

The Australian Local Government Association



**Submission to the Productivity Commission
Inquiry into Section 2D of the *Trade Practices
Act 1974***

Introduction to the Australian Local Government Association (ALGA)

1. This submission has been prepared by the Australian Local Government Association (ALGA) in response to the public inquiry undertaken by the Productivity Commission of Section 2D of the *Trade Practices Act (TPA) 1974*.
2. ALGA is constituted as a federation of the peak Local Government Associations (LGA's) in the six States, and the Northern Territory as well as the government of the Australian Capital Territory.
3. ALGA's national executive comprises elected Councillors nominated by the associations and two members of the ACT Government, who collectively determine ALGA policies. Each year, ALGA convenes the National General Assembly (GA) of Local Government. All local governing bodies can participate in order to consider national policy directions and convey their views to the national executive.
4. Through these processes, ALGA is able to speak on national issues for the 698 Local Governing Bodies throughout Australia and the local communities they represent.

General Information on the ALGA submission

5. On 2 October 2001 the Assistant Treasurer announced the Productivity Commission would conduct an inquiry into Section 2D of the *Trade Practices Act 1974* which exempts the licensing decisions and internal transactions of Local Government bodies from Part IV of the Act.
6. Section 2D of the *Trade Practices Act* (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.

7. This inquiry into the Section 2D exemptions for Local Government is occurring in accordance with that 'legislation review process'. Specifically, the Government has asked the Commission to examine:
 - the objectives of the exemptions and the nature and magnitude of the problems that they seek to address;
 - the extent to which the exemptions restrict competition;
 - the benefits, costs and overall effects of the exemptions; and
 - any alternatives to the exemptions, including non-legislative approaches.
8. In undertaking its assessments, the Commission has been directed to take account of various matters, including:
 - 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. (This same

‘negative onus of proof’ requirement underlies all reviews under the legislation review process);

- the likely impacts of changes to the current arrangements on specific industry sectors and communities; and
- the need to promote consistency in regulatory arrangements, particularly in regard to the treatment of the licensing decisions and internal transactions of the Commonwealth, the States and Territories and local government bodies.

9. The Commission is to report to the Government by 2 October 2002.

The Role of Local Government in Statutory Licensing

10. Statutory licensing by Local Government (via the provision of licences and permits) is a regulatory mechanism by which Local Government (and for that matter State, Territory and Commonwealth Governments) protects the public interest of the local community.
11. Local Government strongly believes the treatment of the licensing decisions and internal transactions of the Commonwealth, the States and Territories and local government bodies (LGB's) should be consistent.
12. The exemption to statutory licensing decisions by Local Government provides significant benefits to the community.
13. Removal of the exemption would introduce an inconsistency in the treatment of transactions conducted by the spheres of Government. It would also introduce a level of uncertainty into statutory licensing decision by Local Government.
14. The anti competitive effect of statutory licensing is negligible. The setting of minimal standards and conditions provides a sense of confidence amongst consumers. As a result, increased confidence encourages consumers, enlarging the market and enhancing competition.
15. Competition, should be conducted in a market where consumers are satisfied the good, or service being supplied meets an agreed minimum standard. Indirectly, Local Government (via statutory licensing) informs the purchasing public that a good or service is of a particular standard.
16. The exemption of certain activities of Local Government from Part IV of the TPA ensures decisions on statutory licensing are made on the basis of the public interest.

17. ALGA believes removal of the exemption to Local Government may divert resources of Local Government towards dealing with spurious legal arguments that a particular licensing decision has somehow contravened the competition principles within the TPA.
18. The removal of the exemption would also undermine Local Government's ability to protect the community. Local Government would no longer be able to preserve standards and conditions putting the community at risk.
19. LGB's are entities in their own right. Legislation impacting on the spheres of Government must recognise Local Government as an equal partner, as a result ALGA recommends:
- Section 2D be extended (or a new section created) to ensure similar 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.

Response to the Productivity Commission Discussion Paper

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?

