Submission to Productivity Commission

Review of Section 2D of the Trade Practices Act 1974

INTRODUCTION

The Municipal Association of Victoria (MAV) is the peak statutory body for local government in Victoria. Under the *Municipal Associations Act 1907* the MAV is required to represent all local governments in the state.

In considering National Competition Policy and trade practices related matters, the MAV Competition and Compliance Working Party (CCWP) has been integral in providing valuable advice to the sector. The CCWP is primarily a networking forum with a strong core participation by a number of local government compliance officers, contracts managers and legal advisers, as well as representatives from the ACCC and the Department of Treasury & Finance (Competitive Neutrality Complaints Unit). Over the years, the CCWP has been proactive in developing programs and guides for the sector to better assist local government in understanding their obligations under the *Trade Practices Act* and National Competition Policy.

The MAV welcomes the opportunity to make a submission on the Productivity Commission's Review of S2D of the *Trade Practices Act 1974* and appreciates the briefings we have received from the Commission as part of the consultation process.

Local Government in Victoria

Profile of functions and roles of councils

Victorian local governments have undergone significant reform since 1993. Following an intensive period of amalgamation, there are now 78 councils in Victoria. The reform of local government in Victoria, along with the implementation of National Competition Policy in 1995, have translated to a number of programs aimed at improving councils' performance and efficiency.

In Victoria, the *Local Government Act 1989* provides the legislative basis from which councils operate in the state and vests power in each council to exercise any powers or functions specified in the Act or by other legislation.[1] As the third tier of government, it acts as a 'gatekeeper' to ensure that developments and services are managed and provided in the best interest of the community it serves.

The purposes and functions of local government are broad. It is accepted that councils cannot act outside or *ultra vires* of their legislative powers. However, this does not mean a council is prohibited from exercising any of its functions in a commercial or entrepreneurial way when appropriate. In fact s.193 of the Act specifically allows a council

[1] Local Government Act 1989, s.8(1)

to enter into a number of commercial-type arrangements and in some circumstances only with the consent of the Minister for Local Government and the Treasurer.[2]

Commercial and non-governmental activities of councils

There are two kinds of commercial or entrepreneurial arrangements that are described in this section:

1. Pre-dominantly commercial
There are cases in which council provides a service that is predominantly commercial in nature, where council has entered the market on a commercial basis and seeks to derive revenue or income from the venture. In such circumstances it is envisaged that the licensing or governmental elements of council decision-making are entirely separate from the commercial enterprise. Such arrangements are likely to be subject to National Competition Policy (and competitive neutrality policy) and Part IV of the Trade Practices Act.

The following list provides examples of some of the predominately commercial undertakings that councils have entered into:

- Commercial car park (Melbourne and Geelong)[3]
- Development of retail shopping centre (Maroondah)
- Land development (Banyule, Monash)
- Livestock and Saleyard (Wodonga)

2. Combination of commercial and government service
A second category exists where the council operates a government/council function on a commercial basis. Services in this category should be distinguished from councils services that have been tendered and are provided by an external contractor or council staff under an "in-house agreement".

In this situation, it is envisaged that the council service is subject to Part IV where the council is providing goods or services for the purpose of trade or commerce. It is unlikely that services in this category would also be issuing licences.

Examples:

- Bulk electricity purchasing for residents (Port Phillip, Darebin and Moreland)
- Greenhouse company (Moreland)
- Street sweeping company (Port Phillip and Stonnington)
- Markets (Melbourne, Port Phillip)

[2] Those arrangements that fall within the described arrangements in s.193(1), (4) and (5A)
[3] Commercial car parks operated by the City of Melbourne cater for a specific market, e.g. short stay parking only.

