Submission to the Productivity Commission

Review of Section 2D of the *Trade Practices Act 1974*

Introduction

This submission is in response to the Productivity Commission's issues paper, *Review of Section 2 D of the Trade Practices Act 1974*, December 2001 ("issues paper").

This submission traverses a number of background matters raised in the issues paper. It also attempts to address a number of the specific issues on which submissions have been invited. As far as possible it follows the structure of the issues paper and employs the same paragraph numbering.

1. What is this inquiry about

The application of the *Trade Practices Act 1974* to local councils

Part IV of the *Trade Practices Act 1974* ("Act") prohibits specific anti-competitive practices by a corporation. A "corporation" is defined in s4 to include a foreign, trading or financial corporation. These expressions have the same meaning as in s51 (xx) of the Commonwealth Constitution. Section 51(xx) confers power on the Commonwealth Parliament to make laws with regard to foreign, trading or financial corporations.

In enacting Part IV the Commonwealth has relied principally on the corporation's power. Section 6 of the Act extends the constitutional base by relying on other heads of Commonwealth power, including the trade and commerce power in s51 (i) of the Constitution, the post and telegraph power in s51 (v) and the territories power in s122.

Section 6 extends the operation of Part IV beyond corporations to activities of an entity that occur in interstate or overseas trade and commerce. However in practice s6 has a limited application to Part IV. In the majority of cases, it is the corporations' power that supports Part IV. Therefore the specific sections in Part IV reflect both the constitutional power that supports them and also one of the essential requirements of each section - that the entity be either a foreign, trading or financial corporation. The character of a "trading" corporation and "financial" corporation have been judicially considered and clarified since federation. [1]

There are therefore two immediate difficulties in applying Part IV to a local government body. First, the local government body must have a corporate status.[2] Secondly, it must exhibit the characteristics of a trading or financial corporation.[3] It is unlikely that the second of these characteristics will be met in the case of most local government bodies. This is

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1 See *Huddart Parker and Co Limited v Moorehead* (1909) 8 CLR 330; *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468; *R v Trade Practices Tribunal; Ex Parte St George County Council* (1974) 130 CLR 553; *Fencott v Muller* (1983) 152 CLR 570; *State Superannuation Board v Trade Practices Commission* (1983) 57 ALJR 89.

2 In New South Wales, s220 of the *Local Government Act 1993* provides that a local council is a body corporate.

3 Clearly the "foreign corporation" component of the corporations' power is irrelevant as a local government body is created by a jurisdiction within Australia.

because trading will not usually constitute a significant enough component of its overall activities. It is for this reason most of all that Part IV will rarely extend to a local government body. Indeed the scope of the corporations' power also limits the application of Part IV to other entities, particularly unincorporated bodies such as partnerships.

To overcome this constitutional limitation the Hilmer Committee recommended the universal application of Part IV[4]: Universal, not only in the sense that it should apply throughout Australia but also should apply consistently to all entities, irrespective of their legal form.

The universal application of Part IV is reflected in the obligation in clause 5 of the Conduct Code Agreement.[5] It requires that each State and Territory put forward application legislation applying Part IV to all persons within the legislative competence of the State or Territory. This was facilitated by the passage by the Commonwealth of the *Competition Policy Reform Act 1995*. It inserted into the Act a schedule version of Part IV. The schedule version is identical to Part IV except that the reference to a corporation is replaced with a reference to a person.

Each State and Territory has now passed legislation applying the schedule version of Part IV (and the remaining provisions of the Act so far as they relate to the schedule version) within their jurisdictions.[6] The States and Territories are able to do so as they are not subject to the same constitutional limitations as the Commonwealth. They are therefore, able to apply Part IV to "persons", not simply corporations.

The schedule version of the Act, as applied in a State or Territory is known as the Competition code. It extends to all entities including natural persons and corporate bodies, irrespective of whether there are involved in trade or commerce. The consequence is that since 1995 there is no longer any dispute that a local government body is subject to Part IV through the Competition code of each State and Territory. The constitutional limitations of the Act continue. However for all practical purposes they have been overcome by reliance on the Competition code.

