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Submission

LGA RESPONSE TO PRODUCTIVITY COMMISSION

S.2D TRADE PRACTICES ACT

February 2002

LGASA Response to Productivity Commission
S.2D Trade Practices Act

INTRODUCTION

This submission has been prepared by the Local Government Association of South Australia in response to the Issues Paper distributed by the Commission regarding the review of the application of Section 2D of the Trade Practices Act (the "Act") which exempts the licensing decisions and internal transactions of Local Government bodies from Part]V of the Act.

Set out below is some contextual information about the Local Government sector in South Australia and the Local Government Association of South Australia (LGASA).

Local Government

There are 68 Councils in South Australia serving approximately 15% of the area of the State and approximately 99% of its population. The Outback Areas Community Development Trust (a statutory body) covers the remaining area and population offering the same or similar services to remote communities as that provided by a Council.

17 Councils are situated in the metropolitan area and 51 in country areas. Councils vary in size (area, revenue, staff and Council Member numbers etc), examples follow (the figures below are 99/00 ABS figures):

Metropolitan Councils: The Adelaide City Council has a population of 13,211, 9 Council Members (including the Lord Mayor), 712 employees and total revenue of $97,245,000. The Onkaparinga Council has a population of 147,000, 21 Council Members (including the Mayor), 500 employees and a total revenue of $62,855,000. There are smaller metropolitan Councils such as Walkerville Council with a population of 6,719, 10 Council Members (including the Mayor), staff of 25 and total revenue of $3,323,000 and Holdfast Bay a medium sized Council with a population of 32,500, 13 Council Members (including the Mayor), 205 staff and total revenue of $24,865,000.

Country Councils: The Whyalla Council has a population of 23,890, 12 Council Members (including the Mayor), 162 employees and a total revenue of $12,558,000. Port Lincoln Council has a population of 13,100, 11 Council Members (including the Mayor), 57 staff and a total revenue of $8,041,000. In contrast Northern Areas Council has a population of 4,800, 9 Council Members (including the Chairperson), 47 staff and a total revenue of $5,206,000, Kimba Council has a population of 1,265, 7 Council Members (including the Chairperson), 13 staff and a total revenue of $1,679,000.

Councils invest about $840m in service delivery in South Australia in each year and manage approximately $8b of infrastructure assets including 15,306 kms of sealed roads, 40 aerodromes, 70 jetties and 147 public libraries. 765 Council members and approximately 7,700 staff provide services to local communities through their Councils.

Over the past 10 years Local Government has progressed significantly in terms of its capacity and performance. The Parliament has recognised in the Local Government Act 1999 that all spheres of government must work together and develop policies and plans, collaboratively, to meet community needs.

NCP and SA Local Government

Consistent with the Competition Principles Agreement signed by the Prime Minister and all State Premiers and the Competition Policy Reform Act (Commonwealth):

- Local Government in South Australia has agreed on a Clause 7 Statement requiring the application of competitive neutrality principles to Local Government significant business activities. This Statement is currently entering into its second review
- the State has reviewed all legislation (or the majority of it) to remove potential anticompetitive behaviour (regulatory or otherwise)
- the "Government Business Enterprises (Competition) Act 199W, which, among other things, establishes a Complaints Commissioner to consider (and where appropriate investigate) complaints

regarding the application of the Clause 7 statement to Council business activities where they cannot be resolved at the local Council/complainant level

- as required by the Clause 7 Statement, Local Government reports annually to the State Government regarding the application of competitive neutrality principles in Local Government. This information is included in this State's report to the Commonwealth to facilitate NCP payments to this State. Local Government has never received NCP payments albeit a number of other States are making payments to Local Government. LGASA continues to lobby its State Government for these payments to be made.

The Local Government Act 1999 reflects a range of NCP principles as follows:

- Requirement to separate significant regulatory and non-regulatory activities and report on them;
- Requirement of subsidiaries (singlelregional) to address the application of competitive neutrality in their charters should they be performing a significant business activity;
- Requirement to adopt policies on contracts and tenders including the contracting out of services, competitive tendering and the use of other measures to ensure that services are delivered cost effectively; the use of local goods and services and the sale of land or disposal of land and other assets. The policies are to address fair and transparent processes for calling tenders and entering into contracts and provide for the recording of reasons for entering into contracts other than those resulting from a tender process; and
- Strategic Management Plans of Councils must identify the means by which activities are to be carried out with particular reference to policies on contracts and tenders, address issues associated with arranging the affairs of a Council to separate its regulatory activities from its other activities as far as it is reasonable to do so, and for the regular review of the charter, activities and plans of any subsidiaries.

