Submission from the South Australian Government
to the Productivity Commission regarding
the Review of section 2D of the Trade Practices Act, 1974 (C/wth).

INTRODUCTION:

1. Structure of Local Government in SA:

In South Australia, the local government environment consists of 17 metropolitan Councils, 51 regional area Councils, and the Outback Areas Community Development Trust which provides services to remote areas. A more detailed description of the structure of local government in South Australia is provided in the submission to the Productivity Commission on this matter from the Local Government Association of South Australia.

2. Local Government is the third tier in Australian constitutional arrangements:

It is the theme of this submission that Australian governmental arrangements consist of three tiers - Federal, State & Territory, and Local. Where any of those tiers of government exercise functions or powers that are governmental in nature, as distinct from carrying on a business in the commercial sense, there should be no inhibition or barrier to the exercise of those governmental functions or powers erected by the restrictive trade practice rules in Part IV of the *Trade Practices Act, 1974 (Commonwealth)*, ("**the TP Act**").

While the place of local government in the Australian government arrangements is not discussed in the Commonwealth Constitution, and it received little attention in the constitutional debates in the late 1890s, local government arrangements (commonly called Municipal or District Councils) were traditionally a matter for the Australian Colonies to determine under their own laws. The few references in the constitutional debates and the latter commentaries speak of Municipal or District Councils acting as delegates of the Colonial Governments, in that their powers were derived from the Colonial legislatures. It is a natural progression from that position that local government structure, roles and responsibilities, and subordinate law making powers, are now determined by State laws [1].

The *Local Government Act, 1999 (SA)*, ("**the LG Act**"), was enacted in accordance with Part 2A (section 64A) of the *Constitution Act, 1934 (SA)* which requires that there shall be a system of local government in South Australia with powers, functions, duties and responsibilities to be determined by Act of Parliament. One object of the LG Act is:

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[1] See: Part 2A of the *Constitution Act, 1934 (SA)*;
the *Local Government Act, 1999 (SA)*;
the *Local Government Act, 1934 (SA)*; and,
the *Local Government Financing Authority Act, 1983 (SA)*.

> "… to enhance the capacity of councils to act within their local areas as participants in the Australian system of representative government."

It is noted that the "Declaration of the Role of Australian Local Government" of the Australian Local Government Association records, under the heading: "Roles and Responsibilities":

> **" 1. Must be a Partner in the Federal System**
> Local Government is a necessary participating partner in the Australian system of democratically elected, representative government in accordance with the view expressed without dissent at the Australian Constitution Convention in Hobart, 1996. **"**

3. **Local government bodies perform a broad range of functions:**

The task of categorising the functions performed and powers exercised by local government bodies requires an exercise of 'characterisation', that is, examining the activity to determine its nature, whether it is:

- Governmental: Providing Rates-driven services such as: garbage collection, maintaining roads & footpaths, lending libraries, community facilities, etc - whether 'in-house', or by contracting-out [2]; representing constituents; developing policy initiatives; encouraging local development; making civic improvements; providing grants & subsidies in support of 'worthy' local endeavours; health services, including subsidised immunisation, providing subsidised land & buildings to non-profit hospitals; purchasing supplies and equipment; investing and managing Rates receipts, etc;

- Legislative: Making Council by-laws and other statutory instruments that have a legislative effect, etc;

- Quasi-judicial: Exercising decision-making powers under a legislative scheme, usually after a hearing, or after the receiving and consideration of relevant information;

- Regulatory: The more straightforward Quasi-judicial functions such as issuing licences and permits under a simple legislative scheme; and enforcement activities (parking infringements, failure to comply with licence conditions, enforcing building and sanitary standards, dog & cat control, etc);

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[2] **NOTE:** It is well established that outsourcing (and privatisation) activities undertaken by the State and Commonwealth governments are not business activities, see: Emmett J in *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419.

- Business activities: The lease or hire of land and buildings; the owning and operating of caravan parks, swimming pools, city car-parks, market & saleyard locations, golf courses, etc; the distributing and retailing of electricity and water [3], etc.

At **ATTACHMENT 'C'** is a 'Summary of Activities of Councils'. It is an indicative list of the type of activities undertaken by local Councils in South Australia.

Section 7 of the LG Act sets out the functions of local Councils in South Australia:

> **" Functions of a council**
> 7. The functions of a council include —
>
> *(a)* to plan at the local and regional level for the development and future requirements of its area;
>
> *(b)* to provide services and facilities that benefit its area, its ratepayers and residents, and visitors to its area (including general public services or facilities (including electricity, gas and water services, and waste collection, control or disposal services or facilities), health, welfare or community services or facilities, and cultural or recreational services or facilities);
>
> *(c)* to provide for the welfare, well-being and interests of individuals and groups within its community;
>
> *(d)* to take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards;
>
> *(e)* to manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner, and to improve amenity;
>
> *(f)* to provide infrastructure for its community and for development within its area;
>
> *(g)* to promote its area and to provide an attractive climate and locations for the development of business, commerce, industry and tourism;
>
> *(h)* to establish or support organisations or programs that benefit people in its area or local government generally;
>
> *(i)* to manage and, if appropriate, develop, public areas vested in, or occupied by, the council;
>
> *(j)* to manage, improve and develop resources available to the council;

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3 In South Australia, local government participation in electricity businesses is limited to the remote area:

- Roxby Downs District Council, which owns an electricity retail and distribution business (and also a water business). Roxby Downs is essentially a 'company town' for WMC's Olympic Dam mining venture; and,
- Coober Pedy District Council, which owns "off-Grid" electricity generation, distribution and retail businesses.

(k) to undertake other functions and activities conferred by or under an Act. **”**

Local Government is involved in service delivery and local development initiatives, in the same way as State and Territory governments, but on a lesser scale and dealing with matters that are relevant to the local Council's area. This is also reflected in the Australian Local Government Association Declaration:

> **“ 9. Will ensure Local Services Delivery**
> Local Government will provide, or ensure the provision of, programs and services required to meet local community needs. These must be affordable and delivered equitably, efficiently and effectively. Local revenues and resources must be supplemented by external resources, including Commonwealth of State/Territory grants, when appropriate.
>
> **10. will facilitate Community development**
> Local Government will seek to ensure the balanced physical, Social and economic development of its local communities. **”**

The Commonwealth and State governments provide some of the funding for local government bodies on a regular basis through general grants and specific purpose grants and subsidies. The Commonwealth makes an appropriation from the Commonwealth Consolidated Revenue Fund to the States, and the States are required to pass through that money to local government bodies in accordance with the recommendations of State Local Government Grants Commissions. See: *Local Government (Financial Assistance) Act 1995 (C/wth)*, and the *South Australian Local Government Grants Commission Act, 1992 (SA)*. Other local government revenue comes from statutory Council Rates, statutory fees and charges for the performance of regulatory and administrative functions, investment income, and through any (profitable) business ventures that a Council might own.

As an indication of the proportion of activities that a local Council in South Australia undertakes that are non-business, as against 'business', in the year ending June 2000 the Burnside City Council obtained some 86.76% of its Total Operating Revenue from Council Rates and from Operating Grants and Subsidies, as against 1.37% from Commercial Activity Revenue (see: Burnside City Council, Operating Statement, Annual Financial Statement for the year ending June 2000, at www.burnside.sa.gov.au).

4. **Local government 'non-business' functions should not attract the Trade Practices Act:**

For all local government activities, except *bona fide* business activities, the application of the TP Act's restrictive trade practices rules (Part IV), and the other generic provisions of the TP Act (such as Part IVA: Unconscionability; and Part V: Consumer Protection; Part VC: Offences, etc) is inappropriate.

The broad sweep of the TP Act was never intended by Parliament to be directed at the functioning of the Crown (see: *Bradken Consolidated Ltd v The Broken Hill Proprietary Co. Ltd* (1979) ATPR, 40-106). Even without the principle of Crown immunity, any application that the TP Act may have to the non-business activities of the

Crown should be seen as an unintended effect of the broad sweep of the language of the TP Act and of the fact that most of the non-business activities of governments will inevitably have some commercial impact in markets. As a matter of policy, local governments, which perform similar non-business functions to the State and Federal governments (but on a lesser scale and dealing with matters that are relevant to the local Council's area) should similarly not have the TP Act apply to their non-business functions.

Other provisions of the TP Act, such as the Access rules (Part IIIA) would apply to governments according to their tenor, that is, to the extent that a government provides services by means of an infrastructure facility. Such activities would, of their nature, be (characterised as) business activities.

Part IV of the TP Act has always been understood in its historical context, derived from the US Sherman Antitrust Act, as a measure ***to prohibit the private regulation of markets***. It was never intended to inhibit the governmental, legislative, quasi-judicial or regulatory activities of government. Section 2A and 2B of the TP Act, together with the finding in *Bradken Consolidated Ltd v The Broken Hill Proprietary Co. Ltd* (1979) ATPR, 40-106, that the TP Act did not bind the Crown in right of the States or Territories, achieved that outcome as far as the Commonwealth and State & Territory governments was concerned. Only where a governmental body is carrying on an activity in the same way as would a private commercial enterprise (*viz*, as a business), should the TP Act apply to the governmental body [4].

However, while section 2D was introduced into the TP Act at the same time as section 2B, it was done so more as an afterthought to provide comfort to local government, rather than as a comprehensive recognition of the role of local government [5].

While 'in trade and commerce', as distinct from 'business', is not a good threshold for the application of the TP Act, there would be great doubt that many of the non-business functions and powers of local government would be carried out 'in trade and commerce', although in a litigation environment, that allegation would certainly be made by a plaintiff. However, there is sufficient doubt and lack of judicial precedent, that some direction should be provided in the TP Act itself. The alternative is to make local government bodies bear the costs of that uncertainty, including the transaction costs associated with litigation and with obtaining legal advice, including executive time.

