

**Submission to Productivity Commission
Legislation Review of Section 2D of the
Trade Practices Act 1974
City of Perth
February 2002**

Background

The City of Perth is the capital city council for the state of Western Australia. Although a geographically small council, it nonetheless has responsibility as the gateway to the state and as the council responsible for the central business district.

The City of Perth undertook a review of its obligations under National Competition Policy in 1999. Three major business undertakings were specifically reviewed and adjustments made to their pricing structures in order to take into account their net competitive advantage. This has principally applied to the City's off-street parking business.

The regulatory side of the City's management of parking has been separated from the management of the commercial business. A thorough review of the parking pricing decisions showed that the City played a major role in cost management given its domination of the local commercial parking business. An examination of the public benefit arguments in relation to parking cost structures revealed that while increasing parking fees might theoretically address issues of competitive neutrality, it could also create a major impact on the economic viability of the central business district given the current status of public transport services. On the other hand, such an action could serve a wider public benefit in reducing car emissions thus achieving goals set out in the Cities for Climate Protection framework.

This particular study showed clearly the difficulties in applying competition policy at a local government level where a decision should not be taken out of its wider context. It also illustrated the deficiencies inherent in the public benefit consideration elements of NCP.

Since 1999, all of the City's existing local laws and all new proposed local laws have been reviewed in terms of their impact on competition.

Section 2D Exemptions

The licenses exempted under Section 2D as it applies to the City of Perth include:

- Building and demolition licenses (Building Act and Regulations)
- Health Act licenses and Registrations (Health Act)
- Afresco Dining Licenses (Alfresco Local Law)
- Street Entertainment Licenses (Street Entertainment Local Law)
- Street Trading Licenses (Street Trading Local Law)
- Stall Holder Licenses (Stall Holders Local Law)

Building and Demolition Licenses

The issuing of building license approvals is currently restricted to local government. There has been some consideration of making private certification available but there has been no serious consideration of a non-regulatory approach to building approvals. There is clearly a major public safety concern in relation to certainty that building construction methods and materials are sound.

Health Act Licenses

These licenses are required in order to ensure that restaurants, cafes, food stalls, lodging houses and other establishments meet minimum standards in terms of public safety. The City of Perth has over 300 eating houses alone within its boundaries. While the majority of these establishments operate satisfactorily, there is an ongoing public health risk which must be managed assertively.

Alfresco Dining Licenses

These licenses are issued to eating houses wishing to use public space to offer an outdoor dining service. The management of public space is a core local government responsibility. The management of alfresco dining has become particularly important from a food safety point of view, as well as having ramifications for pedestrian safety, public amenity and business equity.

Street Entertainment Licenses

Licensing is used to ensure equitable access to preferred busking locations and to ensure that performers are not likely to cause a public hazard or nuisance. They are required, for instance, to move on after 30 minutes and may not return to that same location in less than two hours. The removal of a licence prevents a performer from working in the City of Perth for whatever period the City considers reasonable. This has been found necessary in order to prevent performers whose activities have either caused offence through sexually explicit language or acts, or whose performance places the public at risk (ie acts involving fire or sharp objects), or those performers adversely affected by alcohol or other substances.

Street Trading and Street Stall Licenses

This area is currently under review. One of the major issues for consideration is the impact on competition between street traders and between street traders and shop owners.

Local Preference Policies

The City of Perth does not routinely apply a local supplier preference policy. The guiding factor in determining the selection of a supplier is value for money as demonstrated by the extent to which the quotation, EOI or tender meets established selection criteria.

The City of Perth is not currently a supplier of any service that it also licenses.

Notwithstanding this present practice, there has been some frustration expressed at the elected level where officers have declined to include a local supplier preference clause in tenders. This has been because officers consider that value for money should override local supplier preference considerations. A supplier based in the City of Perth has considerably greater competitive opportunities than a comparable supplier in rural and regional areas. The impact on a local supplier of the City of Perth not engaging it is considerably less than if the supplier was based in a small country area.

The situation is quite different in these areas where a local supplier decision will have far greater impacts than it does in a metropolitan area. The impact on local employment and flow on effect on the economic and social viability of small communities should not be under-estimated or treated as a minor issue. It is therefore critical that the option of providing for local supplier preference in these situations be clearly retained without risk of legal ambiguity.

Potential Conflicts of Interest

The licensing of commercial car parks was a major potential conflict of interest identified when NCP was first introduced. The City of Perth was, at that time, responsible for issuing approvals and licenses for commercial car parks (and receiving a fee for this), while running its own public car parks and also managing the parking law enforcement. This situation was reversed when the City agreed to relinquish its right to issue licenses and collect fees for privately run public car parks in exchange for the repeal of legislation which restricted the use of monies earned through car parking operations. The City of Perth still retains the responsibility under its City Planning Scheme for approval of the use of specified land as a commercial car park but does not have a role in its licensing. Decisions about such approvals, the business decisions relating to the commercial operation and the management of law enforcement are all separated within the City's organisational structure.

Conclusion

The provisions of Part IV of the Trade Practices Act (s45, s46, s47 and s48) adequately ensure that local governments do not engage in activities that unreasonably impact on business competitiveness. The provisions of Part VIII offer local governments the ability to make common sense decision however where such actions are not in the public interest. The public benefit test, however, has not been adequately tested. The relativities between the matters identified as potential public benefit issues have not been explored. There is no guidance as to what process a local government should use in order to assess the relative public benefits whether that be by maintaining a restriction on competition or by removing it. There is also a fundamental flaw in the underlying assumption that a local government can assess public benefit adequately without consideration of its wider context – ie the decisions that state or federal government may make.

The licensing decisions of the City of Perth are clearly not of a major commercial nature. Their overriding concern is to manage public safety and amenity. While it is true that these may have flow on effects on competition, it is the City's view that these effects must take second place to the public interest. While it may appear that the Section 2D exemptions are more symbolic than real, it is nonetheless important that they remain in order to ensure certainty. The impact may be felt more deeply in rural and regional local governments than metropolitan governments but it should be remembered that of Western Australia's 154 local governments, only 26 are based in the metropolitan area. Many of the remaining local governments service extremely remote and sparsely populated communities. Policies that may appear logical when applied to larger instrumentalities can often have unintentionally disastrous consequences for these communities.

There is no cost associated with retaining the exemption and the benefits it provides in ensuring certainty are particularly valuable to rural and remote local governments. It is unlikely that Section 2D will deter local governments from making financially prudent decisions such as contracting out a particular service, providing the consequence of that decision is not one which will eviscerate its own community.

It should be remembered that the core business of a local government is the sustainability of its community. Sound financial management of organisation must always be balanced with the community interest. The provisions of the Western Australian Local Government Act and Financial Regulations provide more than adequate regulation and transparency in commercial decisions. There are numerous other avenues for any party aggrieved by a local government's decision to take action – whether that be through the competitive neutrality complaints mechanism, the Department of Local Government, the Anti-Corruption Commission or through the initiation of civil action in the courts.