2. Current arrangements

Some definitional and coverage issues

The issues paper refers to the application of the principle in *Bradken Consolidated Limited v Broken Hill Propriety Co Limited*.[7] Section 2A provides that the Act (except Part X) applies to the Commonwealth so far as it carries on a business. *Bradken's* case was decided prior to the introduction of s2B. *Bradken's* case addresses the issue of whether the Act applies to the crown and the extent to which the crown is immune from its application.

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4 See Report by the Independent Committee of Inquiry, National Competition Policy, Canberra, August 1993, Chapter 15.

5 Conduct Code Agreement, between the Commonwealth States and Territories, dated 11 April 1995.

6 For example in New South Wales the application legislation is the *Competition Policy Reform (NSW) Act 1995*.

7 (1979) 145 CLR 207.

Bradken's case held that on *expressio unius* principles, the express reference to the Commonwealth in s2A meant that there was an intention that the State crown was not bound by the Act. The principle has generally been followed.[8]

A further feature of the *Bradken* principle is that entities with which the crown has dealings may similarly be endowed with what I term "derivative" immunity. That is, those entities are also protected by the same immunity to the extent that the crown would be deprived of its immunity if those other entities were not similarly immune. For example, parties to a contract with the crown may be protected by this derivative immunity if the crown would otherwise be deprived of the benefit of that contract.

However, it is inaccurate to describe the principle of crown immunity as ever having extended to a local government body. The crown is synonymous with the executive arm of Government.[9] Under the separation of powers doctrine in the Australian Constitution, the executive is separate from the legislative and judicial arms of Government. It is only meaningful to discuss these separate arms of Government in the context of the Commonwealth and State crown. A local government body is purely a creature of statute, not embodying separate notions of legislative, judicial and executive arms.

The Commonwealth or State crown may confer on a public corporation the immunities that apply to the crown. [10]However even if a local government body could truly be said to be a public corporation, there is no such express conferral under the Act.

So far as the States and Territories are concerned, the *Bradken* principle has been altered by s2B. Section 2B now expressly provides that, among other things, Part IV applies to the crown in right of each of the States and Territories so far as they carry on a business. The proposition that crown immunity never applied to a local government body is not displaced by the insertion of s2B.

The terms of section 2D

Section 2D(1) provides:

> "Part IV does not apply to:
> a) 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
> b) the transaction involving only persons who are acting for the same local government body.

A number of observations may be made.

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8 See *Hawthorn Pty Ltd v State Bank of South Australia* (1993) 40 FCR 137; *Jellyn Pty Limited v State Bank of South Australia (1995) ATPR 41-404.* Some doubts over the decision have been raised in *Bass v Permanent Trustee Company Limited* (1999) ATPR 41-682.

9 See R Steinwall "The Liability of the Crown and its Instrumentalities under the Trade Practices Act" (1994) 17 *University of New South Wales Law Journal* 31.

10 P Hogg and P Monahan *Liability of the Crown* 3rd edition, Carswell Ontario 2000, page 337.

Section 2D generally

Section 2D only excludes the application of Part IV. Other parts of the Act continue to apply to a local government body, to the extent that they are able to apply.

The words "does not apply" in s2D is different to the formulation used in the general exemptions found in s51. Section 51(1) for example states, "the following must be disregarded". Section 51(3) on the other hand provides that "regard shall not be had". It is unlikely that much turns on this. If something is to be "disregarded" or if "regard is not to be had" to something it is unlikely that the thing could form the basis of liability under Part IV. However the wording in s2D is to be preferred. It is a clearer and more direct way of expressing the exemption.

Section 2D applies only to a "local government body". The expression excludes a body established solely or primarily for the purposes of providing a particular service, such as the supply of water or electricity. It is not uncommon for these services to represent a significant aspect of the functions provided by some local government bodies. However the definition would appear to apply only to a body that is established "solely or primarily" for the purpose of providing these services. If the body is established solely or primarily for other purposes, then the qualification would not apply, even if the supply of water or electricity represents a significant aspect of that body's overall functions. The deciding factor is not what functions the body in fact performs, but rather whether it was "established" solely or primarily for that purpose.

Section 2D(1)(a)

It would appear that s2D (1)(a) does not apply to the revocation of a licence. Within its terms it applies only to the granting, suspension or variation of a licence. This is in contrast to s2C (1)(b) which applies to the revocation of a licence. The reason for the omission in s2D is not apparent.

