



Australian Competition & Consumer Commission

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Commissioner Helen Owens
Section 2D Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Commissioner Owens

REVIEW OF SECTION 2D OF THE *TRADE PRACTICES ACT 1974*

I refer to the Productivity Commission's Issues Paper dated 4 December 2001 and your request for submissions to the Productivity Commission's inquiry.

Section 2D of the TPA, exempting certain activities of local government from the operation of Part IV of the Act, specifies that:

Part IV does not apply to:

- (a) the refusal to grant, or the granting, suspension or variation of, licences (whether or not they are subject to conditions) by a local government body; or
- (b) a transaction involving only persons who are acting for the same local government body.

It defines "**licence**" to mean a licence that allows the licensee to supply goods or services; and defines "**local government body**" to mean a body established by or under a law of a State or Territory for the purposes of local government, other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.

The ACCC is of the view that, while section 2D does not appear to have any significant practical application, it should be retained for the reasons provided below.

EXECUTIVE OFFICE



The ACCC considers that it is unlikely that the presence of section 2D has, in reality, provided traditional non business local government activities with significant protection from the application of the TPA. The reason for this is that it is difficult to envisage many instances where the conduct described in section 2D would otherwise constitute a breach of the TPA given that in the main, local government activities have not been inconsistent with Part IV of the TPA.

A possible exception to this is the existence of local government policies of “buy local” and “preferred supplier status”. Such policies could fall to be measured against section 45 of the TPA. This section prohibits contracts, arrangements and understandings which have the purpose, effect or likely effect of substantially lessening competition. However, as identified in the Productivity Commission’s Issues Paper, such policies are unlikely to be protected from the operation of the Act by section 2D because the contracting decisions are often separated from the licensing decisions. The application of any local preference arrangement is therefore mainly relevant at the contracting rather than the licensing phase.

Given that section 2D appears to have little practical effect, a legitimate view is that it should be removed. However, removal of the section may have adverse consequences. Even if its removal would have little impact upon the true legal position, it may encourage litigation against local governments, which they would then be required to bear the cost of defending. Its existence thereby provides local government with additional certainty in relation to some of its activities. The ACCC understands from its contact with local government that certainty is an important issue to them, and indeed, was a motivation for including the section 2D exemption as part of the 1995 amendments to the Act.

The ACCC recognises that the Productivity Commission is required to take into account the principle that legislation or regulation which restricts competition should be retained only if the benefits to the community outweigh the costs and if the underlying objectives can be achieved only by restricting competition.

The ACCC is of the view that there are no significant, identifiable costs to the process of competition brought about by section 2D. As discussed above, it does not appear to have a practical effect, and cannot therefore, effect competition significantly.

There is a query raised in the Issues Paper as to whether local government bodies could also be regarded as ‘authorities’ of the States and Territories, so that section 2B would provide

similar protection as section 2D should the latter be abolished. It is the ACCC's view that section 2B could not, without amendment, encompass local government due to the definition of 'authority' in section 4 of the Act.

Yours sincerely

A handwritten signature in black ink, appearing to be 'B. Cassidy', written in a cursive style.

Brian Cassidy
Chief Executive Officer