds of community benefit. The practice is not prevalent in larger councils simply because of the availability of several suppliers of the same goods or services. It would be almost impossible to calculate the financial impact of such a policy for local government as a whole.

Expanded use of State Government Contracts, co-operative tenders organised by Regional Organisations of Council and equipment sharing arrangements between councils has gradually reduced the effect of local preference policies over the past few years. It is also reasonable to assume that some councils may not be aware of section 2D of the Trade Practices Act and that the legislation has had no effect on policy.

## 2. Internal Transactions

It is reasonable to suggest that councils will contract out works and services when there is a proven economic benefit or where it does not have the human resources, capital infrastructure, plant or expertise to carry out. Council has a community obligation with regard to employment. Council has a minimum staff complement number written into the Enterprise Agreement under which it operates. It is difficult to reconcile that there is a difference between a vertically integrated private firm and a council operating on a purchaser/ provider structure. Once again it is reasonable to assert that the functions of council that involve internal transactions are a function of government, not a trading activity. This is supported by the Rockdale Municipal Council case. (page 18 of issues paper)

The question arises as to at what point should the internal supply of goods and services not be subject to competition? For example, should Council get prices to supply all services? This is not the practice of private enterprise and the concept is absurd.

Should a dollar value be set on goods and services above which council has to seek outside prices? Once again the question arises, why is local government any different in this regard to private enterprise?

Council operates a business unit designated "Civilake". This consists of the provider section of engineering services, i.e. road construction and maintenance, parks construction and maintenance and building services. This business unit has tendered for and won in excess of \$9m against private enterprise over the last 4 years. This would indicate that internal transactions involving the above mentioned works are being done on a cost competitive basis and that the community is not being disadvantaged, and that no additional costs were incurred. The amount of works contracted out has increased over the past 10 years due to expanded services in waste recycling collection and an increased focus on environmental works. Council, in the former case, lacked the capital infrastructure and marketing expertise to carry out this function and in the latter, the qualified persons to conduct environmental testing and survey type works.

**With regard to d) : -**

Certain activities of councils are clearly business activities e.g. operation of abattoirs, airports, gas production and supply.

These activities are conducted for profit and compete directly with private enterprise. It is however suggested that complaints regarding the operations of these activities should be considered under National Competition Legislation and the provisions of Competitive Neutrality Guidelines.

**CONCLUSION:**

Local government is a legitimate tier of government constituted in Section 51 of the Constitutions Act, 1902. The functions of local government all come from Statute, either from the Local Government Act 1993 or another Act.

Local government should be recognised as an authority/agent of the State Government, not a trading entity.

Local government should be recognised and exempted in Section 2(c) of the Trade Practices Act 1974.

David Magann

Treasury Accountant

Lake Macquarie City Council