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Dear Ms Owens

Review of Section 2D, Trade Practices Act 1974: Local Government Exemptions

Thank you for sending us a copy of the Commission's Draft Report. You may recall that when we reviewed the December 2001 'Issues Paper' the Balanced State Development Working Group (BSDWG) advised that we would not make a submission at that stage but would reconsider our position when the Draft Report was released.

The purpose of this letter is to draw your attention to issues that we believe have not yet received adequate attention during the Commission's Review.

In April 1995 COAG agreed that all national standards that require agreement by Ministerial Councils or standard-setting bodies should be subject to a nationally consistent process. BSDWG understands that the present review should, therefore, be guided by the COAG Principles and Guidelines developed by the Committee on Regulatory Reform chaired by Roger Wilkins.

Section D 'Features of Good Regulation' includes two 'practical objectives' that seem to be particularly relevant to the Review:

"Minimising regulatory burden on the public

Legislation should entail the minimum necessary regulation to achieve the objectives. When designing measures or standards, regulators should ensure that the potential regulatory burden of alternative measures on the community is identified. Non-regulatory alternatives to regulation should be explicitly considered, including the option of not introducing new regulation.

Minimising administrative burden

Regulators should develop standards or regulatory measures in a way that minimises the financial impact of administration and enforcement of regulation on governments and the sectors of the community which will be affected by them.

Particular attention should be paid to minimising financial impact in instances where different levels of government are involved. A regulator at one level of government may impose enforcement responsibilities on another level of government that the latter does not have the resources to carry out. This may undermine the effectiveness of regulation."

BSDWG believes that the Commission's Draft Report adequately explores the first of these two 'practical objectives' but not the second.

On page 13 of the Issues Paper the Commission contrasts Queensland's Brisbane City Council and Western Australia's Murchison Shire Council but, by limiting the information provided to population size and annual budget, the paper does not address parameters relevant to the second 'practical objective'.

For example the 33rd. edition of the Australian Local Government Guide notes:

The Shire of Murchison has a population of 160, seven Councillors, ten Employees and has an annual income of $2M. Neither Council Auditors nor Solicitors are listed.

The City of Brisbane has a population of 820 000, a Lord Mayor and 26 Councillors, a CEO and ten Executives and an annual income of $1B. The listed responsibilities of the Executives suggest that it has internal audit and legal resources.

Between these two extremes there is a wide range of available resources, for example

In S.A. the District Council of Peterborough has a population of 2 100, it has nine Councillors, 24 Employees and an annual income of $1.8M. Neither Council Auditors nor Solicitors are listed.

In NSW Bombala Council supports a population of 2 900, it has eight Councillors, 56 Employees and an annual income of $7M. Council's Auditors are listed but not Solicitors.

In Qld. the City of Mt. Isa has a population of 22 000, nine Councillors, 196 Employees and an annual income of $32M. The City's Auditors and Solicitors are listed.

In NSW Eurobodalla Shire Council supports a population of 30 500, has nine Councillors 408 Employees and an annual income of $63M. Council's Auditors and 'local work' Solicitors are listed as well as a National Legal Firm.

In BSDWG's opinion any proposal to modify, or abolish Section 2D, would involve either determining conclusively (probably by a determination of the High Court) that Part IV provided adequate protection, or demonstrating that objective two above had been met.

There is nothing in the Commission's draft report to suggest that an estimate has been made of the additional resources Local Government Authorities such as Bombala, Murchison and Peterborough would need, or of the likely level of increase in insurance premiums that these Authorities would be required to pay. Both would lead directly to an increase in the income that would have to be generated from the local population.

In BSDWG's opinion one direct effect of any modification by the Commonwealth Parliament to the present Section 2D would be to impose an additional, and unreasonable, burden on a significant number of 'small' Local Government Authorities.

If, as a result of other arguments, the Commission is still attracted to suggesting some change to Section 2D it would be consistent with the terms of reference for the Review for the Commission to also identify the appropriate level of (annual) financial compensation from the Commonwealth to those Authorities.

Finally, since the Issues Paper canvasses the linkage between Section 2D exemptions and outsourcing the provision of goods and sources, as well as the nature of outsourcing arrangements, the Commission may be interested in the attached article 'Contracting out is stalling' from the March 2002 issue of Engineers Australia.

