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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

REVIEW OF SECTION 2D OF THE TRADE PRACTICES ACT 1974

MRS H.J. OWENS, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON MONDAY, 1 JULY 2002, AT 10.30 AM

Continued from 17/6/02 in Sydney

MS OWENS: Welcome to the public hearings for the Productivity Commission's review of section 2D of the Trade Practices Act. My name is Helen Owens and I'm the Presiding Commissioner for this inquiry. As most of you will be aware, the Commission released a draft report in May. The purpose of the hearings is to give those with an interest in this matter an opportunity to present the submissions in response to the Commission's draft report. Following our round of hearings which began in Sydney and now are in Melbourne, the Commission will be giving further consideration to the matters raised and will move to prepare a final report for government by early September ahead of the formal reporting date in October. I should add that we will be going to Adelaide next week, not having formal hearings but there's a number of people wanted to talk to us informally about their own submission.

I would like these hearings to be conducted in a reasonably informal manner but remind participants that a full transcript will be taken and made available to all interested parties. The transcript will be available as soon as possible on our web site, so I'd like to welcome to this hearing our participants, the Municipal Association of Victoria. Would you like to each give your name, your position with the MAV for the transcript.

MR EDWARDS: Sure. My name is Troy Edwards and I'm a senior adviser with the MAV.

MS YU: I'm Kerry Yu and I'm a policy adviser with the MAV.

MS HOLLINGWORTH: Deborah Hollingworth, legal consultant to the MAV.

MS OWENS: Thank you, and thanks for coming along. We've already had some very good discussions with you in the past and that's why we were quite keen to get you here in a slightly more formal sense particularly to get your response to our draft report and to discuss any other issues that you might want to raise with us. I understand, Troy, that you'd like to make a few remarks.

MR EDWARDS: Yes, perhaps if I could just make some general observations, Helen, and Kerry and Deborah might be able to provide a bit more detail. Obviously I'm pleased to have the opportunity to formally put our views to you today. I note we've had some discussions in the past, way back in November and you also had a meeting with our competition and compliance working group which is a group that the MAV provide secretariat support to of council officers throughout Victoria and they have had quite a bit of involvement in this process with us and I hope that your discussions with them were fruitful as well. As you know from our submission and our follow-up letter to you of 26 June, the sector in Victoria is in favour of actually retaining 2D in its current form and that's a view that they have reinforced with us at a meeting in June this year.

I think the view in Victoria seems to be that 2D provides some clarification of

the law as it is and is unduly restrictive. There seems to be some views amongst the sector that the alternative of direct provision under Part IV would actually raise a number of uncertainties, particularly cost and some definitional issues of costs and a number of pieces of legislation. But as I said we're here today to basically provide you with the sector's view of their favouritism, I suppose, of retaining 2D in its current form.

MS OWENS: Thank you for that. Would either of you like to add to that?

MS HOLLINGWORTH: I think we're probably going to elaborate on that as part of our comments to you. How we thought we'd order this is that perhaps Kerry would go over some of the key issues for the MAV that were presented principally in the submission but without being repetitive, just to identify what the basis of the MAV position is. Then I thought I might discuss with you some of the matters that clearly emerge from your report and particularly the two options that have been canvassed in the draft report.

MS OWENS: Okay, let's proceed that way. So Kerry you're just going to go through and reinforce some of the key points again.

MS YU: Yes, very briefly. Just to reiterate that the MAV agrees with the Commission's proposition that Part IV should not be applied to the licence determination of the council in exercising a governmental function and reiterating what Troy just said about that; the existence of the provision of 2D as it stands now clarifies the status of Trade Practices legislation. You will remember from our submission earlier that we've looked at a number of alternatives to 2D, including the ACCC authorisation section 51(1) exemption and also a modified section 2C and we've identified that. All of those are likely to come at a cost to local government which would then eventually be passed on to the community, none of which were particularly favourable to the sector and that may result in councils taking a more defensive and counter-productive approach towards their licensing decisions. That is basically our view in our original submission. As Troy said, the competition and compliance working party had discussed the draft report again at its June meeting and Deborah is just going to outline some of the issues that were raised and the sector's view on the recommendations put forward in the draft report.

MS OWENS: Thank you.