History of tendering and contracting

Local government reform in Victoria has resulted in a number of programs aimed at rationalising services to improve financial efficiency and transparency of councils. Percentage targets for the competitive tendering of council services were set as part of the implementation of Compulsory Competitive Tendering (CCT) in 1995.[4]

When CCT was introduced in 1995 many councils found it useful to split the 'core' and 'provider' arms of the organisation to ensure a separate and transparent process between the service side of the organisation and the decision-making side of the council. The 'provider' side is often characterised by in-house business units that are responsible for service provision. These units were established to bid for council tenders, on an equal footing with private competitors, to provide services according to specifications by the council. This resulted in many councils operating in a more 'business like' and competitive manner. The separation of the 'core' and 'provider' arms of local government has also minimised council's exposure to anti-competitive allegations.

In December 1999 the *Local Government Act* was amended to replace CCT with Best Value Principles. Without diminishing local government's responsibility to be financially accountable in its operation and ensuring that services are provided at the best value for money, the Best Value Policy gave councils more flexibility than CCT in its operations. This was achieved primarily by removing the 50% target set under CCT.[5] The abolition of CCT has seen a relaxation of the stringent contracting procedures that many councils were following and in some instances, in-house business units became obsolete. Nevertheless, a number of councils have maintained the separation between the 'core' and 'provider' arms of their organisation because of benefits derived from the process.

Overview of the licences granted by Victorian councils

The Productivity Commission has invited comment on the meaning of 'licence' for the purpose of s.2D. It is the MAV's contention that the courts would interpret the meaning of 'licence' in s.2D by giving it a broad definition. It is unlikely the courts would confine the application of s.2D(1)(a) to those decisions in which a document called a 'licence' is issued.

Local government has authority to make a considerable range of licensing decisions. The power to do so 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. Secondly, councils are designated statutory decision-making powers by other State government legislation. Such legislation may confer licensing powers on councils.

Local Laws

[4] By legislation, 50% of council's operating budget was subjected to competitive arrangements under CCT.
[5] For more information on Best Value Victoria, visit the State government website: www.doi.vic.gov.au

The power to make a local law enables a council to regulate activities and behaviours in a municipality over which there are no State laws. 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. A local law achieves this by stipulating conditions such as:

- any limits on the activity
- requiring payment of a fee
- by fixing a period of time in which the activity is permissible.

It is contended that when a council grants permission and sets relevant conditions that it is taking a 'licensing' decision, such as envisaged by s.2D(1)(a).

While there is a public basis for the operation of such local laws the application of National Competition Policy (NCP) to local government has meant that councils are not able to introduce local laws that unduly restrict competition. In 1999 all councils were required to review their local laws to ensure they complied with the objectives of NCP or to justify any undue restrictions on trade on the grounds of public interest.

Statutes

In addition to the power to make a local law under the *Local Government Act*, councils are conferred authority under other Acts that prescribe certain activities. 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);
- Caravan Parks and Moveable Dwellings Act (licence to operate caravan park);
- Extractive Industries Act (extraction licence);
- Domestic (Feral & Nuisance) Animal Act (registration of animals); and
- Tobacco Act

While the term 'licence' may not be used by the conferring statute, the action required of the council is to determine whether an activity is allowed. Just as with local laws, when a council is required to determine whether permission or authority is to be granted the decision should be characterised as a licensing decision. This is the case, irrespective of whether the council actually issues a licence, permit or some other form of formal authorisation.

Councils predominantly issue 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.

The Productivity Commission questions whether there are any 'grey areas' in the field of council licensing decisions. While it is the contention of the MAV that licensing decisions of a council are predominantly authorised either by statute or local law, there is one notable area of exception.

Local government has responsibility, control and ownership over considerable land holdings. Councils have the care and management of Crown land that has been vested in the council by State government authorities. Councils also own land holdings in their municipalities. Some portions of land are leased and licensed to other bodies for various community and public purposes. The decisions made by a council to license the use of premises or land either owned or managed by the council constitute a different category of licence decision. In such situations, the council is not making a licensing decision based on a statutory power. However, there is an argument that the licensing decisions still constitute an exercise of a governmental function.