Section 2D does not provide any great protection in a real sense to local government (see: Worked Example at **ATTACHMENT 'A'**), but, if nothing else, it does establish

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4 In the Second Reading Speech to the 1977 amendments to the Act that introduced section 2A of the TP Act, the then Minister for Business and Consumer Affairs (John Howard) described section 2A as applying to: "the business undertakings of the Commonwealth Government" and drew parallels to the "like operations of private enterprise" (House of Reps. Hansard of 13 May 1977).

5 In contrast to all State and Territory Governments, no local government body made a submission to the Hilmer Committee, and the Committee's recommendation did not address the issue of local government. The addition of requirements placed on Local Government in the *Competition Principles Agreement* was as a result of a decision made late in the course of Commonwealth / State negotiations *post* Hilmer Report.

the policy that certain non-business activities of local government should be immune from the restrictive business practice rules of the TP Act. While section 2D should be transformed into a proper statement of the application of the TP Act to local government bodies, if that does not happen, it should be left as it is, as a guideline for policy, even if it is, essentially, an ineffective immunity for the non-business activities of local government bodies.

5. **Business activities:**

The traditional reasons why a Council starts up a business activity is because the private sector has not been able to satisfy an identified community need, or the business may be commenced to support local development such as a caravan park to support local tourism, or the Council may own appropriate land on which to satisfy a local demand, such as a Swimming Pool or Golf Course situated in a recreational park. Of course, over time the commercial situation may change: demand increases, the local economy expands, and a private competitor(s) may emerge. This could be considered a mark of the success of the local Council's policy.

Some local Council businesses are 'not-for-profit', such as child-care centres, and others are deliberately non-commercial (subsidised from Council revenue) as a community service activity, such as a local immunisation campaign. In the later case, there are no clear rules to help the characterisation exercise - just as it is difficult to determine whether a State government activity is a business or not.

The TP Act's definition of 'business' includes a 'business' not carried on for profit [6]. That could well sweep into the 'business' category some activities that the Council would regard as 'community service activities'. The difficulties with the 'carrying on a business" test are dealt with at **ATTACHMENT 'B'** of this submission.

6. **Local government bodies are not usually "the Crown":**

The LG Act, which establishes the framework for local government bodies in South Australia, does not create those bodies as the Crown. As a general proposition, a local government body is not the Crown, and does not have the privileges and immunities of

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6 Section 4A of the TP Act states, simply, that: " 'business' includes a business not carried on for profit". The traditional statement of what is a business, is provided by *Hyde v Sullivan* (1956) SR (NSW) 113, (approved of in *Nader v Australian Pharmaceutical Industries Ltd* [1981] 57 FLR 89), where the Full Court of the NSW Supreme Court said:

> "Speaking generally, the phrase "to carry on a business" means to conduct some form of commercial enterprise, systematically and regularly, with a view to profit, and implicit in this idea are the features of continuity and system."

Thus, a Council community service activity may require the recipient to make a small charge, but have no intention of breaking even much less of making a profit. There may be an element of commerciality about it (advertising, market positioning, professional presentation, etc), and it would satisfy the requirements of system, regularity and continuity. The one clear determinant of "… a view to profit" is removed by the TP Act's section 4A definition of business. The Council may not regard this activity as a business, but is at risk of it being held to be so under the TP Act.

the Crown, unless that has been granted under particular statutes, usually for a particular purpose [7].

7. **Suggested remedial provision:**

Because a local government body is not 'the Crown', a 'carrying on business' threshold for the application of the generic Parts of the TP Act (Parts IV, IVA, IVB, V, and VA) to local government cannot be based on the scheme in section 2B (in its application to State and Territory governments). Section 2B applies the TP Act to business activities of the Crown, where otherwise the TP Act would not apply. Local government needs the reverse of section 2B, that is, it needs an immunity to be provided ***except where it carries on a business***.

The Productivity Commission's review of section 2D is a convenient opportunity to suggest a more universal approach to dealing with the position of local government *vis a vis* the TP Act. At page 17 of the Issues Paper, the Commission raises the issue of the consistency of regulatory arrangements across all levels of government, which the Terms of Reference require the Commission to have particular regard. The cost to local government bodies of the present legislative arrangement is mainly the transaction costs of obtaining legal advice, and the uncertainty of the application of the TP Act with respect to non-business functions and exercise of powers. This cost even flows through to the State government, which has to obtain legal advice in relation to arrangements that it is involved in with local government bodies [8].

It is suggested that an exemption for local government would look like this:

" The following provisions of this Act do not bind a local government body except in so far as the local government body carries on a business:

(a) Part IV
(b) Part IVA
(c) Part IVB
(d) Part V;
(e) Part VA
(f) Part VB; and
(g) Part VC. **"**

"Local government body" would be defined the same as it is in present section 2D, and section 2C would be amended to include reference to the new arrangements for local government bodies.

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7 See: Nicholas Seddon: *Government Contracts*, The Federation Press, 1999, Second Edition, at pp. 114 - 115.

8 An example is the State Government funding and in-kind support of the "Passenger Transport Networks". This is a support service for regional areas, providing transport to and from medical centres and assistance (such as shopping, unloading, settling-in) to aged, infirm and disabled persons, at a subsidised price. Regular taxi services have complained about this service. It is clearly intended as a community service activity, but taxi services see it as taking business away from them.

SPECIFIC QUESTIONS:

" What range of local government activity is encompassed by the notion of a 'licensing decision' in Section 2D? Are there grey areas and, if so, why? Is there any case law under the TPA or other relevant legislation which provides guidance on what a 'licensing decision' does and does not encompass? "

8. **Licensing decisions:**

As relevant, section 2D provides:

> **" 2D Exemption of certain activities of local government bodies from Part IV**
>
> (1) 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) …
>
> (2) In this section:
> *licence* means a licence that allows the licensee to supply goods or services. **"**

8.1 ***Section 2D exempts statutory licences, not contractual licences*:**

The category of licence referred to in section 2D is a ***statutory licence***, not a contractual licence. The words; "grant", "refusal", "suspension", "subject to conditions", all suggest that the licence derives its authority from statute as part of a regulatory scheme.

The word 'licence' would also include, as part of a regulatory scheme: a 'permit', 'authority', a 'consent in writing', a 'notice in writing', a 'permission', etc.

In contrast, a contractual licence is traditionally a mechanism by which the owner of land, or a chattel, grants another person rights, *eg*, to enter the property and conduct some sort of activity there (including exclusive rights for a stated period), to use the chattel for a period of time, etc. A contractual licence over land provides a less secure right than does a registrable lease, but is nevertheless a common commercial instrument in use in the private sector. There is no logical reason why the TP Act would exempt local government bodies from this type of activity, rather than providing a general exemption that included leases, or indeed even the sale of land, and extend it to the private sector.

An example of a statutory licence is Section 222 of the *Local Government Act, 1999 (SA)*, which provides:

> **" Permits for business purposes**
> **222.** (1) A person must not use a public road for business purposes unless authorised to do so by a permit.

Maximum penalty: $2 500. Expiation fee: $210

Examples—

- carrying on business from a pie-cart drawn up on the side of the road;
- establishing a kiosk on the side of a road;
- extending the business of a restaurant or cafe to outside tables situated on a footpath or roadside;
- depasturing stock;
- cropping.

(2) A permit may grant rights of exclusive occupation in relation to part of a public road.

(3) A permit may be granted for a particular occasion or for a term stated in the permit.

(4) The term of a permit cannot exceed five years. **"**

Thus, when a local government body makes a "licensing decision", it does so either as a regulatory function or a quasi-judicial function.

One judicial decision that would be relevant is the general proposition in *Re: Mid Density Development Pty Ltd and Rockdale Municipal Council* (1992) 39 FCR 579, that fulfilling statutory duties (such as making a 'licensing decision') is ***not*** a trading function: Davies J held that a certificate under s.149 of the *Environmental Planning and Assessment Act, 1979 (NSW),* ("**the EPA**"), that specified certain prescribed matters as to land the subject of a development application, and for which a prescribed fee was charged, was "… not a trading activity but the performance of a statutory duty in respect of which the EPA permitted the charging of fees."

9. **The issue of Derivative Immunity:**

The Productivity Commission's Issues Paper refers to this matter at page 10 with the comment that: "… the exemptions (s. 2D) may also extend to licensees and others with whom local government bodies have dealt …", and quotes *Bradken Consolidated Ltd v Broken Hill Proprietary Co. Limited* (1979) 145 CLR 107, ("**the Bradken case**").

9.1 ***Is there a need for derivative immunity ?***

Assuming (without conceding) that, without the protection provided by s. 2D, a local government licensing decision might contravene the TP Act, it is still difficult to see how the person who obtained the licence could contravene the TP Act, unless by the mere fact of applying for a licence s/he is "knowingly concerned in, or a party to …" the local government body's contravention. Otherwise, it is difficult to see how the licensee could beach the TP Act by the simple act of supplying goods or services in a local Council area, without engaging in some extraneous conduct unconnected to the licence to supply goods or services.

Thus, in this scenario, if s. 2D does immunise the local government body, there would be no need for the licensee to derive any immunity from the local government body, as

the licensee could not be liable on a "knowingly concerned in, or a party to …" basis because there would be no primary contravention by the local government body.

9.2 ***Is the principle of statutory construction upon which 'derivative immunity' is based applicable to s. 2D ?***

The principle of 'derivative immunity' applies where it has been established that the **Crown** has immunity from the application of a particular statute.

