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Dear Cmr Owens

Section 2D Inquiry

Thank you for the opportunity to contribute to the Inquiry on Section 2D of the *Trade Practices Act 1974*.

The City of Whitehorse is a large metropolitan local government authority located in Melbourne's eastern suburbs. Like all Victorian Councils, Whitehorse City Council's powers derive from the Local Government Act 1989, which defines the roles and functions of local Councils in Victoria.

The City's power to make a considerable range of licensing decisions arises from two sources. Firstly, councils are empowered to make local laws in respect to any of its functions, providing they are not inconsistent with another statute. Generally a local law will either specify conduct or activities that are prohibited or if allowed, on condition that a permit, license, registration or form of authority is granted by the council. This power allows councils to regulate and monitor who is engaging in the prescribed activity, on what conditions and in which location certain activities and conduct occur.

It is contended that when Council grants permission and sets relevant conditions that it is taking a 'licencing' decision, such as envisaged by s.2D(1)(a) of the *Trade Practices Act 1974*. While there is a public basis for the operation of such local laws the application of National Competition Policy to local government has meant that councils are not able to introduce local laws that unduly restrict competition. In 1999 the City of Whitehorse reviewed its local laws to ensure they complied with the objects of National Competition Policy and it continues to monitor any proposed changes to local laws to ensure the compliance is maintained.

Secondly, Council is designated statutory decision-making powers by other State government legislation. The power conferred on council may include a requirement that formal authorisation of the council is a condition of an activity. Legislation in this category includes:

- Planning & Environment Act (planning permits)
- Building Act (building permits)
- Food Act (registration of food premises and food safety plans)
- Domestic (Feral & Nuisance) Animal Act (registration of animals)

Council predominantly issues licences when prescribed or authorised by legislation, as set out in the section above. In such situations the council acts in its capacity as an 'authority' under legislation and the decision to either grant or refuse the licence can easily be characterised as a 'governmental' decision.

Application of Part IV of the *Trade Practices Act* to Local Government

Under the Victorian State Government policy framework, *National Competition Policy and Local Government 2002*, council business must be conducted in a competitive manner. The policy requires the City of Whitehorse to apply and demonstrate compliance with National Competition Policy. Within this context, the City conducted a trade practices audit in 1995/96 and since then has put in place an ongoing trade practices awareness

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program to ensure that managers, supervisors and staff are aware of their responsibilities under the legislation. It is currently conducting Best Value Competitive Neutrality service reviews that will address National Competition Policy issues in two critical service delivery areas – childcare provision and leisure services.

Rationale for exempting Local Government licensing decisions

The Productivity Commission questions whether the rationale for exempting licensing decisions from Part IV of the Trade Practices Act (the TPA) is a clarification of trade practices law or whether it addresses a specific practical concern. It is our contention that the rationale for exempting licensing decisions shares elements of both questions.

Firstly, the City agrees with the proposition that the application of Part IV of the TPA will not apply to the licence determination of a council when exercising a 'governmental' function. Such a decision is not a matter of trade and commerce and therefore not actionable under Part IV and not justiciable.

Secondly, there is an element of practical concern that justifies the retention of s.2D. If the existence of a statutory provision operates to clarify the status of *the Trade Practices Act* it does so for all relevant authorities and those with remedies under the Act. The presence of s.2D therefore protects local government from claimants and action that seek to test that interpretation. Its absence may result in either a more defensive approach to licensing decisions or a more litigious approach by potential complainants. This is not necessarily in the public interest.

The Issues Paper further raised the issue of whether Section 2D has any unintended consequences in terms of discouraging local governments from contracting out service delivery, or encouraging or protecting anti-competitive behaviour by them. Our experience is that section 2D has not guided any of Council's decisions on licensing and contracting out of service delivery. Our contracting out program had been prepared in response to legislative changes to the *Local Government Act 1989* that had required Councils to tender a set proportion of their expenditure.

Internal transactions

The TPA exempts the internal transactions of a council. The Productivity Commission has questioned whether this provision operates to clarify the legal principle that an entity cannot enter into a contract with itself. The City of Whitehorse accepts this proposition and contends that the current wording of s.2D(b) ensures that such transactions are not subject to Part IV of the TPA. This provision should therefore remain in operation to ensure that such transactions are not justiciable.

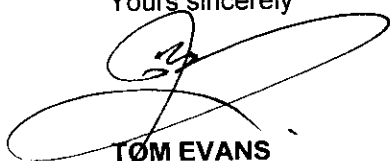
Section 2C Exemption

The Issues Paper also raised the possibility that exemptions currently available to State and Territory government bodies under Section 2C might be applicable to local government established under State or Territory law. This would be an acceptable option should Section 2D be removed. Council is firmly of the view that local government, as a legitimate third tier of government, should be formally recognised and receive consistent treatment with other levels of government in Australia.

In conclusion it is the view of the City of Whitehorse that many of Council's decisions can be interpreted as 'licensing' decisions that constitute an exercise of a governmental function. Retention of Section 2D protects council from the cost of unnecessary litigation by clarifying the scope of *the Trade Practices Act*. Should it be removed, we would strongly urge amendment of section 2C of the Act to make it applicable to local government.

Once again, thank you for the opportunity to comment. We look forward to receipt of a draft report in the near future.

Yours sincerely



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