MS HOLLINGWORTH: Thank you. Could I just start by saying some things that perhaps seem obvious but are important to say nevertheless. Local government in Victoria has operated since the introduction of the competition code on the premise that the Trade Practices Act applies to local government as stipulated in the schedule to the code. The MAV along with councils have worked considerably on the implementation of a number of Trade Practices Act - particularly Part IV - compliance programs. So I think perhaps in some ways the view that the MAV takes of the Trade Practices Act and in particular section 2D is influenced considerably by

a culture of compliance that has prevailed throughout Victorian local government. In saying that we have also worked very closely with the ACCC and perhaps that in some way reflects - though I can't speak for the ACCC - the view that they have also taken in terms of advocating or at least being comfortable with the continuing arrangement of the Trade Practices Act.

Having said that I think it does need to be acknowledged that the Productivity Commission inquiry and report has identified a number of really important matters about the application of Part IV. So given that we have revisited the view that was presented to the Productivity Commission in our submission and have in fact concluded that it is still our preferred approach that the status quo remain, that section 2D not be changed in any way, and the option presented by the Productivity Commission that there be a legislative clarifying statement about the application of Part IV is one that - it's not that we don't support it but I think our view is that it's perhaps not warranted and there may indeed be some risks in taking that course of action.

In coming to that view we've certainly taken into consideration the contrary views of the various peak associations across the countryside and also I think the advice that the Productivity Commission obtained form the Australian Government Solicitor that certainly indicate that there may well be some exposures for local government in its compliance with Part IV, that evidently Part IV is not confined only to the business activities of a council and in some respects I think that councils have operated on the assumption that Part IV really exempts their regulatory, statutory or governmental activities. I'm not disputing the view that the Australian Government Solicitor has come to but I think even they concede that while there may be some governmental or regulatory functions that might be subject to Part IV, it would be in circumstances where the local government authority was clearly acting in the marketplace.

If I can return to my preliminary comments, the approach to trade practice compliance that's been promoted throughout local government in Victoria is that there will be occasions where exercising a statutory function may well include anticompetitive practice and that the Trade Practices Act, particularly Part IV, may well apply. One example is the issuing of building permits. I'm not sure whether this practice occurs in other states but in Victoria, under the Building Act, it is possible for a person seeking a building permit to approach a private building surveyor or a municipal building surveyor and that was formerly not the case but amendments to the Building Act some four or five years ago opened up the process for issuing building permits.

The Trade Practice Compliance Program that the MAV has worked on with local government has certainly cautioned councils to ensure that in their operations, while they're exercising a statutory function - the building surveyor will be exercising a statutory function - the council building surveyor is operating in a market context and therefore would have to apply with or not breach the provisions

of Part IV or be misleading in any manner. So I think that while on the one hand there has been a view that councils, if they are legitimately exercising a regulatory or governmental function that they should not be in breach of Part IV. There are certainly examples in local government, particularly in Victoria, where notwithstanding that prevailing view, statutory decision-making processes may have a market context in which case that culture of Trade Practices Act compliance has continued.

So to return to the issue that I think you want to hear about from us - which are the two options would the MAV prefer - the MAV can see the reasons why it would be compelling to have a direct statement in the Trade Practices Act that for all intents and purposes clarifies the application of Part IV in particular to local government activities. We would regard that as the purest approach and in an ideal environment that might indeed be a view that we might advocate. However, the process of clarifying, in our view, the application of Part IV does require the differentiation between governmental, regulatory and statutory functions. As previously indicated in all probability it's going to have some definitional issues that may well be problematic. So I think we can say that as a matter of principle we have some sympathy with the view that legislation should always be clear and if your inquiry has identified an area of lack of clarity or even some gaps or exposures then perhaps in principle there would be an inclination to clarify that.

As the Productivity Commission report identifies, there are some practical issues that need to be taken into consideration. There's considerable effort required in the clarification of legislation and we would concur with the views that the Productivity Commission seems to have advanced in its report that there are some arguments that would not necessarily warrant that course of action. We would also say that we consider that there are some risks in tidying up legislation. It is never possible to guarantee what the outcome of the legislative process is going to be, neither the drafting process nor the passage of any amending legislation through parliament. Thirdly, often attempts to tidy up legislation result in unintended consequences and certainly the Productivity Commission in its report has referred to that as a potential, unintended and undesired outcome.

I think on balance if I can say the MAV view therefore is that imperfect as the arrangements might be, they are workable and the culture of compliance that does operate in local government I think is probably the most compelling factor, along with the other issues that I've presented to you as to why our view is that section 2D should remain. I think that's really all I need to formally say about that. You may well have some questions.

MS OWENS: That was a very full exposition of your position and I'm very pleased to have that because I think it would be fair to say we haven't had many responses to our draft report but of those that we have had I think the balance of opinion has gone towards putting a direct statement in the act. The Local Government Shires Association of New South Wales put that point, as did the Tasmanian government.

