INFORMATION REGARDING SECTION 2D OF THE TRADE PRACTICES ACT 1974.

The Department of Local Government and the Minister for Local Government have no direct involvement in ensuring compliance with the Trade Practices Act (TPA) by local government. The Department was also not involved in the drafting of the amendments to the TPA including s.2D, and cannot supply any insight into the rationale. However, a watching brief has been maintained, particularly in the first years following the application of the TPA and the Competition Code to NSW and therefore to NSW councils.

Some observations and points of discussion are made below with the Inquiry's terms of reference and the recent "Issues Paper" in mind.

These comments are made in relation to NSW local government. Local government is in the unique position of being a tier of government wholly created by another tier of government. As such, councils' constitution, powers and specific functions vary between States. What applies in NSW should not be assumed in other jurisdictions, and vice versa.

BACKGROUND:

Local Government in NSW is established under the Local Government Act 1993 (LG Act). Each council is a statutory corporation (s.220 LG Act) and has all the powers of a body corporate (see Interpretation Act 1987), as modified under the LG Act.

Councils are not regarded as "the Crown" (see *Federated Municipal and Shire Council Employees' Union of Australia –v- Melbourne Corporation* (1919) 26 CLR 508) nor is a council an authority representing the Crown (see *Deniliquin Municipal Council –v- Murray Shire Council* (1986) 58 LGRA 161). While councils are statutory bodies exercising public functions, this probably does not mean that they are authorities of the State, as the term is used in section 2C of the Trade Practices Act 1974. While established under State legislation, councils are democratically elected and are not under the direct control or administration of a Minister.

There are currently 172 general purpose local councils and 20 specific purpose county councils constituted. General purpose councils exercise a vast range of functions. Regulatory powers are given specifically under legislation, such as the power to approve development of land, to enforce pollution laws, impound abandoned vehicles and animals, approve the construction of buildings, etc. Councils are designated as "roads authorities" under the Roads Act 1993 and therefore have the responsibility for regulating, managing and maintaining the bulk of NSW public roads.

In addition, councils are given a wide grant of power to undertake activities for the current and future needs of the local and wider community (s.24, LG Act). Under this heading councils commonly provide domestic and trade waste collection and disposal services, operate waste transfer and landfill stations, provide water, sewerage, and drainage services, provide parks, open spaces and sporting facilities, own and/or operate childcare centres, leisure centres, retirement homes, caravan parks, airports, abattoirs, gas reticulation services, tourism information services, and plant nurseries. In remote or disadvantaged areas they provide or sponsor health services, such as general practitioners, chemists, and podiatrists.

County councils have been established for various specific purposes. These councils carry out their functions in a number of local council areas to the exclusion of those local councils that would ordinarily have the responsibility. Local councils elect representatives to the county council in their area, if one. At present county councils are established for the eradication of noxious weeds or aquatic pests (under the Noxious Weeds Act 1993), to provide flood mitigation, flood plain management, water supply, and in one case to operate an abattoir.

In addition to service functions and other incidental functions supporting those, councils also conduct business activities deliberately set up to raise revenue and compete with the private sector. Councils have power to determine whether an activity will be run as a 'business' or as a service (although the service may still compete with the private sector). Consequently, the same function may operate differently from council to council. Under the terms of the Competition Principles Agreement signed by COAG in April 1995, certain activities must be treated by councils as businesses:

- Water, sewerage and drainage functions
- Gas production and reticulation
- Abattoirs

(see para 4.10, NSW Government Policy Statement on the Application of National Competition Policy to Local Government, June 1996).

Examples of other operations conducted as businesses include childcare services, nurseries, quarries, airports, recycling centres, land development, certification of building construction and associated development services, leisure and aquatic centres, sporting venues, road construction and maintenance.

In NSW, neither local nor county councils have any legislative powers, such as by-law making powers.

THE APPLICATION OF SECTION 2D IN NSW

A couple of issues of interpretation have been raised as a result of discussions with council officers, local government groups and occasionally the lawyers representing these. It is of course accepted that these difficulties may not exist in other jurisdictions where legislation is worded differently and local government powers unique:

- "licence" - the term "licence" is not generally used in NSW legislation in connection with local government powers. The more usual term is "approval" or less frequently "permit". There is therefore a threshold question about whether a certain permission is a "licence" under the TPA although this isn't generally too difficult to overcome.

- It appears from the Issues Paper that the intent of s.2D may have been to protect the contracting activities of councils in applying local preference policies. This implies that a "licence" extends to permission given other than under specific legislative power. Does it extend to a council giving permission under its broader, general powers such as to licence a person using council land?