The difficulty with s2D and the equivalent provisions of s2C is that the nature of a licensing function is not expressed. A licence is merely defined in both s2C and 2D as a licence that allows a licensee to supply goods or services. The reference in s2D (1)(a) to "whether or not they are subject to conditions" suggests that the section applies to at least two types of licence. First, what might be described as a mere licence, principally one that simply permits the licensee to engage in some activity. Alternatively it may extend to a licence, which contains comprehensive terms and conditions regulating the behaviour and activity of the licensee. This might be used for example to provide for detailed rights and obligations in much the same way as might be achieved by a contract between the parties.

Section 2D(1)(b)

Section 2D(1)(b) and 2C(1)(c) have a limited application to Part IV. In the case of s2C (1)(c) the actions of a person are relevant principally to the extent that the person might have sufficient authority so that his or her actions are regarded as actions of the entity,[11] for which the entity may be liable under Part IV. Alternatively the person may be liable as an accessory or if s6 applies. Otherwise if the person is acting for the crown in the same right, the person is

[11] Alternatively the person may be regarded as having sufficient authority under s84.

nevertheless representing the one entity – the crown and it is therefore of little relevance which department of the crown the person represents. If the crown is acting through a number of statutory corporations, then the section has a greater relevance. This is because some of them may have the benefit of the shield of the crown and others may not.[12] However if they are related they may also attract the protection in Part IV for a related body corporate.

Similar considerations apply to persons acting for the same local government body under s2D (1)(b). Indeed the exemption has even less significance for two reasons. First, it is less common for a local government body to have subsidiary corporations. Second the shield of the crown does not extend to a local government body.

The more important rationale for s2D (1)(b) is the application of the Competition code. As indicated the Competition code mirrors Part IV, except that references to a corporation are replaced with references to a person. Liability attaches to the actions of a person. However the Competition code makes no distinction in the capacity in which the person acts. A person may act alone, for example a sole trader or partner and may be liable for a breach of Part IV as an individual. For example two sole traders who enter into an arrangement to fix the price for goods.

Alternatively a person may act on behalf of an entity rather than in their personal capacity. In this case their actions have a number of consequences. They may be personally liable or liable as an accessory. Their actions may simultaneously render the entity for which they act also liable. The exemption is particularly relevant to this second case. It protects the transaction and hence the local government body from Part IV liability. The intent of s2D (1)(b) is that if those persons are in fact acting for the same local government body then Part IV does not apply to a transaction between them.

The expression a "transaction" does seem to suggest some further limitations of s2D (1)(b). The section could have referred to any "conduct" between two persons. It has not done so. The word "transaction" therefore contemplates a more formal and perhaps business or commercial relationship between the two persons.

Also s2D (1)(b) provides that Part IV does not apply to a transaction. It is only the "transaction" that is protected from Part IV. Arguably discussions prior to and subsequent to the transaction are not protected. For example negotiations and meetings between the parties prior to finalising the terms of the transaction. Similarly it would appear that actions taken to facilitate the transaction but which are not integral to the terms of the transaction itself might fall outside the exemption.

If it is accepted that the exemption applies only to the "transaction" then arguably the persons facilitating the transaction are not protected: Whilst the transaction must involve persons acting for the same local government body, it does not follow that those persons are necessarily protected from a primary contravention or as accessories to a contravention. This may arise for example if not all persons involved are parties to the transaction.

If a transaction comprises 2 persons from a local government body and another person not acting for a local government body, that other person is not protected by the exemption. The

12 s2A, 2B

exemption only protects the transaction with the parties that are acting for the local government body.

Clearly s2D (1)(b) is also capable of applying to a transaction between any number of persons acting for the same local government body. For example, a tripartite transaction or more. The expression "transaction" in this context is somewhat curious. The intent of s2D (1)(b) is clearly to protect the local government body in relation to a relevant transaction. In this context if the persons are employees of the local government body then there would be no need for s2D (1)(b) as they each represent the same entity – the local government body. Certainly there may be contraventions by the employees in their own right or as accessories.

The expression "acting" for a local government body might also suggest that one or more persons are acting as the agent of, in some other capacity for the local government body. It is not clear whether s2D (1)(b) is intended to incorporate ordinary principles of agency.

4. Rationales for exemption

Licensing decisions

The issues paper suggests that the desire to impose minimum standards might be a rationale for the exemption provided by s2D. Alternatively, it is suggested that minimum standards do not constitute "trade and commerce" and are thereby not challengeable under Part IV of the Act.

