



21 February 2002

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

Dear Ms Owens

Local Government Association of Queensland – *Section 2D Trade Practices Act 1974* Inquiry Submission

The Association welcomes the opportunity to make a submission to the Commission on the inquiry into Section 2D of the *Trade Practices Act 1974*.

The Association believes that the case for the retention of the existing section is overwhelming based on the following factors:

- The section was originally inserted to ensure that Councils would not have to deal with legal arguments that statutory licensing decisions may contravene the Competition Code.
- The section therefore does not, and never has, cut significantly across the operation of the Competition Code.
- As nothing has changed since 1995 when the section was introduced, retaining the exemption as a “matter of caution” is desirable.
- The anti-competitive aspects of local government licensing legislation have already been dealt with under their proper heading in terms of the Competition Principles Agreement, that is, under the legislative review of local laws, which was carried out in 1997/98. Section 2D, which makes it clear that the issue is a legislative review matter, rather than a competitive conduct matter, ensures that the integrity and outcomes of that process are maintained, and that NCP issues which have already been finally resolved under their proper NCP heading are not unnecessarily re-opened on some new legal basis under a different NCP heading.

The one change to section 2D, which is desirable is to clarify that transactions between local governments and Local Government Owned Corporations or other related entities are treated in exactly the same way as transactions between related corporations in the private sector. It is possible to argue that the existing section 2D exemption for “in-house” transactions does not include related corporation transactions. This was never a policy intent of the provision. Given that the purpose of section 2D is to give certainty by expressly clarifying the existing law as it would apply in any event, it should be extended to clarify that related corporation transactions for a local government are treated in exactly the same way as related corporation transactions in the private sector.

Response to Issues Paper questions:

Dealing with each of the questions posed by the issues paper:-

- (Page 11): The Association does not believe that there are any grey areas in relation to the definition of “licensing decision”.
- (Page 11): Similarly, the Association sees no ambiguity in the definition of “internal transaction”. In the Queensland local government context, there is a very clear distinction between “transactions” involving different branches of the same local government (including commercialised business units) on the one hand, and transactions between the Council and external entities (including a Local Government Owned Corporations or other corporate entity owned by the Council) on the other. Accordingly, we see no ambiguity or uncertainty in the existing legislation.
- (Page 12): The Association questions the suggestion that section 51 is “another alternative” to section 2D.

The two sections accordingly serve quite different functions, and we believe that as section 51 deals with a different subject matter to section 2D, is not a possible alternative to section 2D.

- (Page 15): Section 2D has no impact on the issue of local preference. The Competition Code itself does not impact on the issue of local preference and the matter should remain for regulation by State governments in their respective Local Government Acts.
- (Page 16): The rationale for exempting licensing decisions is nothing more than a matter of express clarification, as a “matter of caution”, that licensing decisions are not matters of trade and commerce and are therefore inherently outside the scope of the Competition Code.
- (Page 17): The rationale for exempting internal transactions of local government again does no more than clarify an accepted legal principle. However, as noted above, the advent of corporatised business units as part of the competitive neutrality reforms means that the narrowness of the section 2D exemption puts local governments at a potential disadvantage as compared to private sector firms. For the reasons given above, the existing exemption should be extended to make it clear that transactions between a local government and a related body corporate are on exactly the same footing, for Competition Code purposes, as transactions between related corporations in the private sector.
- (Page 19): The main benefit of the section 2D exemption is, as suggested in the issues paper, to give local governments legal certainty that particular matters which are inherently outside the scope of the Competition Code in any event would not be involved in the operation of the Code through legal argument. The issue about consistency with the treatment of State government activities is also relevant.
- (Page 20): The Association does not believe that there is any evidence that section 2D is having a practical impact on markets or competition. Particularly in the Queensland context where local laws are required to explicitly state their public interest objectives, and where any anti-competitive provisions are subject to rigorous scrutiny before a local law is made that the benefits of enabling local governments to regulate legitimate public health and safety concerns through a licensing mechanism (where that is the appropriate mechanism) far outweigh any anti-competitive impact of such laws.
- (Page 20): The Association does not see a need for any changes to section 2D except, as noted above, to change the wording about internal transactions to make it clear that local government transactions with related body corporate are to be treated in exactly the same way as private sector transactions between related bodies corporate. Given that the legislation exists merely to clarify and confirm what would be the existing legal position in any event, we do not believe that there are any alternative approaches, which would offer a better overall outcome.

Conclusion

Section 2D, of course, has nothing to do with the detail of individual regulation by particular local laws. It is an overarching provision, which ensures that the issue about statutory regulation is kept totally distinct and separate from the competitive conduct rules under the Trade Practices Act. This is the legally and factually correct approach to the issue, and the clear recognition and maintenance of that separation is the primary value of section 2D. It is a buffer against those who might otherwise seek to apply improper pressure to local government statutory decision-making by raising the spectre of Trade Practices Act legal sanctions.

The Association supports the maintenance of this section for the reasons outlined above.

The Association again thanks you for the opportunity to make a submission on the review of section 2D of the *Trade Practices Act 1974*.

The Association's contact on this matter is **Corrin Bischoff** on **07 3000 2242**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G Hallam', with a stylized flourish at the end.

GREG HALLAM PSM
EXECUTIVE DIRECTOR
gjh:cb