Mr Ray Steinwell has also argued along those lines. The ACCC in their submission have basically sat on the fence and said they're indifferent between the two options that we put in, we floated in our draft report.

One of the questions we did raise in the draft report to which we've had no answer is why a more direct statement wasn't put in in the first place because under 2A and 2B there are direct statements in relation to the Commonwealth government and the state and territory governments that say that Part IV applies to the states, the territories and the Commonwealth insofar as they are carrying on a business. But no such direct statement was put in at the time and I don't know whether you have any sense of history as to why that didn't occur at the time. Was it because of these potential definitional problems or was it something else or was it just an oversight?

MS HOLLINGWORTH: I truly don't know the answer to that question. It might be an oversight, it might have been intended. There might have been a view that there was not the need to extend that level of coverage to local government; certainly clear from the second reading speeches that it was never intended for Part IV to apply to the governmental decision-making processes, such as rating and other matters that the state and Commonwealth are exempted from. As things have transpired they have not been issues. That's of course not to say that they might not be issues in the future but they have not been the subject of any regulatory concern by the ACCC and nor has there been any private litigation to enforce under the Trade Practices Act. So that's not an answer to your question, I'm sorry, but - - -

MS OWENS: It is a puzzle.

MS HOLLINGWORTH: It is a bit of a puzzle.

MS OWENS: You did mention, Deborah, that you felt there was a potential if we were to move in that direction of our second option there could be definitional issues in relation to what is regulation and what is statutory functions and so on. But given that there are already provisions in the act in relation to the Commonwealth and the state and territories, I presume that those sort of definitional issues really were taken care of by having, for example, the insertion into Part 2B back in 1995 or 1996.

MS HOLLINGWORTH: Definitional issues ultimately are a question for the Federal Court for judicial interpretation really, so I think the issue that we're identifying, 2D could be replaced with a statement that replicates what currently exists for the state or the Commonwealth and then one would have to ask the question of whether those same definitional issues apply to the state and Commonwealth, whether stating that exempting business activities is sufficient. I'm not aware of any case law or where there have been any issues to that effect. I think the MAV view is we can see that is a potential issue. It is perhaps not enough of an issue in itself to say there should not be any legislative clarification.

We come to that view because of the other factors that we've mentioned to you

as well which is it's all very well to state as a matter of principle and legislative purity how legislation should look but then one should always have a look at how the legislation is currently operating; what is happening in practice; in the scheme of Commonwealth government priorities whether that's really warranted to clarify the Trade Practices Act in that way, and also as we've said we do see some potential risks. So there's kind of a combination of things, not just one factor.

MS OWENS: I think we were with you a little bit in terms of you leave well alone. When we had our discussion, our draft report about possibly changing the definition of licence to make it clear what licence was and to cover some of the things you told us about in your previous submission that it goes beyond just the licence to provide goods and services, there are permits to do all sorts of things. In New South Wales they don't use the term "licence" and we'd actually had that discussion there and said it's probably better to leave well alone because once you start opening these things up you can get into strife. I think there's a degree of harmony in our views there. There have been other participants that have said that the exclusions for local government as they stand at the moment only relate to licences and internal transactions. We want consistency with the other tiers of government. The other tiers of government don't just have a direct provision saying it only applies to their business activities but they also have exemptions for taxes, fees and fines and there are also provisions in relation to prosecution and financial penalties.

There was a plea for us to look at the possibility of extending 2D to cover these other things, and one of the ways around that - instead of doing that - is just to have this general provision which means that they're automatically exempted under the act. The question really is, what about those other things, do you think it should have been extended to cover those in which case it means opening up the legislation again for debate in parliament and if not, why not?

MS HOLLINGWORTH: I think if we were having this debate back when section 2A, B, C and D were included at the time that the national competition policy was being negotiated, I think certainly the view of most local government associations would have been that the level of protection granted to the Commonwealth and state should also be extended to local government. But we are not having that debate, that isn't the situation. We now have some seven years of experience with the operation of both the Trade Practices Act and the exemption that has been granted. I think we can concede too that there is a potential gap and exposure that certainly - not so much gap but there is an exposure for local government to Part IV. That has been managed quite effectively in local government in Victoria. It doesn't provide a guarantee for the future but looking at the experience of the legislation it is difficult for the MAV or for anybody else really to conclude that there have been major issues with the inappropriate application of Part IV to the legitimate statutory, regulatory and governmental functions of a local government body.

