

18 MAY 2000

Ms Helen Owens
Commissioner
Section 2D Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2600

Dear Ms Owens

**PRODUCTIVITY COMMISSION – REVIEW OF SECTION 2D
OF THE TRADE PRACTICES ACT 1974.**

I am writing to provide you with the Tasmanian Government's submission to the Issues Paper pertaining to the Productivity Commission's Inquiry into the Review of Section 2D of the *Trade Practices Act 1974* (TPA).

The Issues Paper indicates that Section 2D of the TPA, which exempts certain activities of local government from Part IV of the Act, specifies that:

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) a transaction involving only persons who are acting for the same local government body.

These exemptions parallel similar exemptions for Commonwealth and State and Territory Governments, which are contained in Section 2C of the TPA.

It is understood that this section was included at the prompting of local government, which sought broadly equivalent protection to that given to the States and the Commonwealth, and their authorities.

The Tasmanian Government supports the retention of the freedom of councils to regulate external activities and manage internal activities without scrutiny under the TPA.

In considering the matter of exemption of local government bodies from Part IV of the TPA for licensing decisions and internal transactions, my Government would like to provide some specific comment as outlined below.

Application of Part IV of the TPA:

It is noted that Sections 2B and 2C of the TPA have the combined effect of exempting State and Territory licensing arrangements from Part IV of the Act. Sections 2A and 2C provide a similar exemption for the Commonwealth's licensing arrangements.

Pursuant to Sections 2A and 2B it is also made clear that State, Territory and Commonwealth Governments are not liable to pecuniary penalty or to be prosecuted for an offence under the TPA.

On this basis, it is foreseeable that should a decision be made that Section 2D be removed from the Act, it is suggested that local government would seek the TPA to be amended to ensure that the Act applies consistently to all levels of Government.

Licensing under Tasmania's Local Government Act 1993:

Section 168 of the *Local Government Act 1993* allows councils to make by-laws prescribing, amongst other things, the purpose and the conditions on which "permits, licences, authorities and registrations may be granted by council".

By-laws made under this section cover a variety of topics, including areas such as the licensing of hawkers, roadside and food vendors, market and stall operators, itinerant traders, people occupying caravans and the running of boarding houses.

A brief review of these by-laws indicates that, generally, Tasmanian councils are using licensing or permit arrangements to impose minimum standards or conditions on the supply of goods and services with the clear objective of protecting consumers, promoting health and safety or addressing environmental concerns.

As indicated in the Productivity Commission's Issues Paper, advice from the Australian Competition and Consumer Commission is that arrangements of this type "do not constitute 'trade or commerce' implying that they could not be challenged under Part IV of the TPA". If this were to be relied on, it would seem that as a general rule the removal of Section 2D would have little impact on Tasmanian local government. Nevertheless, it is suggested that there may be some exceptions.

It appears that a few councils have provisions in their licensing by-laws that could be found in breach of Part IV if Section 2D was removed. They usually relate to licensing arrangements for hawkers, roadside vendors and the like. For example, a clause that states when considering an application for a licence of this type council may have regard to matters such as:

...the effect which the application will have, if granted, on premises in the vicinity which trade in associated goods to those proposed to be sold and in particular, to any detrimental effect on the present services and facilities enjoyed by the community. (Brighton Council, Hawkers, Kerbside Vendors and Food vendors, By-Law No 80, 1 March 1995).

Internal Transactions:

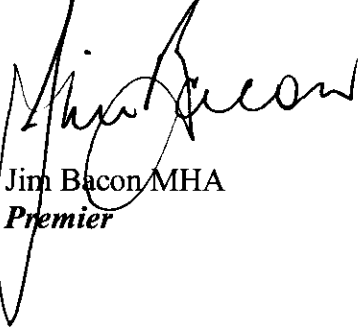
An issue for consideration in relation to the effect of the exemption from Part IV of "transaction(s) involving only persons who are acting for the same local government body" is whether single and/or joint authorities established by councils (under Section 30 of the *Local Government Act 1993*) could be interpreted as "persons who are acting for the same local government". If single and / or joint authorities are currently covered by this exemption, its removal could be an issue for local government.

Examples of the types of single authorities that have been established by councils in Tasmania include the management of community and recreation centres, hospitals and nursing homes. Joint authorities typically provide regional services such as water facilities.

Sections 2A, 2B and 2C exempt certain State, Territory and Commonwealth transactions from the application of the TPA.

Thank you for the opportunity to comment on the Issues Paper. The Tasmanian Government looks forward to reviewing the Draft Report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jim Bacon', with a large, sweeping flourish underneath.

Jim Bacon MHA
Premier