Minimum standards

Section 45 is likely to have the most direct application to minimum standards. There are two potential applications. First, a minimum standard might be imposed as a condition for the local government body acquiring goods or services or in supplying goods or services within the terms of s4D. However s4D (also known as a collective boycott), requires that there be a contract, arrangement or understanding between at least 2 persons who are competitive with each other. If a local government body independently of another local government body imposes a minimum standard, there is neither an arrangement nor an arrangement with another local government body that is its competitor. The collective boycott provisions are therefore unlikely to apply, in the absence of some collusion with another local government body.

Similarly, the general limb of s45 (2)(a)(ii) is attracted only if the imposition of a minimum standard would or would be likely to have the effect of substantially lessening competition in a relevant market. This is unlikely. It is similarly unlikely to apply to vertical transactions under s47 of the Act which also requires a substantial lessening of competition in a market.[13]

"trade and commerce"

The question of whether a licensing requirement itself constitutes "trade or commerce" is not directly relevant to the application of Part IV. This is because in none of the sections in Part IV is "trade and commerce" an element of the offence. The expression "trade or commerce"

[13] Except third line forcing under s47 (6)(7).

was an element of the prohibition on price discrimination under s49, prior to its repeal in 1995.

Certainly whether the relevant conduct is in trade or commerce may go to the issue of whether the entity is a trading corporation or whether the extended operation of the Act in s6 is attracted. However, " trade and commerce" is not a separate ingredient of a Part IV contravention. It is therefore unlikely to have been the rationale for introducing s2D.

Other possible rationales

Section 2D may have been inserted, among other things, because of a concern that licensing activities of a local government body may attract s46 of the Act. Section 46 provides:

> " A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
> (a) eliminating or substantially damaging a competitor of the corporation…;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

At the time s2D was inserted it was thought that market power need not be derived only from factors operating in the market. [14]. However in *Plume v Federal Airports Corporation*[15] decided in 1997 the court said that it is only the power that accrues to a person as a result of its position in the market that is relevant. Similarly in *Stirling Harbour Services Pty Limited v Bunbury Port Authority* the court said that the exercise of a statutory power to licence is not an exercise of market power but the discharge of a statutory function.[16]

The matter is not yet settled. Certainly in 1995 (and perhaps even now) it might have been thought that a licensing function could in some circumstances confer on the local government body " a substantial degree of power in a market". Further the decision to grant or vary a licence might be thought to be a "[taking] advantage" of that power rendering the local government body potentially liable under s46. Section 46, if it applies to regulatory functions, would extend to any other function of a local government body not simply licensing. Licensing may have been expressed because it represents a significant activity of a local government body.

The concerns over s46 will remain unless there is an unequivocal judicial pronouncement that s46 does not apply to regulatory activities. Even so there may still be a need for the exemption. The other reason that the exemption was introduced was probably to extend to horizontal and vertical behaviour to which s45 and s47 would otherwise apply.

Internal transactions

The issues paper suggests that the intent of 2D may be to put internal transactions within government on a similar footing to transactions with vertically integrated private firms, on the basis that the latter generally fall outside of Part IV.

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14 *Trade Practices Commission v Pioneer Concrete (Qld) Pty Limited* (1994) 52 FCR 164 at 172

15 (1997) ATPR 41-589 at 44,131.

16 (2000) ATPR 41-752 at 40,734.

There is no general protection in the Act for transactions with vertically integrated private firms. Rather, Part IV provides certain protection for dealings between related companies, whether vertically integrated or otherwise. Section 45 does not apply to a contract arrangement or understanding the only parties to which are bodies corporate that are related to each other.[17] Section 47 does not apply to dealings between related bodies corporate.[18] Similarly under s46, in determining whether a corporation has substantial market power, s46 permits the aggregation of the market power of related bodies corporate.[19] The treatment of related bodies corporate is therefore different across the sections in Part IV.