Local Government Association

The LGASA is a membership organisation and all Councils are members. Policies are made by the membership at two meetings per year i.e. the General Meeting and Annual General Meeting.

The State Executive of the LGASA comprises 16 members elected by groupings of Councils described as "zones" in its Constitution. These zones represent the key regional areas of the State. The President and Immediate Past President of the LGA are members of the State Executive.

This submission is provided to the Commission and should be read as representing the views of South Australian Councils on this matter.

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RESPONSES TO THE ENQUIRY

General Comments:

Section 2D of the Act is primarily concerned with the non-application of Part IV of the Act to Local Government in circumstances such as:

- 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
- a transaction involving only persons who are acting for the same Local Government body.

Fundamentally the **LGASA** finds it difficult to identify circumstances where its licensing activities are captured by the intent of the NCP and the Act. That is to say that these activities generally:

- have a number of charges set by regulation i.e. through a Parliamentary process not by Councils and therefore apply to all Councils;
- are statutory functions undertaken in the public interest;
- equally apply to the same or similar activities carried on by business/private persons;
- are payable to Local Government as the only body carrying out these functions and recognised in statute; and
- the charges made don't reflect the true cost of the provision of the service and if they did, the public would react significantly to governments and parliaments attempting to make them truly cost reflective.

In addition, the legislative reviews undertaken by each State under the Competition Principles Agreement have required an assessment of anti-competitive behaviour in relation to statutory functions of Councils, particularly with regard to licensing regimes.

It is our advice that legally a Council cannot contract with itself in terms of agreements for the provision of goods and services. This is also recognised in the Issues Paper.

The removal of Section 2D would, in our view, blur the current situation to such an extent that Councils would likely be subject to complaints and legal challenges that would be unsubstantiated and costly for all parties. Section 2D makes it clear that the nature of the work carried out by Councils in circumstances defined in this Section cannot constitute anti-competitive behaviour.

Two further significant issues are important to highlight at this point:

- as a principle, Local Government considers that as a sphere of government it should enjoy the same protection as that provided to State and Federal Governments; and
- the intent of the NCP is not to take away from any sphere of government or its related bodies and authorities the right to make decisions about the manner in which it determines how it will provide its services or acquire its goods (i.e. it chooses whether it will utilise internal or external sources).

The latter point (above) is one that the private sector appears to be unwilling to accept at times (albeit that it enjoys this privilege) or is unable to understand.

Putting to one side the issue of licensing, Councils provide services for which fees are charged. Activities undertaken by Councils can be seen as being undertaken for one or two motivating reasons. One is to protect or enhance community interests of health, safety, education and well being. The second is where an activity is undertaken to earn a revenue return. The lines are sometimes blurred. For instance, the motivating factor for a local Council to establish a child care centre in its area could be either of the above. In circumstances where Council has entered into a commercial venture then the fees charged would generally be at commercial rates and reflect cost recovery. In circumstances where provision is being made in the "community interest" charges do not reflect the actual cost of provision so as to enable access to the service by the community.

As mentioned previously the Clause 7 Statement requires a Council to assess its reasons for delivery of services for which a fee applies and where it could be perceived (or demonstrated) that it is undertaking a commercial activity in a competitive market (or potential market), and using its statutory existence to keep fees down, it would have to charge market rates for the service or apply full cost recovery when calculating its price.

Specific Responses:

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?

The LGASA is of the view that since the introduction of the Clause 7 Statement in South Australia and the general trend towards competition, local preferences policies are used less frequently by Councils. However, having said this, the questions above bring into focus whether in fact under the NCP (and its general intent) and the Act, an argument rightfully exists to suggest these types of practices cannot continue.

As stated previously any "buyer" of services (whether public or private) can choose to engage whatever company it wishes to deliver its services or provide it with goods. The motivating factors that exist for Councils applying local preference policies might be:

- fostering local employment guaranteeing (or providing more surety) access to services or goods in emergency situations
- supporting the prosperity and development of local businesses because of the level of trust that has built up over time with local businesses or a local provider

The above motivating factors also exist in the private sector as generally they too won't always go for the "lowest price" but will have regard to the above matters, particularly in country areas. It also seems reasonable that governments should not have to comply with constraints that do not exist in the public sector.

We are not aware of any legal challenges that go to the question of the application of local preference" policies and would be pleased to be informed of any challenges and the outcomes of cases heard.

