Submission to the
PRODUCTIVITY COMMITTEE

Review of Section 2D of the Trade Practices Act 1.974

Local Government and
Shires Associations of NSW

Introduction

The Associations represent the interests of all 172 general purpose councils, the 13 Divisional Aboriginal Land Councils and the majority of specific purpose county councils in NSW.

The Associations welcome this opportunity to make this submission in response to the Review of Section 2D of the Trade Practices Act (TPA) 1974. Section 2D exempts certain activities of Local Government from Part IV of the Act. Specifically, it provides that Part IV does not apply to:

(a) the refusal to grant, or the granting, suspension or variation of, licenses (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.

Local Government in NSW is established under the Local Government Act 1993. This Act conveys a wide range of powers, functions and responsibilities to Local Government, both directly and through other Acts of the NSW Government. While Local Government exists under State legislation, it cannot be regarded as an 'authority' of the State. It occupies a unique position as a democratically elected third sphere of government.

The existence of Section 2D provides specific recognition of Local Governments status as a legitimate sphere of government. For this and other reasons, the Associations maintain that Section 2D should be retained and not subsumed into Section 2C (which provides exemptions to State and Territory Governments) or removed in favor of alternative avenues of recourse.

The Associations also argue that Section 2D should be amended so that it provides Local Government with the same protection as provided to State and Territory Governments under Section 2C.

The exemption as it now stands applies only to the 172 general purpose councils represented by the Associations. Section 2D should also be amended to include the 20 specific purpose 'county' councils that also exist under the Local Government Act in NSW. While these councils exist for specific purposes like the eradication of weeds, water supply and flood mitigation, they are Local Government bodies whose functions parallel those of councils. Like general purpose councils, they are responsible for a range of statutory regulatory functions.

The Associations responses to the questions raised in the issues paper are provided below.

Responses

Has the significance of local preference policies at local government level declined since the Industry Commission's survey? If so, what factors have led to the decline? How much local activity and employment would be at risk in the absence of local preferences?

Anecdotal evidence suggests that the significance of local preference policies in Local Government purchasing has been in decline. A comprehensive survey would need to be undertaken to gauge the full extent of the decline. The decline also mirrors the demise of local (state) preference policies at the State Government level.

The decline appears to have been driven by a number of factors. The discussion paper has already identified the major factor – the pressure on councils to deliver value for money. Other factors may include concerns about potential exposure to Part IV of the TPA, rationalisation of service delivery by suppliers and greater reliance on centralised purchasing arrangements, for example, by supplies under State Government contract and cooperative tenders organised by Regional Organisations of Councils.

It is also unlikely that local preference ever constituted a large proportion of overall Local Government purchasing expenditure. The practice has not been common in urban councils or larger regional councils, it has been largely constrained to smaller rural councils. Further, many major purchases would not be commonly available locally, for example, large road making plant and computer equipment.

It should be noted that local preference policies are applied as part of a council's tendering procedures, where Local Government has the power to acquire or sell goods, real property and services in the same way as a person or corporation. Contracting and tendering practices are subject to the NSW Local Government Act (1993) and the Local Government (Tendering) Regulation 1999. These impose tendering requirements for contracts over $100,000, which are designed to ensure probity and transparency in the use of public monies.

Under clause 19 of the Local Government (Tendering) Regulation a council may accept a tender that is "most advantageous" to it. This allows a local supplier to be chosen on a case by case basis, even if more expensive, based on the weighting of other factors which might make it "most advantageous".

It is questionable whether a contract entered into through a tender process or otherwise is a 'licence' under Section 2D. The contract does not allow a person to supply goods or services generally, but merely accepts the supply of goods/services specifically to the council on certain conditions.

Even though local preference policies may have little significance in Local Government purchasing from a statewide perspective, the absence of such policies could have significant impacts in smaller communities. Councils are the major economic entity in many regional communities. They are frequently the major employer and the major customer for locally

supplied goods and services. It is important that the option for local preference policies is maintained under these circumstances.