I think ultimately that has been the determining factor for the MAV. You

could describe the two approaches as, on the one hand, taking a very purist approach to legislation - and we don't particularly disagree with it but it's not our view, we're taking a more pragmatic approach. As you've indicated perhaps there can be justification for leaving well enough alone.

MS OWENS: Yes, I think we pointed out in our draft report that in terms of taxes, fees, fines and so on, the fact that there wasn't a specific exemption didn't seem to have caused any problems because there's been no cases since the mid-90s where that has arisen as an issue. I think we probably would have been on that score quite pragmatic. If we hadn't had the Australian Government Solicitor's opinion which basically in our minds led to some degree of uncertainty about the application of Part IV we probably would - it would be fair to say - have said, "Don't bother extending 2D to cover these other things." But what would happen by default, if we recommended option 2, the option to have a more direct provision - and that was accepted by government - those would automatically be exempted by virtue of the direct provision. So local government would actually get more than it has got now in terms of certainty about those other issues.

MS HOLLINGWORTH: We're not trying to be cavalier about this. I think while acknowledging and seeing why other people might come to a different view, ours is really founded on the experience of the past. I think if there had been challenges by corporations or individuals or the ACCC that curtailed the governmental regulatory operations of a council, unquestionably our view would be different.

MS OWENS: Coming back to the point, Deborah, you made earlier about the risks of going the other route, what sort of risks are you talking about? Are you talking about the risks of opening this up in parliament to a debate which could lead you in a different direction or are there other sorts of risks you're talking about?

MS HOLLINGWORTH: They are principally those that have been identified also in your report that tidying up legislation, as tempting as it might be, is not always as simple as it sounds. It can sometimes be the case that amending legislation for the purpose of clarifying something actually is more complex than revamping or introducing legislation but because it's a statement - a clarifying statement - it doesn't make it straightforward. Any introduction of legislation obviously has to be interpreted and applied across the areas to which it's intended to cover. I think the risk that we referred to is that you cannot guarantee an outcome through either the legislative drafting process or through the parliamentary process. So it's possible that you might recommend a statement to clarify the application of Part IV to local government but we end up with a very different outcome.

That may be the explanation for what happened with section 2D that local government argued for one outcome but at the end of a legislative process there was another. I don't want to be unduly cynical about the legislative process but having observed the passage of legislation, as I say, not just through the drafting phase but the legislative process, no-one can say at the outset what you're going to end up with

as a result. I think for those reasons one would only recommend a legislative tidy up if there were some very compelling reasons to do so.

MS OWENS: So you're basically saying, "If it ain't broke, don't fix it."

MS HOLLINGWORTH: That could be a colloquial way of summarising the view.

MS OWENS: Yes. When you saw the Australian Government Solicitor's opinion were you surprised by that opinion because I think everything that we had heard before we got it was that Part IV wouldn't apply to regulatory activities. He looked at the schedule version and said, "Well, that's not necessarily the case."

MS HOLLINGWORTH: Yes and no. The Australian Government Solicitor's advice certainly caused us to review the position that we had taken. But, as I said, when we reflected on that advice, local government in Victoria always operated on the basis that prior to the introduction of the competition code there was a question about whether local government was a trading corporation and therefore a question whether Part IV or any section of the Trade Practices Act applied to local government, and there were split views on that matter. Certainly my understanding is that the competition code quite deliberately included Part IV of the Trade Practices Act to ensure that there was no question about the application of trade practice compliance in local government. The compliance regime with national competition policy that has been applied in Victoria has always operated on the assumption that Part IV applied.

However, having said that, I think that there has also been a view that if a local government council is exercising a governmental or regulatory function it is not operating in the market. I think that has then been translated to a simplified interpretation that Part IV only applies to business and commercial activities and that there is an exemption with respect to regulatory and governmental activities. I think one of the clear benefits of this inquiry has been the refocusing of that that's emerged from the advice from the Australian Government Solicitor. As I said, when we reflected upon it we can certainly see from our own recommended compliance programs we never sought to exempt the exercise of statutory functions from Part IV where the council was operating in the market.

MS OWENS: You gave the example of building permits as a regulatory function. In terms of the definition of a licence in relation to the provision of goods and services, does that come in under a definition of a licence as a provision of goods and services?

MS HOLLINGWORTH: Yes, it probably would. Our view is that a permit is also a licence. It's another word for a licence in most cases.

MS OWENS: You said that the council in issuing building permits is working in a

market environment but it's not actually doing the building.

