



**TRANSCRIPT
OF PROCEEDINGS**

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PRODUCTIVITY COMMISSION

REVIEW OF SECTION 2D OF THE TRADE PRACTICES ACT 1974

MRS H.J. OWENS, Presiding Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON MONDAY, 17 JUNE 2002, AT 9.30 AM

MRS OWENS: Welcome to the public hearings of 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. In fact I'm the only Commissioner on this inquiry. As most of you here 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 their submissions in response to the Commission's draft report.

Following our round of hearings, which begin here in Sydney then progress to 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 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.

I would like to welcome to the hearings our first participant this morning, and I think it may even be our only participant, the Local Government and Shires Association of New South Wales. I understand it's also representing the Australian Local Government Association and the Local Government Association of Queensland. You may like to confirm that in a minute. For the record could you please state your name and your position with the Association, for the transcript.

MR McBRIDE: Yes, Shaun McBride, finance and economic policy of the Associations.

MRS OWENS: Thank you, Shaun. Would you like to just confirm, will you also be representing the Australian Local Government Association and the Local Government Association of Queensland or will you mainly be addressing your own submission?

MR McBRIDE: We will be mainly addressing our own views, although I have consulted with the Australian Local Government Association. Their views concur with ours and they were happy for us to put those forward on their behalf. We understand they don't intend making a formal submission, or if they do it will probably just be a brief letter. Queensland also gave me a copy of their original submission, which you would have already considered, and were happy for me to speak to that in need, although there will probably be no need to speak to that. Again I think their views will be consistent with ours. ALGA informs me that the views we have put forward are probably consistent with those of the South Australia Association.

MRS OWENS: Yes, thank you for that. I think there was a high degree of consistency, which I suppose is reassuring for you, between the associations in each state and the Australian Local Government Association. I don't think I find that particularly surprising.

MR McBRIDE: No.

MRS OWENS: Now, you have tabled for us this morning a further submission based on our draft report. Given that we haven't had time to read this submission, I was wondering would you be happy to just run through the main points for us and then we can have a discussion about it.

MR McBRIDE: Yes, certainly. In our original submission we argued strongly for retention of section 2D for a number of reasons, one being that the specific recognition provides for local government and secondly the certainty it helps provide, were probably the major reasons. We have also argued for extension of the protection provided under 2D, by way of amendments that would extend some of the protections provided to state and Commonwealth under 2C. They were our main arguments in the initial submission. I imagine a lot of other states may have argued the same way.

We did also argue, at the request of some of the county councils in New South Wales, for specific inclusion or mention of those councils. Again in the interests of certainty, I understand that the way things stand there is probably not much doubt that the protection does extend to them anyway, as local government bodies. But again just in the interests of certainty, we would have preferred that.

Then there was an additional issue raised by - and subject of a supplementary submission, a brief one - by Wyong Council, in relation to Gosford and Wyong Councils who operate their water supply functions under a different act to the rest of the councils who operate water supply activities, that being under a New South Wales Water Supply Act or Water Management Act 2000 which also covers Sydney and Hunter water, as opposed to the Local Government Act which covers the other water supply councils. They again sought that inclusion in the interests of certainty, just to make sure it was clear that the protection did extend to them as local government entities. But we were probably disappointed that the county council issue and the water supply council issue was not specifically addressed, although there are probably ways around that.

In relation to the draft report, our comments in response, as I've mentioned, nobody has taken great umbrage at the recommendations in the report. As I said, we were disappointed that some of the specific inclusions that we had requested weren't made. We understand also the Commission's view that consideration of protections provided under 2B and A were outside the scope of the inquiry - recognise that.

In relation to 2C we acknowledge your point that exemption relating to the acquisition of primary products, in terms of extending that to local government, could be deleted but the other three I think exemptions could be added to local government if section 2D were to be amended. We acknowledge that it is questionable whether the extension of the section 2C exemptions would have any

practical effect.