What is the rationale for exempting the licensing decisions of local governments from Part IV of the TPA? Does it merely clarify that licensing decisions are not matters of trade and commerce and therefore not within the purview of Part IV, or does it reflect the need to address a specific practical concern? In this latter regard, does the exemption have any ramifications for the capacity of local government bodies to give preference to local suppliers when contracting out the delivery of services and, if so, why?

There has been considerable discussion about the definition of 'licence'. In NSW Local Government context we are generally talking about 'approvals' or 'permits'. These are generally regulatory devices applied to protect the public interest, not restrictions on trade or commerce.

The discussion paper accurately identifies their purpose:

"Governments impose standards and conditions on the supply of many goods and services. Appropriate product standards can provide significant benefits to the community through protecting consumers from poor quality products, promoting public health and safety or enhancing the environment." (Discussion Paper p15.)

In this respect, it would seem that Section 2D serves the purpose of clarifying that licensing decisions of Local Government do not constitute trade or commerce. The paper notes that Section 2C serves the same purpose for the corresponding decisions of State and Territory Governments.

Even though it is suggested that the explicit exemption may be unnecessary given ACCC advice that such licensing decisions could not be challenged under Part IV of the TPA, it is recommended that a specific exemption be retained in the interests of clarity.

From the Associations view, the exemption should not have any ramifications for local preference schemes. As noted in the discussion paper, the licensing of goods and services providers (i.e. provision of an approval or permit) is quite distinct from the contracting or tendering process.

Is the rationale for exempting the internal transactions of local governments from exposure to Part IV of the TPA simply to clarify an accepted legal principle? Does the exemption put local government entities on the same footing in this regard as private firms, or are there still differences in treatment?

The discussion paper again appears to provide its own answers to the questions raised above.

From the Associations perspective the exemption simply makes it clear that the accepted legal principle applies to the internal transactions of Local Government and this places Local Government on the same footing as private firms and the Commonwealth and State Governments. The principle being that "it is not legally possible for an individual entity to carry on business with itself", as noted in the discussion paper.

It is clear that the exemption does not apply to transactions between councils or to transactions between a council and a corporation wholly owned by council, where the latter is a separate legal entity.

It is suggested that the explicit exemption may be unnecessary as legal precedent would prevent such transactions being challenged under Part IV of the TPA. Again, the Associations recommend that a specific exemption be retained in the interests of clarity and certainty.

What are the main benefits and costs of the Section 2D exemptions? Do the benefits mainly derive from formal recognition of local government in this part of the TPA and consistency in regulatory treatment across levels of government? Would any particular class of local government licensing decision or internal transaction be at risk from actions under Part IV in the absence of Section 2D?

The costs associated with the Section 2D exemptions to Local Government appear to be negligible. The benefits derive from formal and explicit recognition of Local Government as a legitimate sphere of government. From a more pragmatic point of view, it also helps avoid costly and unnecessary judicial processes.

While providing recognition of Local Government as a sphere of government, Section 2D fails to place Local Government on the same footing as other spheres of government. The Associations support the Australian Local Government Association (ALGA) submission in noting that the exemption available to Local Government under Section 2D is not as extensive as Section 2C. Section 2C covers the Commonwealth, State and Territory Governments includes the collection of taxes, levies or licence fees, and the acquisition of primary products by a government body under legislation. Exemptions that apply to Commonwealth, State and Territory activities should also apply to Local Government activities.

In addition, under Sections 2A and 2B, the Commonwealth and the States and Territories (but not their authorities) are immune from prosecution or pecuniary penalties that might otherwise arise in relation to breaches of various sections of the TPA, including Part IV. There is no similar exemption for Local Government.

In view of this inconsistency the Associations support the recommend that Section 2D be extended (or a new section created) to ensure the same provisions as contained within Sections 2A and 2B are provided to Local Government.

Does Section 2D have any unintended consequences such as discouraging local governments from contracting out service delivery, or encouraging or protecting anti-competitive behavior by them?