The principle provides that, to the extent that the Crown engages in a transaction with a person who is subject to the TP Act, the Crown's immunity extends to that person in respect of the particular transaction:

> " ... it follows that the Act will not only not apply directly to the ... (agency with Crown Immunity) but will also not apply so not as to prejudice its interests when in contractual relationship with parties to whom the Act clearly applies or when otherwise interested in transactions affecting those parties." *per* Stephen J. in *Bradken*, 145 CLR 107, at P. 129.

This statement of derivative immunity is not general in nature, but is an adjunct of the principle of statutory construction that provides for Crown immunity, see: *Re Automatic Telephone & Electric Co. Ltd.'s Application*, [1963] 2 All ER 302 and *Wirral Estates, Limited v Shaw* [1932] 2 KB 247.

Section 2D is not structured in the same way as sections 2A and 2B. It does not have an underlying assumption of Crown immunity, and then carve out an area of liability from that general immunity. Except where it is provided in a particular statutory scheme (usually for the purposes of a specific activity), the basic proposition is that local government is ***not*** the Crown and does ***not*** have the privileges and immunities of the Crown [9].

Instead, s.2D assumes the general application of the TP Act, but creates an area of immunity by force of the direct words of the statute. Thus, any extension of section 2D immunity would also need the direct authority of statute, and could not rely upon a principle of statutory construction based on Crown immunity (*viz* the Bradken statement on derivative immunity).

" Would all in-house transactions, including those involved in the in-house provision of goods and services by local government, be encompassed by the definition of an 'internal transaction' in Section 2D? If not, what type of in-house transactions might fall outside the exemption? Are these significant? "

10. '**In-house' or 'internal' transactions:**

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9 See: Nicholas Seddon: *Government Contracts*, The Federation Press, 1999, Second Edition, at pp. 114 - 115.

Section 2D.(1)(b) of the TP Act provides that the TP Act does not apply to: "a transaction involving only persons who are acting for the same local government body". This is referred to at pages 11 & 17 of the Issues Paper.

A rough parallel to this provision can be found in the application of section 2C.(1)(c) to persons who are all acting for the Crown in the same right (but not extending to statutory authorities of the State Crown).

In respect of transactions between persons wholly within the one legal entity, where the persons are employees, agents or delegates of that legal entity, sections 2D.(1)(b) & 2C.(1)(c) simply reflect well established principles of law, whether based on the principles of 'agency', employment law, contract law, or on the general characteristics of being a 'legal entity'.

In *Corrections Corporation of Australia Pty Ltd v Commonwealth of Australia* [2000] FCA 1280, Finkelstein J commented on the 'carrying on of business' test in its relation to the internal arrangements within government. The same general principles are relevant to the internal arrangements within local government bodies (AustLII reference):

> **"** The executive branch of the Commonwealth, often referred to as "the government", carries out its activities through departments, agencies and statutory authorities. These departments and agencies, and many of the statutory authorities, are part of the body politic we refer to as the Crown in right of the Commonwealth, or in modern parlance, the Commonwealth. Often one department, agency or statutory authority will carry out a function that assists the workings of some other department, agency or authority. It would be a mistake in those circumstances to regard the first department or agency (I leave out of account statutory authorities in respect of which different considerations may arise) as having provided services to the second department or agency in anything other than a very loose sense. Consider the case of private employment. While it may not always be an inappropriate use of language to treat one employee of an organisation as providing services to another employee, in reality the services of each are provided to the organisation that employs him. So it is with a department of state or governmental agency. These departments or agencies, which have no separate legal status, do not, strictly speaking, provide any service to other departments or agencies.
>
> 10. Moreover, even to the extent that it is appropriate, in a loose way, to describe the activities of one department or agency as providing services to another, such conduct would not amount to the carrying on of a business. With the adoption of modern theories of government accountability and efficiency, it is common to find that a department or agency will charge another department or agency in respect of services that it renders. If a profit and loss statement were to be prepared for the providing department or agency, it may show that a "profit" has been made. But of course there is no real profit. All that has occurred is that part of the operating budget of the department or agency concerned has been taken from the appropriation of funds and allocated to another department or agency. Moreover, the annual appropriation to the first-mentioned department or agency

> will take into account the anticipated receipt by that department or agency of a portion of the appropriation to the other.
>
> 11. The point that I am seeking to make is, in effect, recognised by s 2C(1)(c)(i) of the Trade Practices Act.**"**

It is noted that section 2C does not limit any other things that do not amount to carrying on a business, see: section 2C.(2).

While the inclusion of sections 2D.(1)(b) & 2C.(1)(c) do **not** in any way expand the area of immunity from the TP Act available to the States or to local government bodies, neither does its inclusion do any damage to the breadth of the their immunity. They might be considered as cautionary provisions, inserted during the 'high-water' days of the application of the TP Act to the State Crowns to provide some comfort and assurance to them (and, consequently, also to local government).

11. **The parallel to 'in-House' dealings - dealings between 'related corporations':** An additional, and an appropriate, area of immunity for local government bodies relates to those transactions between arms of local government where a statutory scheme creates separate legal entities, such as: dealings between a local government body and the Local Government Financing Authority of South Australia, established under the *Local Government Financing Authority Act, 1983 (SA)*, ("**LGFA Act**"). Its functions are:

> **" Functions and powers of the Authority**
> **21.** (1) The functions of the Authority are—
>
> *(a)* to develop and implement borrowing and investment programmes for the benefit of councils and prescribed local government bodies; and
>
> *(b)* to engage in such other financial activities as are determined by the Minister, after consultation with the LGA, to be in the interests of local government. **"**

The Local Government Financing Authority is a separate legal entity, with the function of centralising local government financial activities. It is not part of the Crown, nor is it an agency or instrumentality of the Crown (see: section 4.(4) of the LGFA Act).

Another example would be the dealings between two or more local Councils and their 'regional subsidiaries' established under section 43 of the LG Act.

Such transactions should be treated in the same way as in-house dealings, or at very least, obtain the benefit of the 'related corporations' exemption in sections 45.(8) and 47.(12) of the TP Act.

Governmental and local governmental statutory corporations do not fit within the 'related corporations' definition in section 4A.(5) of the TP Act, which is based on *Corporations Law* principles.

" 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? "

12. **Local Preference policies:**

A local preference policy could be given effect through either: a regulatory or quasi-judicial activity, requiring a legislative scheme; or as an adjunct to the exercise of a general governmental function; or by a Council owned business. For example:

- **'Regulatory' activity:** A legislative scheme might prohibit an activity except with a permit given by the local Council. The Council refuses an out-of-area business in favour of a local business.

- **'Governmental' activity:** A Council needs to purchase new lawn-mowers and grass trimming equipment for the maintenance of its local parks and gardens. It chooses a local supplier rather than one located in a different Council area.

- **'Business Activity':** A Council instructs all of its businesses to purchase particular goods/services only from a nominated local supplier.

12.1 **Giving effect to a local preference policy through a 'regulatory' or 'quasi-judicial' licensing decision:**

***Judicial review issue*:** Using the example above, a local preference policy would have to be a part of the regulatory scheme, *ie*, required by the relevant Council by-law as a matter of law [10]. Otherwise, if the Council made a decision based on

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[10] **NOTE:** It would be most ***unlikely*** that a 'local preference policy' would form part of a scheme established by Council by-laws in South Australia. First, there would have to be authority for such a scheme, either in the *Local Government Act, 1999 (SA)*, the Regulations under that Act, or in some other Act. I am unaware of any such authority.

The only legislated 'preference schemes' that I am aware of in South Australia are obligations that the State Government has placed on developers in the Stony Point, Roxby Downs, and Golden Grove Indentures.

I note that section 247 of the *Local Government Act, 1999 (SA)* requires Council by-laws to comply with the ***National Competition Policy legislation review requirements***:

> **" Principles applying to by-laws**
> **247.** A by-law made by a council must —
>
> *(a)* be consistent with the objectives of the provision that authorises the by-law and accord with the provisions and general intent of the enabling Act; and
> *(b)* …
> *(c)* avoid restricting competition to any significant degree unless the council is satisfied that there is evidence that the benefits of the restriction to the community outweigh the costs of the restriction, and that the objectives of the by-law can only be reasonably achieved by the restriction; and
> *(d)* …
> *(e)* avoid regulating a matter so as to contradict an express policy of the State that provides for the deregulation of the matter; … **"**.

an informal (non-statutory) local preference policy that was not within the statutory scheme, that would be an unlawful decision (because it would be based on an irrelevant consideration) that would be subject to judicial review under traditional administrative law principles.

***Loss of a defence to allegation of breach of the Competition Code*:** Assuming that the 'licensing decision' is made by a delegated Council officer, and that the TP Act and/or the Competition Code did apply to the 'decision', the officer would not be able to use the defence that s/he did not have the requisite purpose (for those prohibitions where 'purpose' is relevant - misuse of market power and primary boycotts).

Because it would not be part of the officer's statutory duty, if the officer made a decision to grant, or to refuse, a licence to supply goods/services based upon an ***informal*** (non-statutory) local preference policy, that could undermine a possible defence to a contravention of the Competition Code based on the officer lacking the requisite 'purpose'. In fact, if the officer gave effect to a local preference policy, the 'purpose' of the officer would be transparently to prevent or hinder a particular (non-local) supplier from providing goods/services within the Council area.

However, as shown in the analysis at **ATTACHMENT 'A'**, it requires a considerable 'stretching' to create the necessary 'fit' between the activity of giving effect to a statutory duty and the prohibitions contained in the Competition Code (or, with even more difficulty, the TP Act).