However, we noted in the draft report that there are conflicting views on the application of Part IV to local government. The report notes that if the view that if Part IV applies to the regulatory activities of local government prevails then there is a risk that collection of taxes, levies, licence fees et cetera by local government could be exposed to action under Part IV. I think we were referring to page 38 of the report there. From our point of view we don't think it was prudent to wait for this to be tested through legal action. The preferred approach would be - you will find there's a typo there, when you get to it. That was a rushed job on Friday. The preferred approach would be to pre-empt any such action. The associations also maintain that section 2D should be amended to include the specific purpose councils and so on.

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 nationally 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 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. Our concern there would be the need to ensure that business activity is clearly defined. It's 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 D would appear to be the inferior alternative or the less preferable. However, it is favoured over the option of repealing section 2D. As I said, these views appear to be - well, from consultation with a couple of states and the ALGA - appear to be generally consistent with the views they're putting forward. They have indicated to me a preference for the second option - at least ALGA has, and that was in consultation with South Australia.

However, the first option, the status quo option, while less desirable, is not totally unacceptable basically. So that's basically our position. We would prefer a substitution, with careful wording, to clarify the situation. However, I don't think there will be too great a level of concern if 2D is retained, but definitely a preference for the latter option, although we would also consider - and I think it's noted in the report - there has been little time to test the implications of that option and we probably need to have further consideration of that before going forward with that option. People would have more time to think it through and consider legal ramifications and so on. So that was basically our position.

MRS OWENS: Good, thank you very much for that. Let's just clarify what you would like. Your preference would be the second option, which is to have a more direct statement relating to what Part IV covers. In addition to that you would like to

see some aspects of sections 2A, 2B and 2C also included, relating specifically to local government so relating to pecuniary fines and taxes and so on - would all be specifically set out in the act, as for with Commonwealth and state and territory governments?

MR McBRIDE: Ideally we would, although it would appear, the way the options are presented, that the second option of inserting a new provision might provide an alternate mechanism for removing any doubts about the protection provided. It may not be necessary. Again I think we would need to look at further development of the second option and the implications before being certain about that. But it would appear that potentially, by substituting different wording and making it very clear what the Part IV applies to, in terms of local government, might be an alternative to all the itemising of - - -

MRS OWENS: Yes. I think that was the sense that we had: that if you had a specific reference to local government business activities in the act in relation to Part IV then you at least don't need the equivalent to a section 2C. I think we did raise a question mark on 2C: why have that specific exemption for the states and territories if you have a direct statement in the act, "This is what it applies to, it's just business activities." So there is that issue of whether you need a 2C. In terms of 2A and 2B, I think that's another question again.

MR McBRIDE: Well, we did sort of acknowledge your view that that's outside the terms of reference so we're not looking at that specifically.

MRS OWENS: But it's much broader than just in relation to the Part IV.

MR McBRIDE: Yes. We would think that if there are issues concerning A and B that that may be suitable for separate consideration or maybe a separate inquiry if it's warranted.

MRS OWENS: It's really interesting to go back to 1995 and speculate as to why they didn't put in a direct provision in the first place. Do you have any sense of why that didn't happen then? I mean, at that stage obviously the local government sector decided to opt for pushing for the exemptions, which then were inserted into section 2D. But as far as I could see, nobody was actually arguing to have a direct provision put in and I'm wondering if there was some good reason for that not occurring at the time or whether it was just an oversight.

MR McBRIDE: I'm not aware of any specific reason at that time. It could be that people were thinking along the lines or they were being guided by the provisions that existed for state and Commonwealth and were just simply looking for something similar and to specifically recognise local government in a similar way to - within the Act as the other provisions existed, A, B and C, but I'm not aware of any other major reasons myself. There could have been some legal argument at the time but I'm not aware of it and so it's something we could probably check out with people who might

have been involved in making submissions at that time.

MRS OWENS: It would be interesting to find out if there's anybody out there with a sense of history that would be able to enlighten us on that issue because it is a bit of a puzzle to us. You said in your opening statement that maybe we need some time to sort of think about the ramifications of this, but eventually we're going to have to put in a final report and we have put out the draft report asking these questions. I have to say we haven't been flooded with submissions telling us what the ramifications may be and why, you know, it is a good idea or not a good idea to go down the second option route. I think our inclination would be to go that way unless somebody comes to us and says, "It's not going to work for this reason," and, you know, we wonder if there are any particular reasons why it may not be feasible to go that way.