In effect the *Corporations Act 2001* applies to the definition of "related body corporate" under the Act. That is, a body corporate is related to another body corporate if it is the holding company, subsidiary or subsidiary of the holding company of the other body corporate.[20]

The protection afforded by s2D (1)(b) for "internal" transactions of a local government body is therefore different to the protection afforded under the Act to related bodies corporate. In the case of related companies, there are one or more companies operating as separate legal entities that are related to each other because they are members of the same corporate group. In contrast, s2D (1)(b) does not apply to separate entities of a local government body, for example a separate subsidiary of a local government body. Rather s2D (1)(b) applies only to persons that act for a local government body.

5. Benefits and Costs

The issues paper refers to the decision in *Mid Density Development Pty Limited v Rockdale Municipal Council.*

The action in *Mid Density Development* was not brought under Part IV but rather s52 in Part V. Section 52 provides:

> "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

The issue before the court was whether the relevant council was engaged in trade or commerce. As indicated, "trade or commerce" is not a separate ingredient of a contravention of Part IV. In this respect the case is not apply directly to Part IV.

In *Mid Density Development* the court considered the issue of permits and licences only in deciding whether it constituted a business activity. This is relevant because the nature of the activity might indicate whether the local council was engaged in trade or commerce under s52. However, whether the issuing of permits and licence is a business activity or in trade or commerce is not relevant to Part IV, except to the extent that it assists the court in determining whether a local council is, in a relevant case a "trading corporation"[21] or whether the extended operation of the Act in s6 is invoked.

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17 s45 (8).

18 s47 (12). There is no protection for related bodies corporate in the case of resale price maintenance. See s 48 and s 96.

19 s46 (2).

20 s4A.

21 (1992) 39 FCR 379. The case went on to appeal to the full Federal Court (1993) 116 ALR 460.

Similarly in *Corrections Corporations of Australia v Commonwealth of Australia* the court considered whether the Commonwealth was engaged in a business activity. As indicated, under s2A, the Commonwealth is subject to the Act (including Part IV) only to the extent that it conducts a business.

Section 2D is not couched in same terms as s2A ands 2B. Sections 2A and 2B have the effect of applying Part IV to the Commonwealth and State Crown only to the extent that they conduct a business. A local government body on the other hand is subject to the Act irrespective of whether it conducts a business or not. Section 2D merely provides that certain activities of a local government body, (namely licensing) are exempt from the operation of Part IV. It is for this reason that neither *Mid Density Development* nor *Corrections Corporation of Australia* is particularly useful to the application of s2D.

6. Options

Limited to carrying on a business

One option may be to treat local government bodies in much the same way as the Commonwealth and the States. A local government body might be subject to Part IV only so far as it carries on a business. Sections 2A and 2B would apply in a similar way to a local government body.

However this would be contrary to the recommendations of the Hilmer report which favoured the universal application of the Act. A local government body is also a creature of statute and therefore stands in contrast to the Commonwealth and the States. If protection were afforded to a local government body then legitimate claims might also be made by other entities, such as public authorities and statutory corporations. However policy considerations may vary and ultimately this is a matter for government.

Section 51(1) of the Act

The issues paper notes that s51 (1) is available as an option for exempting specific activities of local government bodies from Part IV.

Section 51 contains different types of exemptions including exemptions for intellectual property. Section 51(1)(b) for example permits a State to pass an act or regulation specifically authorising certain conduct. It is this provision that is the most relevant and to which the following discussion is directed.

Section 51(1)(b) has a number of limitations. It does not apply to contraventions of the merger provision –section 50.[22] However, is unlikely that s50 would have a significant application to local government bodies.

A State or Territory cannot make a regulation, for longer than two years.[23] Also, the regulation cannot be remade.[24]

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22 s51 (1C)(b).
23 s51 (1C)(c).
24 s51 (1C)(d).

Under the Conduct Code Agreement, a State relying on s51 is required to notify the Commission within 30 days of the legislation been enacted.[25] The Commonwealth has four months from the date of the notice to elect whether to make a regulation under s51 (1C)(f).[26] Section 51(1C)(f) effectively permits the Commonwealth to pass a regulation disallowing an exemption authorised by a State under s51 (1)(b). After four months the Commonwealth may disallow a State exemption only if the National Competition Council tables a report as to whether the benefits of the legislation outweigh the costs and whether the objective achieved can only be achieved by restricting competition.[27]

In its current form s51 is best utilised to impose transitional exemptions that are limited in duration. For example, it may be suitable to provide limited exemptions for specific events such as the recent Sydney Olympics. Alternatively it may be used as a transitional measure when sectors are exposed to competition for the first time. Since the National Competition Policy the clear intention is that s51 be used sparingly. The amendments to s51 outlined demonstrate this very clear directive.