MS HOLLINGWORTH: No. It's more directed not so much to the act of issuing the building permit but the way in which the council might promote its own services so that a member of the public might go to the local council customer service office and say, "I need to get a building permit issued. Where should I go for that?" The compliance advice that's been issued to councils is that it would potentially be anticompetitive for the council to say, "Look, we'll just put you in contact with the municipal building surveyor," that it's more appropriate for there to be a culture of advising residents that there are two options: one is a private building surveyor and the other is the municipal building surveyor.

MS OWENS: Would it be fair to say that the private building surveyor is doing this on behalf of the council?

MS HOLLINGWORTH: That's a difficult issue.

MS OWENS: Is it a contractual arrangement?

MS HOLLINGWORTH: It's a statutory function and the private building surveyor has certain authority under the Building Act to issue the building certificate and the certificate has to be lodged with the council, so the council becomes a registration point and there have been other issues around the status of the private building surveyor in cases where the private building surveyor hasn't issued properly and whether the council has a statutory responsibility to follow up and enforce. They're not easy to resolve actually.

MS OWENS: So they're not doing it on behalf of the council, they're just ensuring that the surveying gets done and they would be ensuring the certification was accurate for it to go to the council, to lodge it with the council. So the council's regulatory responsibility is accepting the certificate, the lodgment of the certificate, rather than actually ensuring that the surveying work gets done.

MS HOLLINGWORTH: That's the view that local government takes of it.

MS OWENS: So it's not really a contractual arrangement, so they're just saying, "We'll do some in-house or we'll contract some out."

MS HOLLINGWORTH: That's right. Well, it's not an agency arrangement and it's not an arrangement where the council have, as you say, a contractual arrangement with a private building surveyor but it's a situation where the statute permits the coexistence of a private building surveying system and a public one.

MS OWENS: If that's the case and if the council was promoting its own service over those of private building surveyors, wouldn't that get picked up under competitive neutrality provisions?

MS HOLLINGWORTH: It might. It depends on whether the building inspection unit is regarded as a significant business, but it won't always. Some councils regard their building surveying as a significant business for the purpose of competitive neutrality. But that's the exception in my experience.

MS OWENS: Excuse my ignorance on building permits - - -

MS HOLLINGWORTH: You're certainly testing my knowledge of it, I must say.

MS OWENS: Is it something that's done under state government legislation?

MS HOLLINGWORTH: Yes, under the Building Act.

MS OWENS: If it's under a Building Act are there other ways in which complaints could be - could a complaint be put in under some other state government legislation? Are there other mechanisms to put in complaints?

MS HOLLINGWORTH: There is. All councils have a complaints process and also it's possible for a complaint to be lodged with the ombudsman under the Ombudsmans Act to review any administrative decision that has been made by the council. Often the complaints that come in will not be about an administrative decision as such but whether a private building surveyor has issued a permit correctly or complied with the Building Act.

MS OWENS: So you'd be unlikely to get a complaint, say, of a council - you wouldn't get the building surveyors themselves saying, "The council is trying to take our work away from us"?

MS HOLLINGWORTH: Yes, you can certainly get those sorts of complaints. I think there probably were those sorts of complaints at the outset as private building surveyors sought to make a mark in the marketplace. But they have done that very effectively. I don't know what the statistics are but there's a high prevalence of permits that are issued by private building surveyors.

MS OWENS: What I'm really trying to get to is, wouldn't going to the ACCC on this matter be somewhat heavy-handed? I mean, it really wouldn't happen, would it?

MS HOLLINGWORTH: I don't know whether there have been any complaints to the ACCC. The ACCC have had relatively a low level of complaints about local government compliance with Part IV and the consumer protection provisions of the Trade Practices Act. But certainly some people do approach the ACCC, there's no question about that, but they're not matters that the ACCC have ever seen, that they need to take up and enforce. I think it's probably fair to say that if there is a company or an individual trader who is disaffected by what they believe to be inappropriate conduct of the council they would pursue whatever avenue of complaint is available

to them, whether it's to the ombudsman, the Competitive Neutrality Complaints Unit, the ACCC. We're certainly familiar with examples of where there's been a bit of shopping around to see who can effectively take up a complaint.

Notwithstanding that I think we can still say that the application of Part IV, despite the initial concerns about how it was going to impact on local government, has not to date been the problematic element of national competition policy. Our major issue with compliance is competitive neutrality.

MS OWENS: Do the competitive neutrality processes in Victoria work reasonably well from where you're sitting?

MS HOLLINGWORTH: What do you mean by the processes?

MS OWENS: If there's a competitive neutrality complaint - - -

MS HOLLINGWORTH: Complaint.

MS OWENS: - - - there's a reasonable process to deal with that in the Victorian situation, the Victorian context?