MR McBRIDE: Well, there are no reasons that we have identified ourselves, and in seeking comments from councils across the state nobody has come up with any specification objections. Most seem comfortable with, or relatively comfortable with, either alternative. Many probably haven't even considered the second option in detail. They're probably, on the basis of what's in the paper, I would think comfortable that it would remove any ambiguities that currently exist. Nobody has raised any sort of detailed legal argument or anything with us on that and, as I said, the ALGA and, from what they tell me, South Australia also seem to take the view that the second option is the preference but they could live with the first option. But certainly they believe that the second option is preferable. I understand that's an issue that you'll be speaking to South Australian government and South Australian Local Government Association about, I understand.

MRS OWENS: Yes. We're going to go to South Australia but the discussions are not going to be a formal hearing. But what we might do at that stage is ask them if they can just put their views on that second option on paper and present it as a formal submission to us just so that we can then go in our final report and say, "This particular option has been supported formally by the South Australian Local Government Association, the Australian Local Government Association." It would be useful for us to have that in writing from the individual association so - I think it just gives it additional clout, if you like.

MR McBRIDE: I'll advise the ALGA. They probably would be making a brief formal response just for the record but that wasn't clear to me. They certainly didn't see it warranted coming to Sydney for a hearing because they didn't have a lot extra to say that we weren't saying - - -

MRS OWENS: Yes. No, that's fair enough. I think what the second option does is probably go further than the retain section 2D options. It's actually giving you more than you perhaps expected to get because it does really infer that the taxes and fines

and so on, that all of those would become exempt by default, if you like, because they are no longer - they are not considered to be business activities of local government. So whereas they are not specifically exempted now in the same way as they are under section 2C, they would be by inference under the second option.

MR McBRIDE: That was our understanding and that's the recommendation and that's why it is our preference we do think it will provide further protection and remove a lot of the ambiguities. As I said, it would probably remove the need to amend 2D to include all these other specific exemptions because it would make that redundant.

MRS OWENS: I have to say that when we started this we really wondered why you needed to have exemptions at all because our view was that we - it didn't to us appear that Part IV would apply to the regulatory statutory responsibilities of local government, we couldn't see why that should be the case, and until we got the Australian Government Solicitor's opinion, it basically went the other way. I think we were probably leaning more towards, "Just get rid of section 2D, you don't need it," and I think the very fact that we got that opinion that went the other way meant that there is that ambiguity. There is a lot of people who have said section 2D doesn't do very much because Part IV wouldn't apply to those activities anyway, and then there was the government solicitor's opinion that said, "Well, because of the way the states brought the provisions of Part IV into their own legislation so that it would apply to persons and hence the local government, then it would apply to local government regulatory activities." So because there is that ambiguity we thought it was important to make it very clear by making a statement of some sort, and we thought the more direct statement was probably a better way to go.

MR McBRIDE: Yes, we would agree with that finding too. I mean, we can always argue that we wanted some protection there in the interests of certainty. Even without the Australian Government Solicitor's advice, there had been concern - or councils didn't feel comfortable about just relying on the broader interpretations, they wanted something specific, their comfort factor. A certainty factor I guess was one of the reasons that we originally argued for its retention and extension, but the approach you're suggesting would seem to be a better approach than that anyway.

MRS OWENS: The government solicitor - I don't know if you've looked at this opinion but - - -

MR McBRIDE: Only the reference in the report.

MRS OWENS: It has been inserted into our report as an attachment but it does, for example, right at the end just look very briefly at the issue of taxes, levies or fees for licences and basically seems to be arguing that it would be unlikely that they would

be picked up under Part IV except under section 46, the misuse of market power section. They just left that hanging a little bit and they said there is a question of whether the need to promote consistency between and within regulatory regimes would warrant exempting such conduct by a council from the operation of Part IV and that is in relation to section 46, so they raise a bit of a question mark about that. I don't know if you've got any comments but it does raise a question of whether it really should be exempting that particular aspect from the Act. But what in effect would be occurring would be that, by putting the direct provision in, you are basically doing so.