What is the rationale for exempting the licensing decisions of local government 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 preference to local suppliers when contacting out the delivery of services and, if so, why?

It is the view of the LGASA that the exemption is included to provide clarity to the actual situation i.e. licensing decisions are not matters of trade and commerce.

As stated previously, preference to local suppliers is not a matter covered by the Act or contemplated to be covered.

In addition we believe that this exemption avoids Councils having to being subject to challenges resulting from misunderstandings in the private sector regarding the application of the NCIP and the Act.

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?

It is the view of the LGASA that internal transactions of Councils being highlighted in the Act simply provides clarity via legislation and avoids testing a judicial interpretation based on the actionslactivities of private firms.

In addition, we believe that the exemption puts Councils on the same footing as private firms.

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

The benefits of this Section are that it makes it clear to business and private persons that treatment is equal and that there is protection provided regarding the quality and standards of products and services in the public interest in circumstances where markets fail to do so. This results in improved community confidence in the standards of goods and services subject to the licensing regimes of Councils and suppliers are comforted in knowing that their competitors cannot enter the market with an inferior product or service.

It is our belief that the imposition of minimum standards does not reduce competition.

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 transactions be at risk from actions under Part IV in the absence of Section 2M

Local Government as a sphere of government should be treated in the same manner as State and Federal Governments (i.e. exemptions applying to State and Federal Governments should also apply to Local Government activities).

Currently there is an inconsistency in the Act as the exemption available to Local Government in Section 2D is not as extensive as that available to the other spheres of government under Section 2C. Section 2C extends to the collection of taxes, levies or licence fees, and the acquisition of primary products by a government body under legislation.

In addition, Sections 2A and 213 provide immunity to Federal, State and Territories (but not their authorities) from prosecution or pecuniary penalties that might otherwise arise in relation to breaches of various sections of the Act, including Part IV. There is no similar exemption for Local Government and we believe a consistent treatment of all spheres of government should apply.

The Australian Local Government Association in their submission to the Commission suggests that:

- Section 2D be extended (or a new section created) to ensure that the same provisions as contained within Sections 2A and 213 apply to Local Government; or
- Section 2D be abolished and Local Government be included in Sections 2A, 213 and 2C

This position is supported by the LGASA.

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?

A survey conducted by the LGASA about 6 years ago revealed that Local Government in South Australia contracts out around 35% of its activities. We have no reason to believe that this has fallen and has either continued to be the same or increased.

Local Government views competitive tendering positively and believes that there are no unintended consequences of the nature highlighted above.

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 2M

The LGASA is not aware of any circumstances relative to the above.

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?

LGASA believes that Local Government should be afforded the same protection as the other spheres of government. The decision of the Rockdale case confirms the need to ensure that S2D remains to achieve this principle and that, as stated later in this submission, S2C is also addressed. The issue as we understand it would not fit within a competitive neutrality as it is not a significant business activity but rather a statutory function.

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

LGASA believes that Section 2D is having a practical impact. It allows Councils to undertake their role in protecting the public interest via the provision of licenses and permits. This can best be measured by the absence of court actions involving Local Government, that is, it has not had to defend or establish that its activities in issuing licences and permits are not activities of a business or trade and commerce nature.

The clear exemption of these activities provides certainty to Local Government, business and individuals thereby preventing needless litigation.

The LGASA believes that Section 2D has put into the Act the principles of the decision of the Rockdale Council.

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?***

Given that Section 2D concerns itself with business or trade and commerce activities, the concept of licensing does not extend to the issuing of licenses for non commercial purposes (eg dog registration and by law permits). The general concept of 'licensing' and the restricted definition for the purposes of Section 2D are often misunderstood by Councils. It may, therefore, be appropriate to expand the definition to clarify that any statutory licensing function (i.e. not only those for commercial purposes) of a Council is within the conspectus of Section 2D and, thereby, provide absolute certainty that there are no 'anti competitive' conduct concerns for Councils. For example, a Council was recently threatened with action under the TPA if it was not prepared to grant a permit (i.e. a license) under Section 222 of the Local Government Act to a mobile flower seller. The applicant asserted that a refusal to do so could have caused harm in a competitive sense for local providers. The Council could not establish whether it was protected from Pt IV in these

circumstances. A wider definition of license' would provide greater clarity and certainty for all parties.

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 2M

An explicit reference to Local Government is required in Sections 2C and 2D. Local Government is a sphere of government in its own right.

If the judgement is that Section 2D is not having any practical impact, what are the arguments for either retaining or removing it?

LGASA believes that Section 2D is having a practical impact.