MS HOLLINGWORTH: Yes, there is now; there hasn't always been. It's something that we've really had to work through. I think the problems have been the understanding of what competitive neutrality is about. We had I think a difficult situation in Victoria in that competitive neutrality became really operational as of 1996. In most cases councils have already entered into competitive tendering arrangements. They were all deemed to be competitively neutral because they had been through a competitive process, but strictly that isn't an application of competitive neutrality. As those contracts have either lapsed or come up for renewal there have been sort of waves of furthering the understanding of how competitive neutrality applies. I think it's probably fair to say that that growing understanding has taken place on both sides, both government - the local government division, treasury and finance who will enforce and operate the Competitive Neutrality Complaints Unit and local government.

But we work very closely with the Competitive Neutrality Complaints Unit and I think we probably all agree that there's still some way to go in terms of properly understanding and getting the balance right so that councils can legitimately subsidise community services and apply competitive neutrality where it's appropriate to do that.

MS OWENS: But you're really just inferring it's a matter of time, it will gradually improve over time.

MS HOLLINGWORTH: That's what we expect to happen. I think the reason why that has become a particular issue in Victoria is because the state government

share 9 per cent of its competition payments with local government and the National Competition Council and also treasury and finance have taken a view that the major compliance component is competitive neutrality, interestingly, and not Part IV. But one can envisage if their view of that had been different then we might be dealing with other issues around the Trade Practices Act.

MS OWENS: Another interesting point that the Australian Government Solicitor made which I think also took a few people by surprise, he argued - the person who actually did the work was a woman but the Solicitors Office argued that in the absence of section 2D a local government body would be considered to be an authority of the state or the Northern Territory and hence within the scope of sections 2B and 2C, and hence that would provide local government with the same exemptions from Part IV as provided to the states and the Northern Territory. I was wondering if you have any views on whether you consider that local government would be considered to be an authority of a state government.

I think in your original submission - I think it was on page 5 - you talk about council acting in its capacity as an authority under legislation. I don't know whether that was implying that you thought it would be seen to be an authority of the state or territory government. Have you got any views on that? You don't have to answer it because it's actually quite a complex legal point.

MS HOLLINGWORTH: I thought it was very interesting and it did make me think that perhaps we hadn't properly considered that particular provision. But it will obviously hinge on how one concludes whether local government is an authority established under state legislation. It's probably one of those situations - certainly it's one of the situations where there are going to be arguments for and against and they have been detailed in the Australian Government Solicitor's advice. I did think - certainly from a very legalistic point of view - there probably are going to be arguments to support the Australian Government Solicitor's proposition, particularly where local government is acting, for instance, under the Health Act or the Food Act or specific state government legislation where there are conferring responsibilities on local government to enforce or be the responsible authority for state government legislation.

I think the Planning and Environment Act even uses that particular terminology. Under the Planning and Environment Act, council is the planning authority for a municipal district. The state is also a planning authority under that same legislation. That may be an example where the Australian Government Solicitor's view that section 2B and C are going to apply to local government. One might come to a different view if you were looking at the statutory functions conferred on local government under the Local Government Act because that legislation establishes councils as local government bodies that are elected by their constituents and confer responsibilities on the body corporate made up of councillors. So the views that have been argued by the New South Wales shires and associations and others - or is the New South Wales state government? I can't recall

now - that local government is a separate entity sphere of government, would I think be true for the Local Government Act but not necessarily true for other legislation.

MS OWENS: I think it was the New South Wales local government department that put that point.

MS HOLLINGWORTH: The department, yes, okay. But anyway that particular view. It's a view I think that from a political perspective local government is going to want to argue. It's certainly been a major issue for Victorian local government to seek proper recognition of local government as a sphere of government in the Victorian state constitution. Local government sees itself as elected and not as an arm or a tier or simply an authority under the jurisdiction of the state.

MS OWENS: So there's a bit of a gap between the perception of what local government is and what the actual legal position really is.

MS HOLLINGWORTH: Yes, I think that's right. The Australian Government Solicitor has also referred to advice - and I'm not sure where this comes from - that state government doesn't interfere with local government and that local government are left to basically do their job as local government bodies. That's absolutely not the case and there are countless examples of where there has been quite direct and indirect interference with local government and how it operates.

MS OWENS: If there was no interference you wouldn't have any need for any local government departments, would you?

MS HOLLINGWORTH: You certainly wouldn't and there would not have been amalgamations in Victoria. There would be no - the reform initiatives that took place in 1994 wouldn't have happened.

