



LOCAL GOVERNMENT and SHIRES ASSOCIATIONS of NSW

GPO Box 7003 SYDNEY NSW 2001 • 215 Clarence St SYDNEY NSW AUSTRALIA
Phone (02) 9242 4000 • Fax (02) 9242 4111 • E-mail lgsa@lgsa.org.au

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14 June 2002

Ms Helen Owens
Commissioner
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Ms Owens

Re: Review of Section 2D of the Trade Practices Act 1974 – Response to Draft Report

The Associations represent the interests of all 172 general purpose councils, the 13 Divisional Aboriginal Land Councils and the majority of specific purpose county councils in NSW.

The Associations welcome this opportunity to make a further submission in response to the draft report of the Review of Section 2D of the Trade Practices Act (TPA) 1974. Section 2D exempts certain activities of Local Government from Part IV of the Act. Specifically, it provides that Part IV does not apply to:

- a) The refusal to grant, or the granting, suspension or variation of, licenses (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

Summary of Initial Submission

Local Government in NSW is established under the Local Government Act 1993. This Act conveys a wide range of powers, functions and responsibilities to Local Government, both directly and through other Acts of the NSW Government. While Local Government exists under State legislation, it cannot be regarded as an 'authority' of the State. It occupies a unique position as a democratically elected third sphere of government.

The existence of Section 2D provides specific recognition of Local Governments status as a legitimate sphere of government. For this and other reasons, the Associations maintain that Section 2D should be retained and not subsumed into Section 2C (which provides exemptions to State and Territory Governments) or removed in favor of alternative avenues of recourse.

The Associations also argue that Section 2D should be amended so that it provides Local Government with the same protection as provided to State and Territory Governments under Section 2C.

The exemption as it now stands applies only to the 172 general purpose councils represented by the Associations. Section 2D should also be amended to include the 20 specific purpose 'county' councils that also exist under the Local Government Act in NSW. While these councils exist for specific purposes like the eradication of weeds, water supply and flood mitigation, they are Local Government bodies whose functions parallel those of councils. Like general purpose councils, they are responsible for a range of statutory regulatory functions. The exemption should also specifically extend to water authorities under the NSW Water Management Act 2000 in addition to those established under the NSW Local Government Act 1993.

Comments in Response to the Draft Report

The Associations are disappointed that the draft report has not recommended that section 2D be amended so that it provides Local Government with the same protection as provided to State and Territory Governments under sections 2A, 2B and 2C. We acknowledge the Commission's view that consideration of sections 2A and 2B fall outside the scope of the narrow terms of reference of this inquiry. However, the Associations continue to support extension of the exemptions provided to Commonwealth, State and Territory Governments provided by section 2C, to Local Government. We recognise that the specific 2C exemption relating to the acquisition of primary products may be unnecessary for Local Government and would agree to its omission from the extension.

We acknowledge that it is questionable whether the extension of the section 2C exemptions would have any practical effect. However, the draft report points out that there are conflicting views on the application of Part IV to Local Government. The report notes that if the view that Part IV applies to the regulatory activities of Local Government prevails, then there is a risk that collection of taxes, levies and licence fees by Local Government remains could be exposed to action under Part IV (p.38). We do not think it is prudent to wait for this to be tested through legal action taking action. The preferred approach would be to preempt any such action.

The Associations also maintain that section 2D should be amended to specifically include special purpose county councils. While it appears that current provisions provide protection for practical purposes, specific inclusion would provide certainty. We believe this amendment is still warranted.

The Associations also raised a similar issue in relation to Local Government water authorities that operate under the NSW Water Management Act 2000 as opposed to those established under the NSW Local Government Act 1993. This issue has not been directly addressed. While this only applies to two councils in NSW (Gosford and Wyong), it is of concern, and the councils would like to be certain of their protection.

In the absence of amendments to extend and clarify the exemptions specifically provided under section 2D, the Associations favour the second of the preferred options put forward by the Commission. The Associations naturally agree that Part IV of the TPA should only extend to the functions of Local Government to the extent that they are carrying on a business. Replacing section 2D with a direct provision limiting the application of Part IV to the business activities of Local Government would remove much of the ambiguity surrounding the current provisions and if appropriately worded, would provide a higher degree of certainty to Local Government. Care would need to be taken to ensure that 'business activity' is clearly defined. It is also recommended that the provision makes it clear that it included county councils and all Local Government water supply authorities.

The other preferred option of maintaining the status quo by simply retaining section 2D, is an inferior alternative, however it is favoured over the option of repealing section 2D.

These views appear to be consistent with those expressed by the Australian Local Government Association and a number of other State Local Government Associations.

Yours sincerely



Brenton (Ally) Taylor
Executive Director