Licensing is a significant activity of most local government bodies. These function are also on-going rather than transitory. Section 51 is therefore not well suited as a vehicle for exemptions of the type provided by s2D. As there is provision for intervention by the Commonwealth, s51 also creates uncertainties for both the State and the local government bodies that must rely on s51.

Authorisation

In general terms the Australian Competition and Consumer Commission may grant an authorisation if the public benefit of the conduct exceeds the anticompetitive detriment. [28] However a number of features of the authorisation process limit its usefulness as a substitute to s2D.

Authorisation is not available for s46 conduct.

Until authorisation is granted the conduct is not protected. There may be a considerable period between the application for an authorisation and its grant. During this period the parties must put their conduct on hold unless informal assurances have been received from the Commission.

There is no guarantee that the Commission will grant an authorisation. It has a statutory obligation to weigh up the public interest arguments against the anticompetitive detriment. If granted the authorisation may also be subject to conditions. The Commission may review the grant of an authorisation, for example if there has been a material change in circumstances.[29] An authorisation may also be revoked.[30]

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25 Clause 2(1) Conduct Code Agreement.

26 Clause 2(2) of the Conduct Code Agreement as amended in November 2000. The original reference in clause 2(2) of the Conduct Code Agreement to paragraph 51(1B)(f) should have been a reference to paragraph 51(1C)(f).

27 Clause 2(2) Conduct Code Agreement.

28 See s90.

29 s91B (3)

30 s91B (4)

An applicant must compile and provide a considerable amount of information to the Commission on the relevant market and the extent of competition. Sourcing this information can be difficult and involves not insubstantial expense. The Commission may also wish to hold a conference to receive public submissions.[31]

An authorisation must be sought in relation to identified conduct. It is not available as a blanket protection for specific conduct, though similar in nature. Considerable expense would be involved in submitting multiple applications relating to different conduct and different types of licences.

Before lodging an application the applicant will also need to obtain advice on whether the conduct is such as to warrant an application at all. That also involves time and expense. The fact that the applicant will need to turn its mind to whether to apply for an authorisation underlies the uncertainty with the authorisation approach. Indeed it highlights the value of a specific, certain and permanent exemption for licensing by a local government body.

Notification

A corporation that engages or proposes to engage in exclusive dealing may lodge a notification with the Commission.[32] There in lies its limitation – it applies only to s47 conduct. It also suffers from many of the limitations of the authorisation process.

Exemption

On balance there is much to be said for retaining a general exemption for licensing activities of a local government body. It is explicit, limited and enduring and provides the necessary degree of certainty while not adding to transaction costs.

However some amendments may be warranted. Of particular concern is whether a local government body should be protected from s46.

Section 46 might apply in a number of ways. Suppose for example that a local government business is engaged in the retailing of electricity within its area of operations. Assume also that a retailer of electricity is also required to hold a licence issued by the local government body. There is an incentive for the local government body to not licence a new retailer that might provide a service in competition with it. Alternatively it may grant a licence on more disadvantageous terms. This may have the effect of preventing entry to a market or deterring competitive behaviour amongst those in the market.

Licensing is clearly an important activity for a local government body. It serves broader public interest goals of safety, liability, minimum acceptable standards, consumer protection and accountability. However it should not be used as a vehicle to stifle competition which may have benefits for ratepayers in the form of reduced prices, improved choice and lower prices.

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31 See s90A

32 s 93.

On balance, issues of certainty and high transaction costs well and truly justify a general exemption from Part IV. However it is not as obvious that the benefits outweigh the costs of extending the protection to s46 conduct.

It may also be desirable to better define the licensing functions to which the exemption applies. Corresponding changes should be made to s2C.

Issues surrounding the scope of the exemption (some of which have been discussed) might also be clarified.

Finally it is not clear why the exemption should be located in s2 of the Act. It is fundamentally different to s2A and s2B which are a positive statement of the liability of the Commonwealth and the States, to the extent that they are involved in a business. In contrast s2D is a negative statement indicating that the Act does not apply to the licensing functions of a local government body. It is in truth an exceptio. As such it is better placed within s51 with the other general exceptions to the Act.

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