SUBMISSION OF MASTER BUILDERS AUSTRALIA TO THE PRODUCTIVITY COMMISSION REVIEW OF SECTION 2D OF THE TRADE PRACTICES ACT 1974

Master Builders Australia welcomes the opportunity to make a short submission to the Commission. It notes that the Commission's terms of reference are narrow. At issue is whether s.2D should be repealed or, if it is retained, what, if any, amendments should be made to it.

In its Issues Paper dated December 2001, the Commission pointed out that s.2D was inserted in the Act to give local government bodies the same explicit Part IV exemptions from their licensing decisions and internal transactions as apply to Commonwealth and state and territory governments by virtue of s.2C.

The Commission also pointed out that s.2D would appear to be largely symbolic given that the enabling provision of s.51(1) would exempt these activities in any event because of the existence of state and territory Local Government Acts or equivalents.

Master Builders Australia strongly believes that, although it probably seemed like a good idea at the time, s.2D is misguided because it creates a separate, stand-alone, class of exception in the Act when it was originally intended that the exception only have Commonwealth validity to the extent to which it has state or territory validity. The distinction is a subtle but crucial one.

An essential pillar of democracy is that government is responsible to the people it governs. There are three tiers of government in Australia: local, state/territory and Commonwealth. The legal pillar for local government is state or territory level legislation, principally in the form of Local Government Acts or equivalents. Therefore, each individual state or territory is responsible for formulating the laws governing the local government bodies within their jurisdictions. It follows that those state or territory governments should be the only ones responsible to their populations for these laws.

The danger of inserting provisions such as s.2D in Commonwealth legislation is that it creates a superfluous tier of direct government responsibility at the Commonwealth level when the matter, as reflected in the enabling terminology of s.51(1), should be restricted to state/territory government responsibility.

As it happens, Master Builders Australia has recently engaged in correspondence with the NSW Minister for Local Government concerning the very poor standard of conduct of tenders by NSW regional councils. The complaints fall into two broad categories.

The first is the failure to disclose to tenderers the existence of a local preference policy so that councils obtain cost-free scoping bids from non-local contractors against which to gauge the competitiveness of tenders received from local contractors.

The second is the failure to recognise councils' conflict of interests when evaluating tenders when one of the tendering contractors is their own in-house operation.

Contrary to the Commission's observation on page 15 of its Issues Paper that "increased pressure on councils to deliver value for money services appears to have reduced the use of local preference policies", Master Builders Australia regularly receives complaints from members that these policies still actively exist but at the cost of what appears to be the subversion of the tender process to achieve the desired outcome.

Master Builders Australia strongly contends that it is precisely because whether or not it is successful in improving the standard of tendering practices of councils at the state level is an immaterial consideration for the purposes of the Commission's Commonwealth-level review of s.2D that provisions such as s. 2D cause bureaucratic blockages at the Commonwealth level which inhibit the speed of effecting change at the state/territory government level.

At issue is the principle of confining governmental responsibility to where it belongs to ensure that dealing with government is made as efficient as possible.

Therefore, the regional council issue serves as a salient example of what Master Builders Australia believes is a crucial but largely unrecognised efficiency consideration when dealing with government: that any citizen or representative body is entitled to deal only with that tier of government responsible for implementing the matters about which s/he or it is complaining.

Statutory provisions such as s.2D, which unintentionally make the Commonwealth government an additional, sleeping, party to matters of which it neither has an interest or concern, actively contributes to delays in achieving reforms because they require negotiating not only with the state or territory government concerned but also with the Commonwealth government which has no active interest in the matters of concern and therefore in resolving them by amending its own legislation accordingly – an outcome which is mandatory if reform within the state/territory is to be achieved.

It is Master Builders Australia's view that this is why enabling provisions such as s.51(1) were drafted in the manner they were in the first place and why they should not be sidestepped by provisions such as s.2D now.

For this reason alone, Master Builders submits that there is compelling reason to repeal s.2D.

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