MS OWENS: I think there was those cases like with the Melbourne City Council where they actually sacked the council - - -

MS HOLLINGWORTH: Spend or sack, yes, exactly.

MS OWENS: So I don't know whether you'd define that as interference but it certainly - - -

MS HOLLINGWORTH: I think for most people it is. I think it's a yes and no. I guess there would be some benefits for local government to argue that perhaps for some purposes they are authorities under the Trade Practices Act and therefore have the protections that that provision provides.

MS OWENS: But not necessarily across all activities.

MS HOLLINGWORTH: No.

MS OWENS: So if we decided we were going to get rid of section 2D, there's no guarantees that all activities would then get picked up under those other sections. Would that be fair to say?

MS HOLLINGWORTH: Yes, that's right. I mean, it's our primary position that section 2D should remain.

MS OWENS: No, we just thought, explore all the options. I mean, we basically I think said in our draft report that we wouldn't go down the route of abolishing section 2D just because of the uncertainty about the coverage of Part IV. I think if we actually opted for that option we would have got a lot more people coming to our hearings and a lot more submissions.

MS HOLLINGWORTH: It would be controversial both politically and in terms of its legal implications too.

MS OWENS: The Australian Government Solicitor also made another interesting legal point where the local councils - despite the fact they might be interpreted as being authorities in the states - don't share the immunity of the Crown.

MS HOLLINGWORTH: I think that's been a view - I don't think there has ever been really any question about that. I don't think anybody has ever operated on the basis that there was Crown immunity; certainly not since 1920 anyway.

MS OWENS: There was another specific issue which you raised in your original submission to us about internal transactions. I think it was about page 7. This might be going over some territory we've already covered but nevertheless I just wanted to clarify something here. You basically are arguing on page 7 that it is possible for a council to transact with itself. There can be in-house agreements that have operated in local government since the operation of compulsory competitive tendering. This is in that paragraph that's headed Internal Transactions. You're basically talking about the tendering process which has enabled in-house service providers to compete for the provision of services that were being market tested. That's a bit like our building permit example we were talking about before. You were basically arguing there that you do need the exemption in this instance but given the advice of the AGS and given what the Law Council has been saying relating to exemptions for internal transactions, do you still think that that's the case? Do your views still stand?

MS HOLLINGWORTH: I'm not sure whether the Australian Government Solicitor had this example in mind when they concluded that that internal transaction provision was redundant. There quite clearly is the case that an entity does not enter into a legally binding contract with itself. It can't. The point that I think we're making here is that use of the word "transaction" which is a much broader one than "contract" or "agreement" certainly does potentially have some application to local government. But having said that, council has entered into in-house agreements

under the Local Government Act, and the Local Government Act actually gave expression to those words "in-house agreement" and it sanctioned in-house agreements. So it would have been difficult I think where a council was complying with the compulsory competitive tendering arrangements and it entered into an in-house agreement with its staff for the provision of services, as long as it hadn't breached the Trade Practices Act in its tendering processes probably would not have had any issues really with anticompetitive conduct under Part IV.

MS OWENS: Does it make any difference whether they're actually doing it in-house or some of it is going out? There's still internal transactions, it's just that they're making a decision that they're either going to do it in-house or they're going to get somebody outside to do it.

MS HOLLINGWORTH: That's right. But that decision-making process has a number of industrial implications and it has some marketing implications too and I can envisage a situation where it might have been the basis of someone's argument that the council had breached one of the Part IV provisions by entering into an arrangement with its workforce for the provision of services. But again whether it was section 2D that protected councils or whether it just wasn't an issue, it's hard to say. Compulsory competitive tendering has now been repealed from the Local Government Act and councils can still tender and they may still enter into in-house agreements but those statutory protections under the Local Government Act don't exist. I don't think our view really has changed and I think in some ways we would probably say that there is a basis on which that component of 2D should remain also. When the AGS and others came to the view that internal transactions under 2D were redundant they certainly did not have in their contemplation the sorts of examples that we've included in our submission.

MS OWENS: But I still think with that example it's still just an internal transaction.

MS HOLLINGWORTH: I mean, I think that there's that view too, but if we're wanting to take a more cautious approach, that it certainly has potentially protected at least some situations that were taking place here in Victoria, then one would say why take it out, because to take it out you're going to have to repeal legislation.

MS OWENS: I think our conclusion in our draft report was to say that it doesn't seem to do anything, it doesn't do any harm, and that the transaction costs of taking it out are going to exceed the benefit - - -

MS HOLLINGWORTH: It would outweigh it.