12.2 **Giving effect to a local preference policy through the exercise of a governmental function:**

Continuing the example above of the purchase by Council of certain equipment, there should be nothing to inhibit a local Council from dealing with whom it pleases, apart from general principles of prudential management (obtaining the best bargain and appropriately safeguarding against risk). The Council may decide only to deal with local suppliers, either generally or in particular circumstances [11].

However, section 49 of the LG Act does require local Councils to prepare and adopt a "Contract and Tender Policy". While local preference is not precluded, it must be made transparent in the policy [12].

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[11] **Note:** The Australia New Zealand Government Procurement Agreement does **not** extend to "local authorities" (cl. 1(4) of the Agreement).

[12] **" Contracts and tenders policies**

49. (1) A council must prepare and adopt policies on contracts and tenders, including policies on the following:

(a) the contracting out of services; and
(b) competitive tendering and the use of other measures to ensure that services are delivered cost-effectively; and
(c) ***the use of local goods and services*** (emphasis added); and
(d) the sale or disposal of land or other assets.

Although it may be an inflexible matter of principle in some economic policy circles, local Councils should have as much freedom to decide to 'buy locally' as any other person. There are many more considerations than a superficial regard for national allocative efficiency that are properly matters for consideration in a Council's "Contract and Tender Policy", such as: local economic development; any local 'multiplier effects'; social policy issues; local employment; environmental issues; as well as commercial issues such as convenience, availability of servicing & spares, etc.

12.3 **Giving effect to a local preference policy through a business activity:**

Council business activities should be subject to the TP Act in the same way as State and Federal Government businesses, which is to the same extent as private businesses.

The general rule applying to selective supply and acquisition is: "a person may deal with whoever he pleases, so long as he does not breach the TP Act - so, first, find the breach !!"

Obviously, a misuse of market power, where there is a purpose of harming competition or a competitor, would breach section 46. Also, conduct that satisfies the section 4D prohibition against primary boycotts or the section 45D & 45DA prohibitions against secondary boycotts would be illegal, as would any contract, arrangement or understanding that had the effect of causing a 'substantial lessening of competition'.

Apart from that, the TP Act enables a local Council business, in the same way as it enables any private business, to deal, or refuse to deal, with whoever it likes.

" What is the rationale for exempting the licensing decisions of local governments from Part IV of the TPA? Does it merely clarify that licensing decisions are not matters of trade

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(2) The policies must —

(a) identify circumstances where the council will call for tenders for the supply of goods, the provision of services or the carrying out of works, or the sale or disposal of land or other assets; and … (PTO)

(b) provide a fair and transparent process for calling tenders and entering into contracts in those circumstances; and

(c) provide for the recording of reasons for entering into contracts other than those resulting from a tender process.

(3) A council may at any time alter a policy under this section, or substitute a new policy or policies (but not so as to affect any process that has already commenced).

(4) A person is entitled to inspect (without charge) a policy of a council under this section at the principal office of the council during ordinary office hours.

(5) A person is entitled, on payment of a fee fixed by the council, to a copy of a policy under this section. **"**

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 contracting out the delivery of services and, if so, why? "

13. **Rationale for exempting the licensing decisions of local governments from Part IV of the TP Act:**

This issue is discussed fully in paragraphs 2 - 7 above (Introduction segment). The central theme of this submission that Australian governmental arrangements consist of three tiers - Federal, State & Territory, and Local. Where any of those tiers of government exercise functions or powers that are governmental in nature, as distinct from 'carrying on a business' in the commercial sense, there should be no inhibition or barrier to the exercise of those governmental or similar functions or powers erected by the TP Act.

14. **Relevance of the 'trade and commerce' criteria:**

At page 16 of the Issues Paper the criteria 'in trade or commerce' is referred to. It is seen as a barrier to the application of the TP Act to local government licensing decisions.

14.1 ***The role of the 'trade or commerce' criteria in Part IV of the TP Act***

As far as the substantive provisions go, only section 45DB, dealing with secondary boycotts affecting **foreign** trade or commerce, and section 47, which proscribes exclusive dealing, in trade or commerce, have that criteria as a threshold to their operation.

Section 6 of the TP Act provides for an additional operation of certain provisions of the TP Act based on the Commonwealth's constitutional power over 'trade and commerce'. However, this extended operation is not in the same category as the specific limitation in sections 47 and 45DB.

The constitutional requirements in Part IV of the TP Act relating to 'corporations' (in effect, 'trading or financial' corporations) requires that the corporations "engage in trading activities on a significant scale" (see: *State Superannuation Board* case [13]) to satisfy the 'current activities' test (see: Adamson's case [14]). In practice, such 'trading activities' would be activities 'in trade or commerce'.

The definition of a 'service' in the TP Act includes the granting of certain rights, benefits, privileges, etc, conferred 'in trade or commerce'.

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[13] *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304.

[14] *R v Federal Court of Australia; Ex Parte Western Australian National Football league* (1979) 143 CLR 190 at 219, 243. This includes an intention to trade that has not yet commenced, but which is apparent from the corporation's constitution, see: *Fencott v Muller* (1983) 152 CLR, 570 at 602.

In *Re: Mid Density Development Pty Ltd and Rockdale Municipal Council* (1992) 39 FCR 579, Davies J held that a certificate under s.149 of the *Environmental Planning and Assessment Act, 1979 (NSW),* ("**the EPA**"), that specified certain prescribed matters as to land the subject of a development application, and for which a prescribed fee was charged, was "… not a trading activity but the performance of a statutory duty in respect of which the EPA permitted the charging of fees."

While 'a trading activity' and 'in trade or commerce' are not exactly coterminous, the Rockdale case is a clear enough authority that performing a regulatory function for a fee is not the provision of a service for the purposes of the TP Act [15].

14.2 ***Meaning of 'in trade or commerce'***

'In trade or commerce' has a more limited application than 'in relation to trade or commerce'. Thus, the day-to-day internal dealings within a company (*eg*, between the company and its employees) is not conduct which is an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character - see: *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594

However, in relation to activities of a trading or commercial character, 'in trade or commerce' has a wide meaning:

> "The terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and delivery which comprised commercial arrangements … the word 'trade' is used in its accepted English meaning: traffic by way of sale or exchange or commercial dealing … Moreover the words cover intangibles, such as banking transactions, as well as the movement of goods or persons… ."
>
> *per* Bowen CJ in *Re Ku-Ring-Gai Building Society (No 12) Ltd*, (1978) 36 FLR 134 at 139.

A press release by a regulatory body concerning its regulatory activities is not published 'in trade or commerce', see: *Giraffe World Australia Pty Ltd v ACCC* (1990) ATPR 41-669.

Political statements, advertisements and media releases, are (usually) not made in trade or commerce. However, there is some ambiguity at the edges - a statement by the Commonwealth Minister for Primary Industry at a conference about the 'health' of the Australian Wool Commission (a matter within his Portfolio interest, and relating to a Commonwealth authority) and concerning the price of wool was **not** actionable, whereas statements by a Minister and government officials regarding the solvency of a building society **were** actionable.

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15 A different approach was taken in *I W v City of Perth* (1997) 191 CLR 1 where, ***for the purposes of WA Anti-discrimination legislation***, "services" included certain regulatory functions performed by a local government body. However, this case turned on principles of statutory interpretation, and should be regarded as being in a special category relating to anti-discrimination legislation (which was drafted following a UK model, and had a definition of 'services' that included "services of a kind provided by … a local government body").

14.3 ***Application of 'in trade or commerce' to the Competition Code***

Critically, the Competition Code that applies through the 'application laws' of the various States and Territories [16], and which applies to individuals as well as to corporations, and to bodies corporate that are not constitutional trading or financial corporations, does not carry the 'in trade or commerce' impedimenta of Part IV (except in section 47 - there is no section 45DB in the Competition Code).

Thus, except for exclusive dealing conduct proscribed by section 47, the Competition Code ***catches all conduct*** without requiring that any specific 'in trade or commerce' threshold be satisfied (as described in paragraph 14.1 above, the TP Act requires that a body be a trading or financial corporation). The provisions of the Competition Code apply to all legal 'persons' (including all bodies corporate) and would apply according to their tenor - that is, as far as the plain and ordinary meaning of the words of the statute provide.

The critical issue, therefore, is simply to apply to the various activities of local government bodies the restrictions contained in the Competition Code in accordance with the plain and ordinary meaning of their words - to which 'in trade or commerce' is relevant **only** in relation to exclusive dealing in section 47 [17].

15. **Does section 2D address a specific practical concern**:

At **ATTACHMENT 'A'** to this submission is an example of a licensing decision and a worked through examination of the application of the TP Act, and particularly of the Competition Code which is not restricted to 'corporations'.

The activity of "refusing", "granting", "suspending", "varying", etc a statutory licence to supply goods or services contains little risk of contravening the TP Act or the Competition Code. The only operation of the Code is a somewhat unintended and perverse operation (as shown in the worked example).

Therefore, the advantage of section 2D is not so much that it provides any real protection for local government bodies, rather, that it acts as a beacon for the principle that regulatory and quasi-judicial activities of local government bodies are not (and should not be) subject to the TP Act - See: paragraph 4 above.

16. Does the section 2D exemption have any ramifications for the capacity of local government bodies to give preference to local suppliers when contracting out the delivery of services and, if so, why?

As discussed above:

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16 The *Competition Policy Reform (South Australia) Act, 1996 (SA).*

17 **Note:** Conduct that does not satisfy section 47 falls back to be examined under section 45. Conduct that is caught by section 47 is prioritised as a contravention of section 47, not 45 - see: section 45(6).