We would be happy to respond further on any of the issues discussed above, or to address any other matters that may assist the Commission.

Yours Sincerely

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The rapid increase in the 1990s of contracting out maintenance has now stalled, according to a new study by BIS Shrapnel. The key findings of this study are described in the lead article. Also included in this feature are articles on maintenance software management at Yallourn Energy's operations in Victoria, maintaining ships' combat systems in the Navy, asset maintenance procedures and news and upcoming activities relating to the Maintenance Engineering Society of Australia.

Contracting out is stalling

THE SHARE OF Australia's $20 billion maintenance work undertaken by contractors increased sharply during the 1990s, as industry and governments enthusiastically pursued outsourcing, but the rate of increase in the contractors' share is now stalling, according to a recent study by BIS Shrapnel.

Titled *Maintenance in Australia 2001-2016*, the study said the stalling is the result of entrenched policies of some state governments (NSW and Queensland particularly) and most local councils, and various concerns on the part of industry about outsourcing maintenance.

It said budget cuts and stagnant or declining funding over a long period in education, hospitals and railways has meant "flat or falling maintenance expenditures in real terms, a large build-up of deferred maintenance, and in many cases a deterioration in the quality of assets to below sensible fit-for-purpose standards".

In the private sector, it said miners and heavy manufacturers in the past couple of years had also cut costs as a result of weak world demand, falling commodity prices and excess capacity.

The report also said the nature of maintenance contracting has changed and while lump-sum, performance-based contracts are still the most prevalent, the alliance type contract was becoming increasingly popular. The study said these contracts have evolved in response to the first round of maintenance contracts in the 1990s, where problems relating to loss of control, cost blow-outs and difficulty in monitoring contractual disputes came to prominence.

The report identifies a number of impediments to greater contracting out. In the public sector the policies of the Labor state governments and most local councils favour keeping work in-house.

In private industry there are also increasing concerns about using contractors. These concerns include:

- perceived loss of control over work
- higher costs of monitoring quality
- lack of commitment and responsibility on the part of contractors
- loss of in-house expertise
- less continuity of staff
- conflict between contractors' profit drivers and the companies they work for.

The principal author of the study, senior economist Nigel Hatcher, said these factors, together with concerns at lower levels of organisations about maintenance and safety standards in work done by contractors, have inhibited the growth in contract maintenance, particularly in mining and heavy engineering.

"Levels of maintenance in water, wastewater and electricity have been declining in real terms for many years and this is unsustainable," he said.

"In electricity the larger issue is capacity shortages, which will become even more apparent over the next five years and will stimulate reactivation of generating capacity, construction of new capacity and increased maintenance."

The report said attention is increasingly being focused on previous inadequate levels of maintenance in the public sector.

The McInerney Inquiry into the NSW rail system has already led to big increases in funding for rail maintenance. Funding for maintenance in schools, TAFE colleges, universities, public hospitals and roads is also expected to increase.

Stronger economic growth in 2002/03 is expected to feed into increased spending in state budgets and will carry through until 2004/05.

Roads have fared better than other sectors, largely due to the introduction of dedicated funding sources (fuel levies) in most states, combined with the higher political priority. Road maintenance is one area where government funding has been strong and this will be boosted over the next four years by the federal government's *Roads-to-Recovery* package and funding increases for national highways and arterial roads.

A sleeper issue, which could have a significant impact on long term road maintenance, is a High-Court decision last May to remove common law immunity for nonfeasance from road authorities. Nonfeasance is a legal term which means the failure to perform an act which ought to be performed. Its significance is that deteriorating road conditions resulting from lack of maintenance could lead to accidents and claims against road authorities. ■

New system cuts expenses for generator

YALLOURN ENERGY's replacement computer system for maintenance, repair and operations (MRO) has saved the generator more than $7 million in inventory holdings and hundreds of thousands of dollars in IT infrastructure costs, according to the firm's business support manager George Ballard.

Yallourn Energy is based 150km east of Melbourne in the Latrobe Valley. The company's operations include Australia's second largest open cut coal mine and the nearby Yallourn W powerstation, which it supplies. The powerstation produces about a quarter of the state's electricity needs from four generating units with a combined capacity of 1450MW.

Next for Yallourn will be the development of the nearby Maryvale coalfield – a $200 million 10-year development that will produce