

## **Submission by the Trade Practices Committee**

### **Productivity Commission Review of Section 2D of the Trade Practices Act 1974**

As a committee specialising in competition law and policy, the Trade Practices Committee does not profess to have any particular expertise in local government. The following comments are, therefore, limited to a few issues.

#### **Background**

Section 2D was inserted in the Act in 1995 as part of the competition policy reform package. Its aim was to provide greater certainty for local governments that they would not contravene Part IV by carrying out their licensing functions. It was also intended to provide a degree of uniformity in the treatment of all levels of government.

As local governments do not enjoy the shield of the Crown, there is no need to apply the Act to them specifically. By contrast, the “shield of the Crown” exempts the Commonwealth, the States, the Territories and many of their authorities from the Act in the absence of express provisions to the contrary. Sections 2A and 2B were inserted to ensure the Act does apply to those levels of government “so far as” they “carry on business”. In case “business” might be interpreted as including “governmental” functions, s 2C provides that certain activities (collecting taxes, levies and fees; granting or refusing to grant licences; internal transactions; compulsory acquisition of primary products) do *not* amount to carrying on business.

Section 2D puts local governments in the same position as the other levels of government in relation to granting or refusing licences and internal transactions.<sup>1</sup>

#### **Discussion**

The Productivity Commission questions whether s2D is necessary.

##### *Paragraph 2D(1)(a)*

Section 46 is the only section of Part IV that could apply to the grant, refusal, suspension or variation of a licence. Any agreement or arrangement relating to the grant or refusal of a licence would appear to fall outside the provision and so would be subject to s45 or s47.

In theory a local government might refuse to grant a licence, for instance in relation to the use of premises, in order to prevent the entry of a trader into a market or to prevent competitive conduct. Accordingly, a local government could contravene s46 by granting or refusing to grant a licence although, subject to information the Productivity Commission may obtain in the course of the review, the possibility of this happening in practice seems slight.

Neither s46 nor the other sections of Part IV were designed to apply to the exercise of a regulatory function under statute. Any problems with the exercise of such a function should be

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<sup>1</sup> It is not clear why collecting taxes (rates) or fees was not included in s2D.

addressed by reviewing the legislation conferring the function and the policy to be applied in carrying out the function. Part IV is concerned with the rules of competitive conduct in markets and is an inappropriate instrument for reviewing regulatory decisions. In so far as paragraph 2D(1)(a) may serve a useful purpose in ensuring that the decisions of local governments in granting or refusing licences are not subject to challenge under Part IV, it seems justified.

The Committee is concerned, however, that some local governments may be carrying on business activities in markets over which they also exercise a regulatory function. In such cases the local government might have an incentive to make decisions granting or revoking licences in a way that advantages the local government operation and disadvantages an actual or potential competitor.

An important principle of national competition policy is that a regulator should not also be an operator in a market affected by its regulation. The Productivity Commission should examine the facts to determine whether this is a problem in practice. If so, State and Territory governments should be required to ensure that local governments constituted under their laws conform to national competition policy. If necessary, the National Competition Council might also take up this issue.

#### *Paragraph 2D(1)(b)*

The internal transactions of a body corporate would usually be excluded from the scope of Part IV under general principles, although there is no express exception in the Act to this effect. There does not appear to be any reason why local governments should be treated any differently from other bodies corporate. Consequently, the Committee would normally recommend repeal of paragraph 2D(1)(b) in the interests of uniformity.

On the other hand, s2C expressly provides the same exception for other levels of government. There does not seem to be any reason to distinguish local government from other levels of government in relation to the exception. Perhaps the real question is whether s2C should provide the exception for the other levels of government. The Committee suggests this question be considered.

It may be argued that a purely declaratory provision does no harm and may provide some comfort to governments. But the expression of the exception for governments could support an argument that the Act operates differently in relation to other bodies. It also clutters the Act unnecessarily and is inconsistent with the objective of uniform application of the Act to all entities irrespective of ownership or corporate form.

It should be noted that s2C also provides an exception for transactions that are not purely internal, such as between the government and “non-commercial” authorities. This exception may raise different considerations.

### **Conclusions**

1. The Productivity Commission should determine whether local governments carry on business activities in markets over which they also exercise a regulatory, licensing function and whether this gives rise to actual or potential problems. If so, State and Territory governments should be required to ensure that local governments constituted

under their laws conform to national competition policy. If necessary, the National Competition Council might also be asked to take up this issue.

2. Paragraph 2D(1)(b) should be repealed subject to repeal of the equivalent provisions of s2C.

Dated: 19 March 2002