The Associations are not aware of any evidence suggesting Section 2D has discouraged councils from contracting out service delivery. The notional advantages that may be conferred by the exemption of internal transactions are inconsequential to decisions to contract out service delivery. These decisions are typically driven by cost, efficiency, sustainability and service quality considerations. This accounts for the increasing level of contracting out by NSW

councils. It should also be noted that NSW councils were actively engaged in contracting out prior to the Trade Practices Act 1974 and well before the emergence of National Competition Policy.

Other legitimate factors may come into account within the context making the 'most advantageous' decision. For example, councils in rural and remote areas may apply weightings to local employment impacts and potential negative impacts arising from the loss of skills and resources to the area. The latter is important when it comes to a councils capacity to respond to an emergency or step in where a contractor fails. These considerations may result in having the service maintained in house, but they are not a consequence of Section 2D.

Is there any evidence that parties adversely affected by particular local government licensing decisions or internal transactions would have sought to take action under Part IV but for the existence of Section 2D? Given the precedents established by the Rockdale Council and subsequent related cases, what would have been the basis for such actions? Could underlying concerns have been addressed through other avenues — for example, recourse to competitive neutrality complaints mechanisms?

The Associations are not aware of any specific examples where parties adversely affected by Local Government licensing decisions have been dissuaded from taking action by the existence of Section 2D.

In most conceivable examples, alternative remedies would be available. In regards to NSW we are mainly referring to 'approvals' and 'permits' as opposed to 'licences. In many cases recourse would be available through the State Acts under which they were issued. For example, the NSW Environmental Planning and Assessment Act. Other issues may be addressed by the established competitive neutrality complaints mechanisms.

If Section 2D is having a practical impact, are the resulting benefits sufficient to outweigh any associated costs?

As noted earlier, there do not appear to be any significant costs associated with Section 2D. The primary benefits are clarity and certainty, helping to ensure that councils are not exposed to costly and unnecessary litigation in carrying out their legitimate statutory functions. These are statutory functions designed to protect the public interest.

Are there modifications that could be made to Section 2D that would increase its benefits relative to the costs? For example, is there a need to better prescribe what conduct is covered by the section? Are there alternative approaches that would offer a better overall outcome for the community while still meeting the objectives of the current arrangements?

Section 2D would be enhanced by amendments that make the exemptions applicable to Local Government consistent with those applying to State and Territory Governments under Section 2C.

The issues paper raises the potential alternatives of relying on the authorisations of the ACCC or judicial processes as an alternative to legislative exemption. The Associations do not consider these to be viable alternatives.

The conduct in question may be carried out by all 192 councils (172 general purpose and 20 specific purpose councils) in NSW, which would require time consuming co-ordination and administration at all levels. The conduct may vary slightly between councils, requiring individual assessment of each council. Secondly, the cost to a council of resourcing an application may be prohibitive, particularly for smaller councils. Third, it does not promote consistency within Local Government, an important issue for councils and the community alike in relation to law enforcement.

Another issue that needs to be addressed is the status of 'county councils'. The exemption as it now stands applies only to the 172 general purpose councils represented by the Associations. Section 2D should also be amended to include the 20 specific purpose 'county' councils that also exist under the Local Government Act in NSW. While these councils exist for specific purposes like the eradication of weeds, water supply and flood mitigation, they are Local Government bodies whose functions parallel those of councils. Like general purpose councils, they are responsible for a range of statutory functions that involve issuance of approvals and permits.

Could local government bodies be regarded as 'authorities' of the States and Section Territories, meaning that Section 2C would provide similar protection to them as 2D were the latter to be abolished? Or would explicit reference to local government in Section 2C be required for it to operate in place of Section 2D?

Local Government is not and should not be regarded under State legislation as an 'authority' of the State. It occupies a unique position as a democratically elected third sphere of government under State legislation. The Associations seek consistency with Section 2C but this should be dealt with by amending the provisions dealing specifically with Local Government in Section 2D.

An explicit reference to Local Government would be required in Section 2C if it were to operate in place of Section 2D.

If the judgement is that Section 2D is not having any practical impact, what are the arguments for either retaining it or removing it?

The Associations maintain that Section 2D is having a practical and positive impact, even if this is only in terms of clarity and certainty.