- "that allows the licensee to supply goods or services" – Very few local government approvals specifically permit the supply of goods or services. Most approval powers relate to a specific activity, such as to dispose of waste, erect a building, carry out development, use public land. The activities approved may all be necessary to allow a person to supply of goods and services (eg for a land owner to contract a builder, a waste operator to dump waste) but do not directly go to permitting supply etc. The application of the exemption to these approvals is problematic. For example, is a council exempt from Part IV when it refuses consent to a trade waste competitor to place a waste storage container in a public place (s.68, approval C4, LG Act)?

  There still exist a few approvals that relate to the supply of goods etc., including an approval to operate an undertaker's business, approval to operate a mortuary, approval to operate a caravan park (s.68, LG Act). However, in line with the State Government's policy to reduce 'red tape' and under national competition policy, these occupational licences are being systematically reviewed.

The intent and language of s.2D could therefore be clarified appreciably. The direction of clarification, whether to expand or restrict the exemption will no doubt depend on the assessment of costs and benefits carried out by the Commission.

Other comments in relation to s.2D are;

- It is noted that the exemption does not apply to local government bodies established to provide a particular service. In NSW there are 20 'county councils' which are established with specific charters, mostly for the eradication of noxious weeds, or for water supply/ flood mitigation. These councils carry out regulatory functions as well as functions which are regarded as businesses under national competition policy in the same way as the local council would if the function remained with it. There seems no good reason to distinguish between county and local councils in relation to licensing.

- The scope of "in-house transactions" within councils has not been an issue raised with the Department. It clearly excludes transactions between individual councils. On the face of the section, it appears to include transactions between separate units of a council, for example between a section responsible for a business activity such as domestic waste removal and another part of council. This is because the sections are still part of the same legal entity – the council. However, transactions between a council and a corporation wholly owned by the council would not be exempt, and nor should they be, because the two are legally separate bodies.

LOCAL PREFERENCE POLICIES

The impact of Part IV on councils' local preference policies was an issue of widespread concern on the introduction of the TPA reforms. At a number of information sessions for councils in 1996 staff of the ACCC responded to the question by suggesting that these policies may be questionable under Part IV, s.45. The Local Government and Shires Associations also attended these information sessions and did not make any adverse comment on the Commission's position.

The Commission subsequently published its booklet "Local Government and the Trade Practices Act" where the warning was elaborated (see copy under). Also attached is a copy of a speech by the ACCC's Regional Director, Melbourne, in 1996 reiterating the same views. The Department has received little complaint from councils regarding this interpretation of Part IV.

The views of the ACCC strengthened the Department's own position on local preference policies, which was (and is) to discourage a 'blanket' preference arrangement where any local supplier's tender might be discounted 10% or an out of area supplier's bid increased. Under cl 19 of the Local Government (Tendering) Regulation a council may accept a tender that is "most advantageous" to it. This allows a local supplier to be chosen on a case to case basis, even if more expensive, based on the weighting of other factors which might make it "most advantageous". The Department does not have any real information on the use of local preference policies and whether these have declined in recent years.

LOCAL PREFERENCE POLICIES AND THE APPLICATION OF S.2D

Most of the discussion regarding Part IV and s.2D occurred in 1995-98 closer to the time of the application of the TPA. During that time the possibility of s.2D applying to protect local preference policies was never raised by any organisation with the Department.

It is the Department's understanding that local preference policies are applied as part of a council's tendering procedures, where local government has the power to acquire or sell goods, real property and services in the same way as a person or corporation. In NSW the LG Act and the Local Government (Tendering) Regulation 1999 impose tendering requirements for contracts over $100,000, which are designed to ensure probity and transparency in the use of public monies.

It is questionable whether a contract entered into through a tender process or otherwise is a 'license' under s.2D. The contract does not allow a person to supply goods or services generally, but merely accepts the supply of goods/services specifically to the council on certain conditions.

Councils do enter into licensing arrangements where it allows another to use the property of the council for a fee and on certain conditions (eg use of public land, council equipment). Again it is hard to see that this would be a 'licence' as defined under s.2D.

COMMENTS ON OTHER MATTERS RAISED IN THE ISSUES PAPER

Re: Section 5 Benefits and Costs – the Department has no evidence regarding the impact of s.2D on local government.

Re: Section 6 Options – As canvassed earlier, local government is not and should not be regarded under State legislation as an 'authority' of the State. It occupies a unique position as a third tier of government created by the State. If parity with s.2C is desired, then this should be dealt with in provisions dealing specifically with local government rather than subsuming councils under s.2C.

Re Section 2 Current Arrangements – The Issues Paper raises the possibility of relying on authorisations by the ACCC as an alternative to legislative exemption. This is not supported. Firstly, the conduct in question may be carried out by all 192 councils in NSW, which would require time consuming co-ordination and administration at all levels. The conduct may vary slightly between councils, requiring individual assessment of each council. Secondly, the cost to a council of resourcing an application may be prohibitive, particularly for smaller councils. Third, it does not promote consistency within local government, an important issue for councils and the community alike in relation to law enforcement.