



Western Australian
Local Government Association

SUBMISSION

TO THE

REVIEW OF SECTION 2D

OF THE

TRADE PRACTICES ACT 1974

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Introduction

The Productivity Commission in response to a referral from the Assistant Treasurer has initiated an Inquiry into Section 2D of the *Trades Practices Act 1974 (TPA)*. Section 2D was inserted into the TPA to exempt the licensing decisions and internal transactions of Local government bodies from exposure to Part IV of the TPA.

This submission has been prepared by the Western Australian Local Government Association (the Association) in response to the Public Inquiry. The Association, which has an elected executive of 25 Elected Councillors, is a member driven body representing 143 Local Governments in Western Australia.

Through this process the Association is able to speak on behalf of its members and it is on this basis that we make this submission.

General Commentary

Section 2D of the TPA, exempting certain activities of local government from 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.

The use of licences and permits is the primary mechanism Local Government utilises to ensure the public interest where markets fail to do so. Local communities rely on their Local Government to keep the best interests of their constituency upper most in the Local Governments mind. Where it can Local Government encourages competition. Competition, however, must be conducted in a market where consumers are satisfied the goods or services being provided meets a certain minimum standard.

Bearing the above comment in mind it therefore follows that the exemption of certain activities of Local Government from Part IV of the Act ensures that decisions are made on the basis of the public interest within the community. Removal of the exemption to Local Government's would undermine it's ability to preserve standards and conditions which, have been established to protect the community.

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?

Local preference policies in the area of purchasing in Local Government in Western Australia are based on powers contained within the Local Government Act 1995. As a result only non metropolitan local governments have some flexibility to determine formal

purchase preference arrangements. The overarching principles are that non metropolitan Local Governments can develop a Regional Preference Policy within the constraints of the provisions of the Local Government Act. This limits the amount of preference that can be provided and is only available to businesses within the local government concerned. The policy before it is implemented must be advertised for community comment

It is recognised that within the rural environment Local Governments are a substantial institution and can be the largest employer. As a result many activities of the Local Government have a direct impact on the fundamental operation of the community.

Whilst it is difficult to comment with any degree of accuracy on the significance of local preference policies on the level of employment in the community, it is reasonable to assume. that in pure economic terms circulating money into the local economy will have a positive multiplier effect. Statistics aside it is an important policy to many Local Governments to give a degree of preference to the local suppliers.

Many Local Governments in rural areas have suffered significant downturn in employment and then in turn on their economy, through the structural reform process that has been initiated by successive Governments both State and Federal. This has seen many jobs lost to the rural sector and also causes residents wishing to transact business to do so in another location with the consequence that business is lost to the local community.

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?

The rationale for exempting the licensing decisions of Local Government from Part IV of the TPA is to ensure licensees supply goods and services to agreed minimum community standards and conditions. Such standards protect the community, individuals and business know they will be protected to some extent from the supply of poor quality products or services.

It is important that the community can rely on the quality of services provided by various organisations who are required to deliver their service under some form of license. Examples of this include restaurants (ie eating houses) and buildings (license for construction of dwellings and other buildings).

On balance it is likely that the exemption for the licensing decisions of Local Government will have little impact on the capacity of Local Governments to operate local preference regimes. In many cases the licensing of providers by Local Governments is usually separated from the process of contracting.

It is however important to keep the exemption in case licensing and contracting processes are connected as this could be the case in smaller Local Governments. The exemption would protect any local preference policy attaching to those contracts.

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 Local Government Act 1995 (s3.60) precludes any Local Government from forming or acquiring a controlling interest in an incorporated company or any other body corporate excepting a duly constituted regional council, unless it is permitted to do so by regulation.

It therefore follows that no Local Government can operate an incorporated business but having stated that many Local Governments operate internal business units under the control and management of the Council. In other words there is not a separate entity established.

The questions arises to what the definition of internal transaction is in the context of the Part IV of the TPA..

The Association believes reference to internal transactions should be maintained, as there is a preference for clarity via legislation rather than have it tested through the judicial system and then based on the activities of private firms.

What are the main benefits and costs of the Section 2D exemptions?

Both individuals and business know that they will be protected to some extent from the provision of poor quality products or services.

As previously mentioned, the provision of licences and permits is the primary mechanism Local Government utilises to ensure the public interest where markets fail to do so. The major benefit arises as a result of improved community confidence in the standards of goods and services being supplied to them. Suppliers also take a degree of comfort in knowing that a competitor cannot enter the market with an inferior product.

In this regard, the Association does not believe the imposition of minimum standards reduces competition. Local Government welcomes competition between suppliers on the basis of price and a higher quality of good and service

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?

Local Government is the third sphere of Government in Australia, Local Government should not be treated in any different way to the other two spheres. Exemptions that apply to Commonwealth, State and Territory activities should also apply to Local Government activities.

Currently there is an inconsistency. The exemption available to Local Government under Section 2D is not as extensive as Section 2C. Section 2C which 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.

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. The Association believes a consistent approach should be taken within the TPA, and recommend that either:

- 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; or
- Section 2D be abolished and Local Government be included in Sections 2A, 2B and 2C.

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

The Association is not aware of any unintended consequences that are such as to discourage Local Government from contracting out service delivery, or encouraging or protecting anti-competitive behaviour by them.

Local Government views competitive tendering positively. It is a mechanism utilised by Local Government to benchmark activities and reduce costs. However, some regard must be given by Local Government to the potential loss of intellectual property as well as the negative impact arising from the loss of skills and resources that could reduce their capacity to respond to an emergency or step in if a contractor fails.

Local Government is subject to the agreements underpinning National Competition Policy (NCP). As a result Local Government must balance the public interest of local preference policies against efficiencies arising from contracting out services. Even though it is a part

of the NCP philosophy, in Western Australia the State Government denies any part of the dividend that it receives for being part of this policy program.

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?

The Association is unaware of any parties that have been 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 Association is not aware of other avenues that could be used to address these underlying concerns.

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

The Association believes Section 2D is having a practical impact. Section 2D allows Local Government to undertake its role of protecting the public interest via the provision of licences and permits. It also clarifies the role and powers Local Government without having to go to a costly judicial process.

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?

As mentioned earlier there is a need to provide the same protection for Local Government as there is for other levels of Government with the consequence that Section 2D should be repealed and Local Government included in Sections 2A, 2B and 2C..

However if it believed that Section 2D should remain in its current format, as Local Government activities operate within a dynamic changing environment due to community demand. In respect to the legislation it is felt that it would be difficult to draft up detailed or prescriptive legislation that would remain relevant.

Could local government bodies be regarded as ‘authorities’ of the States and Territories, meaning that Section 2C would provide similar protection to them as Section 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 a democratically elected sphere of Government and should not be referred to as an “authority” of the State. 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 Association believes that Section 2D is having a practical impact.

Conclusion

Local Government as an equal level of government, with Commonwealth, State and Territory should be treated in an equitable fashion and if any exemption applies to activities then it should equally apply to Local Government.

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 bodies which is considered important to the ongoing development of Local Government.