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

Ensuring that council business is conducted in a competitive manner and fostering a competitive environment in one's municipality are essential elements local government in Victoria has to comply with. Under the Victorian State Government's policy statement *National Competition Policy and Local Government 2002*[6] councils are to apply National Competition Policy (NCP) in three areas:

- Competition Code/trade practices;
- Local Laws; and
- Competitive Neutrality – in a Best Value Victoria context

Victorian councils have been required to report on their implementation of NCP since it was first applied to the sector in 1996/97. In demonstrating their NCP compliance, councils must submit an annual statement to the Minister for Local Government with evidence that NCP has been satisfactorily implemented in the three areas specified by the policy. Under an agreement with the State Government, councils who have demonstrated compliance with NCP receive competition payments disbursed by the Victorian Government.

A thorough understanding of and compliance with the *Trade Practices Act* is a key component of the NCP compliance requirements. Following the initial trade practices audits in 1995/96 Victorian councils have also increased their levels of awareness of local government's obligations under the *Trade Practices Act*. This includes developing appropriate compliance strategies for their organisations. In most cases, councils are required to demonstrate NCP compliance for trade practices by putting in place an

[6] The 2002 policy is a revision of the 1996 *National Competition Policy and Local Government*. The revised statement reflects the changes that have occurred since NCP was first applied to local government.

ongoing trade practices awareness program and demonstrating a robust process for handling any trade practices complaints.

"Exemptions " for Local Government

Rationale for exempting 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 the MAV's contention that the rationale for exempting licensing decisions shares elements of both questions.

Firstly, the MAV agrees with the proposition that the application of Part IV of the TPA should 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 a more defensive approach to licensing decisions. This is not necessarily in the public interest.

The MAV does not believe that local preference policies are impacted by s.2D. A licensing decision that purported to give preference to local suppliers either under a local law or statute may occur. However, the MAV would expect that given the Local Laws review undertaken by all councils in 1999 and councils ongoing compliance requirements with NCP that such a decision could only be supported by a local law that met public interest exemptions. Local preference policies that impact on licensing decisions of a council should be able to occur without reliance on s.2D.

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. In the Victorian experience, the MAV does not believe that Section 2D has guided decisions on licensing and contracting out service delivery.

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 can not enter into a contract with itself. The MAV accepts this proposition. However, it is possible for an entity to transact with itself. This is evidenced by the large number of "in-

house" agreements that have operated in local government since the operation of compulsory competitive tendering. The *Local Government Act* permitted a council to accept tenders from council staff in a tendering process, enabling an in-house group of service-providers to compete for the provision of services that were being market-tested.[7] It also enabled the council to enter into a binding agreement with its workforce in respect to the provision of services and the employee employment conditions. Most in-house agreements included a certified industrial agreement that bound the group of employees to the conditions of the tender. While the provisions of the *Local Government Act* that compelled a council to enter into competitive arrangements has now been repealed and replaced with Best Value, there are still a number of in-house agreements under s.208D that are in operation. It is anticipated that some councils will continue to market-test services and will allow both internal and external tenders. It is foreseeable that councils will continue to enter into 'transactions' with its workforce.

The MAV 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.

Alternatives to Section 2D Exemption

A) ACCC Authorisation

In addition to Section 2D of the TPA, there are other clauses within the Act which may exempt local government from activities that can be construed as anti-competitive. For instance, there are provisions in Part VII of the TPA whereby councils can approach the ACCC to authorise a specific conduct. Authorisations are generally granted provided that the benefits to the public resulting from the conduct outweigh any costs.

However, the application process for an ACCC authorisation for local government activities in itself introduces costs to the community. Councils would need to devote a significant amount of resources to preparing the application in the first instance. The approval process involving the ACCC to ultimately determine an outcome may take up to six months in some cases. The time delay will not only cause problems for the applicant, i.e. councils, but also for the licensee. Ultimately, costs borne by council would be passed on to the community.