- section 4D provides an exemption from the TP Act for licensing activities which fall under the characterisation of being regulatory or quasi-judicial functions of local government;

- the relevant type of licence is a statutory licence, not a contractual licence; and,

- as discussed above, and particularly as shown in the Worked Example, the act of refusing, granting, suspending, or varying a statutory licence is not at any real risk from the TP Act, and only attracts the Competition Code in a perverse way (if the Council officer happens to acquire, in his personal capacity, any of the goods for which he has granted a licence).

Further, as discussed above at paragraph 12, and particularly at paragraph 12.2, local preference schemes are a matter for decision by local Councils themselves, and should not be a focus of attention for national economic policy makers.

Certainly, there should not be any Federal legislation dealing with the issue. Nor should policy be based on a 'tail wagging the dog' theory, *ie*, fail to reform the situation of local government under the TP Act simply so as not to undermine a perceived barrier to preference for local suppliers (in fact, after analysis, the TP Act provides little inhibition to local preference in purchasing or outsourcing decisions).

" 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? "

17. See paragraphs 10 and 11 above.

The internal transactions provision simply reflects traditional principles of law, and those principles would equally apply to private firms. The 'internal transactions' provisions in sections 2C and 2D are essentially otiose.

However, governmental structural arrangements are usually based on statutory corporations (bodies incorporated under a statutory scheme), whereas private firms are usually incorporated under the *Corporations Law*. The related corporations exceptions in sections 45.(8) and 47.(12) of the TP Act relate to a *Corporations Law* structure, and do not fit with the statutory corporations model.

To create a fair environment, governmental bodies (State and local government) should have a redefined 'related corporations' provision.

For States and Territories, I suggest the simplest way of achieving this is to amend section 4A of the TP Act, and of the Conduct Code, to provide in a new sub-section 4A.(7):

> **"** (7) For the purposes of sub-sections 45.(8) & 47.(12), the Crown and Instrumentalities of the Crown shall be deemed to be related bodies corporate.

In this sub-section:

"Crown" means the Crown in right of each of the (Commonwealth, the) States, the Northern Territory and of the Australian Capital Territory; and,

"Instrumentalities of the Crown" means, distributively, Instrumentalities of the relevant Crown. ***”***

I note that the term "Instrumentality of the Crown" is well understood, see: the Julia Farr case: *The State of South Australia v Corporation of the City of Unley and Julia Farr Services*, (1997) 68 SASR 511, Supreme Court of South Australia.

A provision to the same effect would need to be drafted for local government bodies (which are not the Crown, and so the term ‘Instrumentalities of the Crown’ is not appropriate).

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

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 transaction be at risk from actions under Part IV in the absence of Section 2D?

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?

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 2D?

***Given the precedents established by the Rockdale Council and subsequent related cases, what would have been the basis for such actions?*; and,**

Could underlying concerns have been addressed through other avenues — for example, recourse to competitive neutrality complaints mechanisms? ”

18. **Costs and benefits of section 2D:**

The costs are the transaction costs of legal advice and local and State government executive time associated with lack of a clear statement in the TP Act, with a similar effect as section 2B as it applies to State governments.

There are no costs on private firms, as the section 2D exemption is practically ineffective (see above).

The benefit is that it acts as a beacon for the principle that regulatory and quasi-judicial activities of local government bodies are not (and should not be) subject to the TP Act - See: paragraph 4 above. It should not be removed unless a more comprehensive provision is inserted, as discussed earlier.

19. **Are there benefits derived from formal recognition of local government in this part of the TPA and consistency in regulatory treatment across levels of government:**

As discussed above, the practical benefits are slight, but the 'beacon' effect has some value.

However, a comprehensive approach needs to be taken to the application of the TP Act to Local Government (see: paragraph 7 above).

Section 2D ***does not*** provide consistency in regulatory treatment across levels of government.

20. **Risk, if section 2D was not available?**

As discussed above and in the Worked Example, there may be certain minor perverse and unintended applications of the Competition Code in the absence of section 2D. Further, the very act of removing section 2D would be likely to encourage some speculative (if wild) litigation.

21. **Are there unintended consequences: discouraging contracting out of service delivery, or encouraging or protecting anti-competitive behaviour?**

In light of the analysis above, there are none.

Contracting out is not a 'licensing decision', unless it is part of a statutory scheme.

Section 2D is not really required to safeguard Council's 'regulatory' and 'quasi-judicial' activities.

22. **Is there 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 2D; and,**

Given the precedents established by the Rockdale case, what would have been the basis for such actions?

The nature of adversarial litigation is that any advantage, whether specious or real, will be seized upon, particularly by persons with a sense of grievance. Thus, to remove section 2D, and not replace it with a comprehensive alternative, will surely encourage some wild litigation.

The existence of section 2D is most unlikely to have inhibited litigation that would have had any real prospect of success. Any litigation under the TP Act directed at a

Council's regulatory or quasi-judicial activities would have had no real foundation, even in the absence of section 2D.

The proper legal principles with which to challenge a regulatory or quasi-judicial decision are the administrative law principles applying to judicial review.

23. **Could underlying concerns have been addressed through other avenues — for example, recourse to competitive neutrality complaints mechanisms?**

Competitive Neutrality only relates to the Business activities of local government.

Licensing decisions are not business activities, rather regulatory or quasi-judicial activities.

Only if a business activity also involved the statutory licensing of suppliers of goods and services (and I cannot envisage such a thing), would Competitive Neutrality be relevant.

As a matter of course, significant (*ie*, not trivial or insignificant) local government businesses in South Australia have to implement Competitive Neutrality and Structural Review principles, and that includes the 'regulatory equivalence' principle, and having industry regulation removed from them - if ever they would have had such a role in the first place.

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

24. While section 2D has little practical impact, it does have a ***significant symbolic value***.

Because of its lack of practical impact there are ***no*** identifiable costs associated with section 2D that would be borne by private firms. However, the lack of a comprehensive approach to dealing with the application of the TP Act to local government means that local and State governments do bear legal and executive-time transaction costs in respect of the non-business functions of local councils.

" 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? "

25. There needs to be a comprehensive approach to the position of local government under the TP Act. Simply, further elaborating on what is, or is not, a 'licensing decision' would be of very little value.

" Are there alternative approaches that would offer a better overall outcome for the community while still meeting the objectives of the current arrangements? 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 2D? "

26. As stated earlier, a comprehensive approach is better than piecemeal amendments of present section 2D, or an amalgamation of sections 2C & D.

    I note that, except for the provision dealing with the 'acquisition of primary products', section 2C simply restates the general legal position in relation to what is not a business of the Crown. Section 2C adds little if anything to the general debate as to what is, and is not, a business activity.

    Further, section 2C is drafted in reliance on the scheme in sections 2A and 2B, where the Crown has an existing immunity (see: comments in paragraphs 6 & 7 above).

    Finally, section 2B of the TP Act, which acts as the trigger for the section 2C definition of things that are not business, is ***not*** relevant to ***all*** 'authorities of the State' - ***only*** those 'authorities of the Crown' that have Crown Immunity. This is shown by the wording of Section 2B, which is directed at the business activities of the: "Crown … so far as the Crown carries on a business, either directly or by an authority of the State…".

    As local government bodies are not the Crown, and do not have Crown Immunity from the application of the TP Act, then they are not an 'authorities of the State' as contemplated by section 2B. If this was not the case, local government bodies would benefit from the 'carrying on business' test in section 2B, and section 2D (and this review) would be entirely unnecessary.

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

27. It is the theme of this submission that Australian governmental arrangements consist of three tiers - Federal, State & Territory, and Local. Where any of those tiers of government exercise functions or powers that are governmental in nature, as distinct from carrying on a business in the commercial sense, there should be no inhibition or barrier to the exercise of those governmental functions or powers erected by the restrictive trade practice rules in Part IV of the TP Act, or by other TP Act rules such as "unconscionability". The remedy for aggrieved persons should be either in the political arena, or if a legislative scheme is involved, judicial review on administrative law principles is available.

    As stated above, section 2D provides very little protection for local government bodies, simply because the act of granting, revoking, etc, a statutory licence is a regulatory or quasi-judicial activity and, simply, just does not fit within the elements that make up the various prohibitions in Part IV of the TP Act.

    The argument for retaining section 2D is only relevant if there is a failure to replace it with a comprehensive scheme of immunity / exemption for the non-business functions and powers exercised by local government bodies. In that situation, it has a minor

beneficial effect to guard against certain perverse (and certainly unintended) effects of the Competition Code (see: Worked Example at Attachment ‘A’).

Without anything to replace it, section 2D still has a significant symbolic value, and it may act to discourage the wilder, more speculative TP Act litigation that might otherwise be brought against local government bodies.

ATTACHMENT 'A'

WORKED EXAMPLE

There is a statutory scheme contained in the *Local Government Act, 1999 (SA)*, ("**the LG Act**"), relating to the commercial use of roads, that prohibits the sale or supply of food or beverages from a parked vehicle (*eg*, one of the Adelaide 'pie-carts') without a permit [18] - ***see: copy of article in Eastern Messenger (local newspaper) attached***. Section 44 of the LG Act provides that a Council function may be delegated to an employee of the Council. Section 188 of the LG Act enables a Council to charge a fee for the permit.

Assume a permit is granted to one supplier, with conditions as to hours, waste management, etc, enabling the supplier to sell food and beverages from a large caravan at a commercially desirable curb-side. Later, a second applicant requests access to the same general area. S/he is refused, primarily because the first applicant has secured long-term rights over the particular parking area during commercially desirable hours, and two large caravans on the same stretch of curb-side would create traffic flow and other difficulties.

The decision to grant the first permit, and to refuse the second applicant, is made by the relevant Council employee, under a delegated authority, after consultation with the Council's Chief Engineer (traffic flow, provision of electricity to the site, lighting, etc) and its Environment Officer (waste disposal, amenity, health and safety issues, etc).