MS OWENS: - - - so you may as well just leave it. But what I want to be clear about is our conclusion that it has really no impact which is basically the AGS's conclusion as well. I just want to make sure that our statement is a correct one which we make somewhere. We basically say on page 44:

> We note that the internal transactions of a local government body cannot infringe Part IV and that this exemption is redundant and should be repealed.

You're saying the exemption may not necessarily be redundant.

MS HOLLINGWORTH: I would hope that if anybody was going to challenge it before the Federal Court, the Federal Court would say, "Look, this is an in-house agreement, it is an internal arrangement and it is not an arrangement that would fall within section 45." But if that's not the case and the Federal Court does say, "Section 45 doesn't just apply to agreements, it also extends to arrangements. This is an internal arrangement that has the potential to restrict market sharing of, for instance, the supply of services by this council arranging with its workforce to provide those services in preference to other marketplace providers," then section 2D(b) does have an important function and I think it would be prudent for it to remain. If, as you say, it doesn't appear to have done any harm, I don't think it's unduly restrictive for the purpose of the legislative review. I can see that at least in local government in Victoria there have been some arguments for its retention, so I think it remains our position that - - -

MS OWENS: I mean, it really is a question of whether Part IV actually applies to these sorts of situations. Basically section 45, we've said in our report that it doesn't apply to contracts, arrangements and understandings between related corporations, and the Trade Practices Act in section 4A defines corporations as being related where a body corporate - we've got a list of - you know, it's a holding company of another - a subsidiary of another body corporate or whatever. So the staff would fit into that definition of related corporations. Section 45 really wouldn't apply. So if it doesn't apply you don't need an exemption from it.

MS HOLLINGWORTH: I agree with that. If your view is right then I think that there is an argument for repealing section 2D(b).

MS OWENS: But you've just raised the question mark.

MS HOLLINGWORTH: That's right. I'm just saying none of us can know how it's going to ultimately be interpreted by the Federal Court which is the issue we come back to about including terminology that can't be totally defined in legislation. Ultimately it would be defined by the judiciary.

MS OWENS: You don't want to see any changes to any of the definitions - the definition of licensing or the definition of local government body. That was an issue in New South Wales when we were there, you know, what do you define as being a local government, because they've got all these specific - - -

MS HOLLINGWORTH: Yes, they have their own particular issues with that

definition.

MS OWENS: So again you'd just like to leave well enough alone with the definitions.

MS HOLLINGWORTH: You could define "licence" except that I think the common view is that licence would probably have a reasonably broad application and extend more generically to the issuing or the granting of commission, permits et cetera. We don't particularly have an issue with the need to define "licence". I think if you were going to open up the legislation then you would do, as has been advocated by some of the other associations and that is you have a clarifying statement about the application of Part IV. But we've been through why we don't think that that's absolutely necessary. I mean, I don't think there are so many problems with the definitions as they currently stand. One can see them and the potential for them but they simply have not emerged.

MS OWENS: I was just wondering whether either of your colleagues want to say anything. I think I had one other thing I was going to ask you. Is she doing all right there? Do you disagree with her on any of these views?

MS HOLLINGWORTH: They would say something if they did, I'm absolutely confident of that.

MS OWENS: It is such an esoteric area, isn't it, when you get into the legal definitions and what's the act really trying to cover and what's being exempted and so on.

MS HOLLINGWORTH: And trying to see all of those things in the public policy context and the practical context in which they actually take effect. As I say it's not that the MAV wants to be cavalier about this but I think we are reflecting on the experience of the Trade Practices Act so far and that's not inconsiderable.

MS OWENS: No, indeed. I don't think I do have any other questions, so we'll probably go away and deliberate on these matters. As I said at the outset we will be talking to the South Australians next week and see what they think and maybe if they've got any views that are different from yours or similar we'll ask them to put them in writing so that we've got a formal submission. We haven't heard anything from Western Australia or Queensland or the Territories, so we'll go with what we've got and we'll just sit down and think about all these issues again. Are there any other issues you want to raise?

MR EDWARDS: No, I don't think so. We've covered everything.

MS HOLLINGWORTH: Thank you very much for coming and thank you for the submission you gave us earlier and for the opportunity to talk to you a couple of times in our visits. I'm going to close the hearings now and I've just noted, the

Commission will be giving further consideration to the matters raised in these hearings and we'll move to prepare a final report for government by September ahead of the formal reporting date in October. So I would like to thank the MAV for attending today and for your submission.

AT 11.46 AM THE INQUIRY WAS ADJOURNED ACCORDINGLY

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