B) Section 51(1) Exemption

The Issues Paper also identified Section 51(1) of the TPA as having ramifications for exempting local government from activities that may contravene Part IV of the Act. Section 51(1)(b) states that:

> In deciding whether a person has contravened this Part, the following must be disregarded:

[7] Local Government Act 1989, s.208D and, s.208B(1)(b) prior to 22 December 1999..

Anything done in a State, if the thing is specified in, and specifically authorised by:
(i) an Act passed by the Parliament of that State; or
(ii) regulations made under such an Act

Again, resource implications including time spent on the process is likely to have an adverse impact on local government and the community. Although it appears that a group of councils in New South Wales have successfully used this mechanism to set an agreed charge for a 'tip fee', it is not known whether there have been successful attempts by Victorian councils in gaining exemption from the TPA through this means.

The above may offer alternatives to the Section 2D exemption, it is our view that they are less attractive options for local government. There are potentially significant costs involved in the approaches outlined above, such as resources devoted by councils in preparing an application, time consumed in the application process and the flow-on implications, uncertainty and delays – all of which are borne by the council and the licensee. Section 2D provides a clear and directive mechanism by which local government's licensing decisions are exempted from Part IV of the TPA.

C) 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. Should Section 2D be removed, the MAV will accept a modified Section 2C that offers comparable treatment to local government as it does the State and Territory government bodies. The MAV believes that it is important that local government, as a legitimate third tier of government, is formally recognised and receives consistent treatment with other levels of government in Australia.

Another factor which needs to be considered in the removal of Section 2D is the potential legal costs for councils to defend licensing decisions. In Victoria, a number of complaints against councils have been received by the Victorian Competitive Neutrality Complaints Unit (CNCU) from private operators of fitness and aquatic centres and/or their representatives, some of which are legal advisers.[8] The allegations raise concerns in terms of both Competitive Neutrality Principles and the *Trade Practices Act.* While advice from the ACCC indicates that there are currently no grounds for the Commission to follow-up on those submissions, it cited the exemption offered by Section 2D as a means that local government may invoke regarding licensing decisions.

There are concerns that the removal of Section 2D may trigger an influx of complaints and appeals against local government such as those received to date. The absence of Section 2D may offer another avenue by which council decisions can be challenged by private operators. While the MAV believes that it is important for private competitors to have access to appropriate channels whereby legitimate complaints against councils can be fully considered, removing the current exemption offered by Section 2D could have a

[8] It appears that the complaints received are generated from a template complaint.

detrimental effect on local government. It is possible that valuable resources may be taken up by councils to defend inappropriate and vexatious complaints.

CONCLUSION

While Section 2D of the *Trade Practices Act* currently provides an exemption for local government with respect to licensing decisions and internal transactions, it is the MAV's view that this exemption does not unduly restrict competition. Given the lack of clarity in the definition of a 'licence' and a 'permit' and whether some licensing decisions concerning commercial undertakings still constitute an exercise of a 'government function', S2D provides some assurance for local government in the legitimacy of their decision-making process.

In formally recognising local government as a legitimate tier of government, the MAV strongly believes that consistent treatment in the Act should be applied to councils as it does other levels of government. On that basis, S2D should be retained or a modification be made to S2C such that it applies to local government.

Moreover, the alternatives to S2D are likely to introduce additional costs to local government. Applications for an authorisation, be it under Part VII or S51(1) of the TPA, is expected to introduce significant administrative costs to local government. Time delays and uncertainty in the process would inconvenience the applicants, including private business operators and councils. There are also serious concerns that the absence of S2D may result in either a more defensive approach to licensing decisions or a more litigious approach by potential complainants, both of which would not result in outcomes that are in the public interest. Ultimately, costs borne by local government would be passed on to the community. The MAV believes that S2D should be retained in its current form.