***Analysis*:**
Considering the provisions of the Competition Code ("**the Code**"), because they have the widest application:

- Sections 45.(2)(a)(ii) & (b)(ii) provide, at their lowest threshold, that a person may not be a party to, or give effect to, an understanding (a meeting of minds) if the understanding is likely to have the effect of substantially lessening competition in a market in Australia.

  Arguably, there is a meeting of minds between the relevant Council Officer and the Chief Engineer and Environment Officer. The effect of their understanding leads to

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[18] **Section 222 of the *Local Government Act, 1999 (SA)* provides:**

" Permits for business purposes
222. (1) A person must not use a public road for business purposes unless authorised to do so by a permit.

Maximum penalty: $2 500. Expiation fee: $210

Examples—
- carrying on business from a pie-cart drawn up on the side of the road;
- establishing a kiosk on the side of a road;
- extending the business of a restaurant or cafe to outside tables situated on a footpath or roadside;
- depasturing stock;
- cropping.

(2) A permit may grant rights of exclusive occupation in relation to part of a public road.
(3) A permit may be granted for a particular occasion or for a term stated in the permit.
(4) The term of a permit cannot exceed five years. **"**

the decision to respectively grant one, and refuse the other, permit. For the purpose of the example, let us assume that the decision gives the permitted pie-cart owner a monopoly in a particular (local) market.

However, unless any of the Council officers have a second job supplying food and beverages in the relevant market (or one of them purchases a pie or a coke in the relevant market), section 45.(3) would preclude this conduct from being a breach of section 45 or 45A of the Code.

Section 45.(3) provides that the substantial lessening of competition must occur "in any market in which a person who is a party to the … understanding … supplies or acquires, or is likely to supply or acquire, goods or services …".

Thus, the only exposure of the Council officers would be, ***perversely***, if any one of them was seen purchasing food or beverages at the particular pie-cart, as they would then be operating in the retail market for the acquisition of supply of the relevant product and would satisfy the requirement of section 45.(3).

- Sections 45.(2)(a)(i) & (b)(i) proscribe exclusionary conduct (or primary boycotts). Section 4D of the Code sets out the relevant conduct.

  To stretch section 4D to attempt to fit this example, the Council officers would need to be held to be competitors, who had reached an understanding that had the purpose of preventing or limiting:

  - the supply of goods/services (the permit?) to a particular person in particular circumstances (the unsuccessful applicant, in relation to his/her particular application); or,

  - the acquisition of goods/services (food/beverages) from a particular person (the unsuccessful applicant) -

    - by all or any of the parties to the understanding (the Council officers).

  The conduct of the Council officers is clearly **not** a primary boycott.

  The officers are not competitors in the relevant sense required by section 4D.(2), that is, in competition with each other "… in relation to the supply or acquisition of … the goods or services to which the relevant … understanding relates", namely, the granting of the permit. The Council officers do not compete in that supply.

  It could be argued that while, in their private capacities, the Council officers do not (or, are most unlikely to) compete in the market for the *supply* of food/beverages, they are, in a technical sense, *demand side* competitors - they must eat and drink!! However, the '**purpose**' of their understanding is **not** to prevent their own acquisition of food/beverage, it is to fulfil their statutory and employment duties. It would not even be a substantial purpose that was one of a number of purposes (s.4F of the Code).

  In any event, the decision in relation to the permit is not the supply of a 'service', it

is the performance of a statutory duty (or: it is a regulatory function), not an activity 'in trade or commerce' - see: decision by Davies J in the Rockdale case (above).

- Sections 45A (Price Fixing) and sections 45B and 45C (Covenants) are clearly not relevant.

- Section 45D of the Code (Secondary Boycotts) prohibits person A (the Council Officer) in concert with person B (any of the other Council officers) engaging in conduct that hinders or prevents person C (a potential customer of the unsuccessful permit applicant) acquiring goods/services to from person D (the unsuccessful applicant) for the '**purpose**' of causing substantial loss or damage to the business of person D.

  As for Primary Boycotts, the 'purpose' test ensures that the activities of the Council officers do not satisfy the elements of the prohibition in section 45D.

- A similar result is obtained in relation to section 45DA (Secondary Boycotts causing a substantial lessening of competition).

- Section 46 (Misuse of market power) is not relevant, as the Council officer(s) could not be described as having a substantial degree of power in any relevant market. This follows from the decision in the Rockdale case that fulfilling statutory duties is not a trading or market-related activity.

- Section 47 (Exclusive dealing) has the specific threshold requirement that the contravener be engaging 'in trade or commerce', which could **not**, on the authority of the Rockdale case, be satisfied.

- Section 48 (Resale Price Maintenance) is clearly not relevant.

- Section 50 (Acquisitions resulting in a substantial lessening of competition) is clearly not relevant.

ATTACHMENT 'B'

The concept of "CARRYING ON A BUSINESS" in the TP Act:

28. The "carrying on business" test in sections 2A & 2B the TP Act is, theoretically, a sound threshold for the application of the TP Act to the Commonwealth, and to the State & Territory Crowns. It would also be an appropriate threshold test for the application of relevant Parts of the TP Act to local government bodies.

However, because the definition of "business" includes a "business not carried on for profit" (section 4.(1) of the TP Act), there is a risk that, in its practical application, the TP Act concept of "business" might catch government community service activities where there is an element of cost recovery, and the activity is carried out with some of the verbal and other paraphernalia of "business", *eg*, use of a "Business Plan", use of language including 'customers' or 'clients', etc.

As a general proposition, section 2C of the TP Act simply repeats concepts that are already clear under general principles of law. Section 2C would be much more useful if it could exclude governmental activities where there is a degree of cost recovery (less than full cost recovery) and the activity is conducted as a community service activity, not from a commercial motivation.

29. Part IV of the TP Act only applies "in so far as the Crown carries on a business". The Crown, in this context, includes both the 'core Crown' and any statutory corporation that has been determined to have 'shield of the Crown'. The 'Crown' includes Ministers of the Crown, and a Minister incorporated as a corporation sole [19].

Further, officers, servants, contractors and agents of the Crown when acting within their capacity as officers, etc, represent the Crown and attract all relevant immunities of the Crown if the Crown's interests would be prejudiced if such persons were bound [20].

This is important because the practice of the Australian Competition and Consumer Commission ("**ACCC**") is to address and serve the compulsory processes available to the ACCC - such as section 155 of the TP Act (Power to Obtain Information, Documents and Evidence) and section 75AY (Notice to Produce Documents and Information relating to the Price Exploitation provisions) - on individual officers of the Government, not on the Crown as a legal entity.

Government activities constitute a continuum from "governmental" to "business":

30. The TP Act applies to the State Crowns "***so far as*** the Crown carries on a business …".

It may be that a particular statutory corporation is entirely engaged in "business", in which case there is no need to examine the matter further - Part IV of the TP Act applies.

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19 *Commercial Oil Refiners Pty Ltd v South Australia* (1974) 9 SASR 88, at 92 - (the Fire Brigades Board case).

20 See: Selway: '*The Constitution of South Australia*', The Federation Press (1997) at para 10.2.6.

Alternatively, where the body (such as the 'core Crown') conducts both "business" activities and "governmental" activities, there will be a need to examine the particular activity in respect of which a TP Act issue has arisen to determine whether or not it is a "business" activity.

31. There is a wide range of pricing models under which the Government and its instrumentalities provide goods and services to the community (usually, for well justified policy reasons), including:

- in a fully commercial and market-driven environment;
- where a price is 'proclaimed' or otherwise set by a Minister (or other body) for a (near) monopoly good/service (*eg* for water and sewerage services - where there is a low level of price elasticity), with no reference to prices charged by 'competitors';
- a price may be partly commercial, developed by reference to a benchmark price that may be only indirectly related to, but lower than, the cost of providing the good/service [21] (*eg*, entrance fee for a South Australian Wildlife Park, which was set by reference to the standard price for cinema entry - thus, the benchmark of a price for 'entertainment');
- a price may have elements of cost recovery to recover only some (or all) of a particular cost element, such as administrative costs (*eg*, vehicular entrance to a National Park, Public School administrative and materials charges, camping charges in reserves), but where the cost of the commodity component (*eg*, tuition, the value of the park or reserve, etc) may be free;
- having only a nominal charge to discourage wastage and ill-considered consumption (VacSwim), price of some government publications; and
- entirely free.

Thus, the basis upon which the Government provides goods and services to its citizens represents a continuum from fully commercial businesses to government funded 'community service activities'.

At the extremities, there will be no doubt whether the activity is a "business" or is a "governmental" activity - the difficulty is the 'grey area' in between.

32. A further issue to consider, in addition to pricing policy, is when a particular governmental activity that may appear semi-commercial has a dominant "governmental" policy, economic or regional development, etc, purpose behind it.

While the ***intention*** behind the carrying out of the activity should be the critical element in determining whether the activity is to be characterised as a "business" or "governmental" activity, the Court will look primarily to the indicia of commercialism

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21 Note that "business" includes a business not carried on for profit (section 4.(1) of the TP Act).

behind the activity, rather than be swayed by incidental policy outcomes that are sought to be achieved. A Court could well take the view that these outcomes could always be achieved non-commercially if the Crown considered them important enough.

33. **Two perspectives:**

- A government agency might provide goods or services for reasons that it considers non-commercial, to persons whom it considers as the "community", for a price that merely aims to recover part of its costs in order to assist the Departmental budgetary position.

- However, a private entrepreneur may see the government activity as a business opportunity, the "community" as a "market", and the government agency as its (possible) competitor that is excluding (or damaging) its business activity in that market by predatory pricing !!