20. Activities undertaken by Local Government are based on general competency powers contained within each State Act. As a result LGB's are free to determine their own processes in regard to local preference policies.
21. Local preference policies have a greater emphasis in rural LGB's rather than metropolitan ones. In many rural areas LGB's are the most substantial institution and the largest employer as a result the activities of an LGB have quite a direct impact on the fundamental operation of the community.
22. ALGA cannot comment with any degree of accuracy on the significance of local preference policies and their impact on local activity employment. Employment levels in Local Government have fallen over the past few years (147,700 in Feb 97 to 139,400 in Feb 2000)¹. ALGA believes these reductions have resulted more from continuing structural reform within Local Government.

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

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1. ¹ National Office of Local Government, *1999-2000 Report on the Operation of the Local Government (Financial Assistance) Act 1995* p42-43

preference to local suppliers when contracting out the delivery of services and, if so, why?

23. The rationale for exempting licensing decisions of Local Government from Part IV of the TPA is to ensure licencees supply goods and services to agreed minimum community standards and conditions. Such standards protect the community (individuals and businesses) from the supply of poor quality products or services.
24. Exemption for statutory licensing decisions of Local Government will have little impact on the capacity of LGB's to operate local preference regimes. In many cases the licensing of providers by LGB's is usually separated from the process of contracting.
25. However, it is important to keep the exemption in case licensing and contracting processes are connected, this would particularly be the case in smaller LGB's. The exemption would protect an LGB from legal action arising from a local preference policy attached to contract arrangements.

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?

26. LGB's have only recently been able to incorporate business units on the same basis as the other two spheres of Government (in regards to income tax exemptions). As a result ALGA expects the rate at which Local Government Business Enterprises incorporate will increase in the near future.
27. ALGA believes reference to internal transactions should be maintained and extended to transactions conducted between corporate bodies belonging to Local Government and Local Government.
28. There is a legal ambiguity regarding the transactions conducted between an LGB and a corporate entity owned by the LGB. Transactions undertaken between these two

bodies are not covered under the provisions of Section 2D. Including such transactions would place those transactions on a similar footing to transactions within vertically integrated private firms. These transactions generally fall outside the purview of Part IV of the TPA

29. There is a preference for clarity via legislation rather than have it tested a judicial interpretation based on the activities of private firms.

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

30. Individuals and business know they are protected to an extent from the provision of poor quality products or services.
31. Statutory licensing via the provision licences and permits is the primary mechanism by which Local Government can protect the community. The major benefit arises as a result of improved community confidence in the standards of goods and services being supplied to them. Suppliers can also take a degree of comfort in knowing they will not be undermined by a competitor entering the market with an inferior product.
32. ALGA 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?

33. 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.
34. 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.

35. 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. A consistent approach should be taken within the act. ALGA 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?

36. ALGA does not believe Section 2D has any unintended consequences such as discouraging LGB's from contracting out service delivery, or encouraging or protecting anti-competitive behaviour by them.

37. Local Government views competitive tendering positively. It is a mechanism utilised by Local Government to benchmark operational activities and reduce costs. However, some regard must be given by LGB's to 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.

38. Local Government is subject to the agreements underpinning National Competition Policy (NCP). Therefore Local Government must balance the public interest of local preference policies against the efficiencies that may arise from contracting out services.

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?

39. ALGA are 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?

40. Statutory licensing arrangements may have aggrieved some parties. ALGA believe the existence of an exemption has ‘filtered’ frivolous and far fetched claims from more serious ones. These could be addressed through the competitive neutrality complaint mechanism.

41. Removing the exemption may encourage frivolous actions being undertaken against Local Government under the auspices of Part IV of the TPA.

42. ALGA recommends some form of exemption remain in order to ensure a filtering mechanism remains.

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

43. ALGA believes Section 2D is having a practical impact allowing 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 resort 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?

44. ALGA believe an exemption to Local Government statutory licensing decisions should remain. Local Government activities are dynamic changing as a result of community demand as well as Commonwealth, State and Territory legislation. There would be difficulties in drafting 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?

45. 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?

46. ALGA believe Section 2D is having a practical impact.