Legal principles relevant to whether the Crown is "carrying on a business":

34. Section 2B of the TP Act, introduced in mid-1995 (becoming operative on 20 July 1996, 12 months after Royal Assent), and section 13 of the *Competition Policy Reform (South Australia) Act, 1996 (SA)*, ("**CPR SA Act**"), applied the Competition Code to the State Crown, but only in "***so far as the Crown carries on a business***".

35. Apart from section 2C of the TP Act and its parallel in section 15 of the CPR SA Act, the phrase "carries on a business" is ***not defined*** except in so far as it includes a business not carried on for profit (section 4.(1) of the TP Act).

Evidence of profit may, however, be an indicator of business activity (see, the tax case: *Hope v Bathurst City Council* (1980) 54 ALJR 345 at 348). In *Hyde v Sullivan* (1956) SR (NSW) 113, (approved of in *Nader v Australian Pharmaceutical Industries Ltd* [1981] 57 FLR 89), the Full Court of the NSW Supreme Court said:

> "Speaking generally, the phrase "to carry on a business" means to conduct some form of commercial enterprise, systematically and regularly, with a view to profit, and implicit in this idea are the features of continuity and system."

This is supported by Sackville J in *Fasold v Roberts* (1997) 70 FCR 489:

> "[G]enerally speaking, the word 'business' as used in the Fair Trading Acts, bears the dictionary meaning of 'trade, commercial transactions or engagement'. However, that will not always carry the matter very far. I think that in addition, ordinarily at least, the concept of 'business' imports, as Barwick CJ suggested in *Hungier v Grace*, a notion of system, repetition and continuity … [I]n general, for an undertaking to constitute a business it will have to be conducted with some degree of system and regularity."

However, as noted by the Chief Justice in *Hungier v Grace* (1972) 127 CLR 210 at 217 mere repetitiveness is not sufficient to constitute the carrying on of a business. Further, absence of a system and regularity might mean that a business is not being carried on, but their presence does not necessarily establish that a business is being carried on.

36. Section 2C of the TP Act and section 15 of the CPR SA Act provide (**without limiting other things that do not amount to carrying on a business**) that the following things do **not** amount to carrying on a business:

- imposing or collecting taxes, levies, or licences fees (to supply goods or services);
- granting, refusing to grant, revoking, suspending or varying licences to supply goods or services (whether subject to conditions or not);
- intra-governmental transactions, **but not** transactions between the Crown in right of two or more different legal entities - *ie.* transactions between a Department and a Statutory Authority, or between two Ministers in their capacity as corporations sole, or between a Minister as corporation sole and the Crown or a Crown Authority, are **not immune**; and
- the acquisition (including vesting by legislation) of primary products by a governmental body under legislation when the governmental body has no discretion as to whether to acquire the products - this is relevant to statutory marketing schemes.

Except for the primary products exemption, this list is particularly ***unhelpful*** because the matters referred to therein are so obviously ***not*** business activities, or would not breach the TP Act.

37. Some assistance as to what is included in the concept of a Crown business operation is given by section 2A.(4) of the TP Act which assumes that the Commonwealth did carry on a business of developing, and disposing of, interests in land in the Australian Capital Territory (which it carried out prior to ACT self-government) - and then excludes the application of Part IV (but not the rest of the TP Act).

38. In the Second Reading Speech to the 1977 amendments to the Act that introduced section 2A, the then Minister for Business and Consumer Affairs (John Howard) described section 2A as applying to "the business undertakings of the Commonwealth Government" and drew parallels to the "like operations of private enterprise" (House of Reps. Hansard of 13 May 1977).

39. In the Second Reading Speech to the *Competition Policy Reform Act, 1995 (C/wth),* which introduced the 1995 TP Act amendments, the then Federal Minister gave the example of government schools as not normally being engaged in business activity, even though they may be seen as competing with private schools for students.

He also indicated a view that it is not legally possible for two governmental departments to engage in business when they deal with each other, because both were part of the same legal entity (this point was obviously ***not*** noted by Emmett J in *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419).

40. Apart from these matters, there is nothing further in the TP Act or the explanatory material that assists by providing general principles for what is, essentially, an exercise of "***characterisation***". As Emmett J said in the *McMillan* case:

> "The term 'business' is defined in s.4 as including a business not carried on for profit. Nevertheless, it is still necessary to find an activity that can be ***characterised*** as carrying on a business. Words such as 'business' have "about them a chameleon-like hue, readily adapting themselves to their surroundings, different thought they may be": *per* Mason J in *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 378-9; 39 ALR 521 at 537." (emphasis added)

See also the comments of Finkelstein J in *Corrections Corporation of Australia Pty Ltd v Commonwealth of Australia* [2000] FCA 1280, at *AustLII* [16].

The case law:

41. There is not a great deal of assistance provided by case law, particularly in terms of the "grey area" between the Crown's "commercial" or "business" activities and its "governmental" activities where a non-commercial price is charged.

42. At the one end of the continuum, in what would now be considered an obvious decision, the Federal Court decided that Australia Post [22] and The Australian Telecommunications Commission (Telstra) [23], quite obviously, carry on a business. It is also suggested that, at least in respect of some of its activities, the ABC carries on a business, although not for profit (*Sun Earth Homes Pty Ltd v ABC* (1991) ATPR 41-067).

43. At the other end of the spectrum, the decision in *Mid Density Development Pty Ltd v Rockdale Municipal Council* (1992) 39 FCR 579; 116 ALR 460; showed clearly that activities funded by Council rates were not a business activity (and not sufficient to make the Council a constitutional 'trading corporation').

44. In *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419, Emmett J held that there was a distinction between activities that were purely "governmental or regulatory" and those that entailed "carrying on a business". The fact that an owner-government regarded a particular agency or body as a business unit might be a factor which influenced the decision whether or not that body was carrying on a business.

    However, I note that use of the popular nomenclature of accounting and 'business' (business unit, business plan, investment, resources, revenue, etc) is superficial and, of itself, no indicator of an intention to operate as a "business" for the purpose of the application of the TP Act.

45. I note that in the *McMillan* case Emmett J held, incorrectly, that the Australian Government Publishing Service ("**AGPS**", a unit of the Commonwealth Department of Administrative Services) was carrying on a business in that it operated under a "fee for service" regime in charging other agencies of the Commonwealth Government for the services that it provided. While it intended to be self-supporting from cross-charging, it did not in fact break even (however, there is no requirement in the TP Act for a

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22 *Suata Holdings Pty Ltd v Australian Postal Corporation* (1989) ATPR 40-937

23 *Tytel Pty Ltd & Ors v Australian Telecommunications Commission* (1986) ATPR 40-711

business to seek to earn a profit, or to achieve a profit - see: the definition of business in section 4.(1) of the TP Act).

While this part of Emmett J's decision was incorrect, simply because AGPS was a part of a Commonwealth department and provided services to other 'core Crown' departments, his reliance on AGPS's cross-charging activities and its intention to be self-supporting from fees, has been generally accepted as indicative of an intention to operate as a "business".

No issue of the Crown conducting a business arises when the activity, including cross-charging, involves only different parts of the same legal entity (section 2C.(1)(c) of the TP Act and general legal principles).

46. The critical lesson from the *McMillan* case is that a government ***outsourcing*** or ***asset sale*** is ***not*** the Crown "carrying on a business".

47. In *National Management Services (Australia) Pty Ltd v Commonwealth*, unreported, SC NSW, 13 September 1990, McLelland J said that the Commonwealth was not carrying on a business in acquiring and renovating five floors of a Phillip Street site for the purpose of Cabinet and Ministerial offices: "There is nothing to suggest that in relation to the development of the site the Commonwealth was engaged in a trading or commercial activity which could be characterised as carrying on a business".

Nicholas Seddon, the author of *Government Contracts*, 2nd Edition, 1999, The Federation Press, comments at pages 205-6 that: "… it would be very difficult to argue that it was carrying on a business in respect of the analogous activity of purchasing or selling assets. Securing office space for Commonwealth purposes is analogous to procuring goods and services for government purposes". I note that Seddon acknowledged this principle even though the central thesis of his book is that the TP Act should apply to all activity of the Crown in trade or commerce. Obviously, the Government of South Australia disagrees with that thesis.

48. In the *PAWA* case, *NT Power Generation Pty Ltd v Power & Water Authority* (2001) ATPR 41-814, Mansfield J determined that the Northern Territory Power and Water Authority was not carrying on a business of acquiring electricity generation and transmission assets, or of providing 'third party' access to those assets. Its business was the supply and sale of electricity to consumers in Darwin and Katherine areas:

" 299. I do not consider that … (the '*Queensland Wire*' case) is applicable in the present circumstances. PAWA generates and sells electricity for the purposes of the Northern Territory Government. It does so using assets, including generators and its infrastructure. Its use of those assets for the purpose of conducting the business of generating and selling electricity is not itself the conduct of the business of acquiring those assets or the business of providing either to itself or to third parties access to those assets. The ownership and use of PAWA's infrastructure by PAWA is not in respect of the carrying on of business by PAWA in the provision of access to its infrastructure, but is for the fulfilment of PAWA's function of planning and coordinating the generation and supply of electricity in the Northern Territory: see s 14(1)(b) and (d) of the PAWA Act… . **"**

NEWS

Pie cart dispute heats up again

THE PARADE Pie Cart is back – but as usual, not without controversy.

Norwood, Payneham & St Peters Council has granted Vili's approval to operate a pie cart outside Norwood Oval in the evenings and on football days.

But the decision has angered Norwood Football Club because its major sponsor – Balfours – is a rival pie maker.

The Redlegs fear the council's decision could prompt Balfours to withdraw its sponsorship.

Club president **John Rickus** says NP&SP should have asked Balfours to bid for the permit.

Vili Milisits, who was the club's major sponsor for seven years, said he was glad to again be associated with footy at The Parade.

"I'm red and blue right through – it was available and I took an opportunity," Mr Milisits said.

He said he had "a very good rapport with the footy club" but he and Norwood general manager **David Wark** "might disagree on a lot of things".

"David Wark was happy to have ... Cowleys (the supplier of a former Parade pie cart) there but he's not happy to have Vili's there," he said.

Mr Milisits was given a free trial by NP&SP to trade outside the club during a recent trial game, when he sold 1800 pastries.

He now plans to put seating for patrons next to his cart.

At last week's council meeting, Cr **Paul Wormald** said the cart's permit should have gone to tender.

"The first person that sends us a letter gets the nod," Cr Wormald said.

"This is not how business has been done in the past."

Cr **Carlo Dottore** disagreed, saying the council should not be "hoodwinked" by the club.

"We might as well go to Victoria and get Four 'n' Twenty to look at it as well," Cr Dottore said.

NP&SP chief executive **Mario Barone** cautioned against "setting up a bidding war".

Only Crs **Reno De Fazio** and Wormald voted against issuing Vili's the permit.

The previous cart operator, Price's Bakery, shut its cart last year saying it was not viable.

Mr Milisits sponsored Norwood until 2000. He quit the club when the Cowleys pie cart shifted from the George St corner to the new site outside Norwood Oval.

Balfours could not be contacted last week.

– CHRIS PIPPOS

Vili Milisits: "I'm red and blue right through – it was available and I took an opportunity." Picture: Ray Murray.

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Summary of activities of Councils in SA for Trade Practices Act policy research purposes. **ATTACHMENT 'C'**

ACTIVITY	EXAMPLE	LEGISLATIVE AUTHORITY	COMMENT
Business / commercial activities	Markets and saleyards (eg. Adelaide Central Market and Naracoorte Regional Livestock Exchange)	s. 7 Local Government Act 1999	Unusual currently but was common in the past. Other Councils may make land available for groups to run markets but Adelaide Council has established Central Market and runs it itself via a Committee of Council. It is on community land under the Local Government Act and specific sites are leased to stallholders. The only known Council saleyard is the one at Naracoorte.
	Golf courses (eg. North Adelaide Golf Links, Marion Golf Course)	s. 7 Local Government Act 1999	Number of Councils either run golf courses themselves or enter into contracts for others to run Council owned courses.
	Car parking centres (eg. ACC U-Park, Glenelg Council car parks)	s. 7 Local Government Act 1999	Number of Councils run car parking sites which require parking fees in order to recoup costs of providing service. However, most councils provide free car parking sites or regulated on-street car parking.
	Property management (eg. Marion Domain, ACC commercial properties)	s. 7 Local Government Act 1999	Small number of Councils lease, on a commercial basis, land stock prior to using that land for some "community" objective, eg turning into parkland or selling for housing development. Usually excluded from community land classification by the Council unless it is intended to turn it into parkland.
	Waste Management Centres	s. 7 Local Government Act 1999	Many Councils own their own waste &/or recycling centres while others pay to have rubbish deposited at private facilities. Council centres will compete, in the Adelaide metropolitan area, with private centres and other council centres.

Function and recreation centres	s. 7 Local Government Act 1999	Most Councils will have halls and centres which are leased or licensed out for community and private purposes. Many will be retained as community land by the Council.
Caravan and camping sites	s. 7 Local Government Act 1999	Many Councils either operate caravan parks and camping grounds or enter into contracts for others to run them on a commercial basis. Some may be classified as community land.
Quarries (eg Monarto Quarry)	s. 7 Local Government Act 1999	Unusual. At least one Council has established a commercial quarry.
Cemeteries (eg. Centennial Park Cemetery)	s. 7 Local Government Act 1999 & s. 585 Local Government Act 1934.	While many rural Councils run cemeteries as community service activities in the absence of church cemeteries, some regional and metro council cemeteries are significant business activities and compete with private and denominational cemeteries. All cemeteries involve the granting of “interment rights” which are akin to a licence or lease. Most will be retained as community land.
Electricity undertakings (eg. Roxby Downs, Coober Pedy)	s. 7 Local Government Act 1999	Unusual in SA. Only occurs in a couple of remote Councils outside the State grid and seen as a community service activity.
Water undertakings	s. 7 Local Government Act 1999	Usually only occurs in councils outside the State proclaimed water districts and seen as a community service activity.
Sewerage undertakings	s. 7 Local Government Act 1999 & s. 530c Local Government Act 1934	A number of Councils operate septic tank effluent drainage schemes and levy service charges under the Local Government Act 1999 to recover costs of their operation. Primarily initiated as a means of dealing with public and environmental health risks from septic tanks on poorly draining soils.

	Civil works (eg. Wakefiled Council & Elliston Council & Kimba Council))		A couple of Councils tender for private civil works (including Govt contracts such as with TSA) and use cost reflective pricing.
	Aged or disabled care services		Number of Councils run their own nursing homes &/or retirement villages which involve leased accommodation units or are subject to the Supported Residential Facilities Act 1992. Victor Harbor is establishing accommodation for intellectually disabled. Seen as community service activity. Facilities may be on community land.
	Swimming pools	s. 7 Local Government Act 1999	Seen as a community recreation activity but they do compete, in some situations, against private pools.
Community services	Public transport		Many community public transport services run by councils are either for free or subsidised fee paying.
	Libraries	Councils encouraged to establish libraries by the Libraries Board under s.14 Libraries Act 1982.	Community service.
	Health services (eg. immunisation, hospitals)		Some Councils get involved in the operation or subsidisation of immunisation programs. Some Councils also provide land, building &/or grants to local incorporated public hospitals.
	Road construction and works	Under s. 208 Local Government Act 1999, all public roads are vested in the Council.	Local Government Act 1999 Chapt 11 Part 2 sets out Council's powers and responsibilities with respect to roads, in particular the ability to authorise or permit activity on them and a prohibition on business use of roads without Council approval

	Parks and gardens and public toilets.	Local Government Act 1999, Chapt 11 Part 1 sets out Councils powers with respect to land.	Council land is divided into community land and non-community land. The Act sets out Council's powers and responsibilities with respect to community land, in particular the ability to lease or licence such land and.
	Rubbish collection	s. 7 Local Government Act 1999	
	Home and community care programs		Variety of services run by Councils.
	Crime prevention programs		Some Councils facilitate or support resident action groups and neighbourhood watch committees.
	Stormwater and drainage systems		A traditional role of Councils which is now being altered with the rising role of catchment water management boards under the Water Resources Act 1997.
Regulatory	Planning and building controls	Development Act 1993	Councils must establish development panels under the Development Act 1993 to undertake its powers and functions under the development assessment part of the Act.
	Public and environmental health	S. 12A(2) Public and Environmental Health Act 1987	Councils have the ability to issue various enforcement orders under Part 3 of the Public and Environmental Health Act 1987.
	Food standards	s. 28 Food Act 1985	Councils regulate adherence to food safety standards.
	Feral animal & weed control	s. 15(1)(b) Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986	Urban Councils are given the powers and functions of an animal and plant control board. Control Boards have authorised officers which issue orders and control notices.

	Dog and cat control	Dog and Cat Management Act 1995	Under s. 26 Dog and Cat Management Act 1995, Councils must enforce provisions of the Act relating to dog registration, regulation and management. In doing so they must appoint a registrar of dogs and may appoint a dog management officer. Under s. 68 of the Act the Council may also appoint a cat management officer.
	Stray stock control	Impounding Act 1920	Under s. 4 Councils may establish pounds and pound keepers for the holding of stray stock. Under s. 14 Council officers may impound stray stock.
	Fire control	Country Fires Act 1989 & SA Metropolitan Fire Service Act 1936	Rural councils must appoint a fire prevention officer under s. 34 Country Fires Act. Under s. 38 fire permits may be issued by a Council authorised officer (not the Council). Under s. 40 hazard reduction orders can be issued by the Council. Under s. 60B of the SA Metropolitan Fire Service Act 1936 Councils can also issue hazard reduction orders.
	Graffiti control	Graffiti Control Act 2001	Under s. 7 Councils may enforce provisions related to the sale and storage of spray cans. S. 12 authorises Councils to clean-up graffiti on private property with the owners consent.
	Issuance of orders relating to local nuisance on private land.	Ss. 254 & 299 Local Government Act 1999	
Governmental	Creation of local laws (by-laws) regulating activity on Council land.	Chapt 12 Part 1 Local Government Act 1999 is primary power to make by-laws.	Ss. 238, 239 & 240 Local Government Act 1999 sets out specific powers regarding by-laws on local government land and roads.

	Creation of local laws (by-laws) regulating other activity.	Chapt 12 Part 1 Local Government Act 1999 is primary power to make by-laws.	Other specific powers found in s. 667 Local Government Act 1934, s. 90 Dog and Cat Management Act 1995, and s. 18A Harbors and Navigation Act 1993.
	Licensing, licensing or authorisation of activity on “community land”.	Ss. 200, 202 & 206 Local Government Act 1999.	
	Authorisation of activity on roads.	Ss. 221 to 227 Local Government Act 1999.	
	Development and town planning	Development Act 1993.	Councils have responsibility for the establishment of Development Plans for the Council area which contain the policies against which development applications are assessed.
	Water plans	S. 108 Water Resources Act 1997	Councils may prepare local water management plans.
	Traffic management plans		Councils prepare traffic management plans as a general course of action in managing local roads but may also have to prepare one as part of a road closure delegation under ss. 11 & 33 Road Traffic Act 1961.