MR McBRIDE: Well, that's why it would appear to be unnecessary to have the specific provisions if you - the specific items in there if you put in the second option, but I suppose we'd probably be interested in the Australian Government Solicitor's opinion how the second option - on the implications of the second option, I guess.

MRS OWENS: I suppose we could ask the government solicitor if there's any reason why that option shouldn't be considered.

MR McBRIDE: I think that would be useful or if - it didn't just attest whether he had any doubts about the protection that that type of approach would afford. I mean, I suppose at the end of the day we're more concerned about the sort of practical protection that's provided and a sort of transparent degree of certainty so it's clear to councils where they stand. But we are open to the alternative approach that is suggested, that could achieve that in a better way than itemising the specific exemptions.

MRS OWENS: It's interesting that although there hasn't been total certainty and clarity about, say, the taxes and fees and levies, the fact that that wasn't brought into 2D, there's never been any litigation in relation to that and you wonder whether there ever would be. But what you're saying is you still like to have that certainty.

MR McBRIDE: A certainty, yes. I mean, we'd probably take the view that just because it hasn't happened doesn't mean that somebody may try to take action in future or given the changing nature of council roles and functions of activities, whether that may open up grey areas or angles that people may try to exploit that haven't previously been exploited.

MRS OWENS: I think the other really interesting thing that the government solicitor said, which again tended to contradict everything that we'd heard, was that the solicitor said that if you didn't have section 2D, then a local government body would then be considered to be an authority of the state or the Northern Territory and hence within the scope of sections 2B and 2C, and I think everybody that we had spoken to before that opinion came, including I think in your own submission, had

said that that wasn't the case, that local government wouldn't be seen as an authority of the state and hence wouldn't be picked up under those sections, and then we got this opinion that had the contrary view and I was just wondering if that has changed your view on that or whether you think the government solicitor may have got that a bit wrong.

MR McBRIDE: Well, in our submission on that point, we say that they couldn't be seen as state government authorities. We were partly guided by the legal advice from the New South Wales Department of Local Government who were firmly of that view and interpretation and we accepted their advice on that issue. They were firmly of the view that - contrary view to the solicitor-general or Australian Government Solicitor, and again I think it would be a question of certainty. Councils did want to see specific acknowledgment of local government in the Act.

MRS OWENS: Yes. I think given that there are these diverse legal opinions, I suppose the last thing you want is for that to go and be fought out in the courts and so if you can get that certainty, all the better. But I thought it was really interesting that there were these different legal views even about whether local government was seen to be an authority of states or not, because the government solicitor was basically arguing that local government was not seen as being part of the crown but was seen as being an authority of the state but interpreted in a different way and I thought it was - it was one of those issues that could have run for quite a long time in the courts if you let it happen.

MR McBRIDE: Yes, and we would want to avoid that naturally. One of our prime objectives is removing uncertainty in this area and that's what our members have been seeking.

MRS OWENS: Now, we have another participant who has turned up at the table. Would you like to give your name and your position for the transcript.

MR CLARK: Yes, David Clark, the legal officer for the association.

MRS OWENS: Sorry, I missed your name.

MR CLARK: David Clark.

MRS OWENS: David Clark, thank you.

MR CLARK: Sorry I'm late.

MRS OWENS: That's okay. Well, I don't know, you've just come in on that discussion about whether local government is an authority of the state. Have you got

any comment you'd like to make on that particular issue?

MR CLARK: It would only be as a fairly limited authority if it's an authority at all. We derive our life, I suppose you could call it, from a state Act, the Local Government Act. We depend on the state government to say what we can and can't do, but apart from that we're fairly autonomous.

MRS OWENS: I was saying to Mr McBride that our Australian Government Solicitor's legal opinion which has been attached to a draft report came to an opposite conclusion I think to just about everybody else that we had spoken to about this issue and it was interesting to just see the diverse legal opinions relating to this matter.

MR CLARK: Yes, I've had a quick look at that and on the basis of what I've seen I would beg to differ from it.

MRS OWENS: So it is based on impressions or a different legal interpretation?

MR CLARK: I think it's a different legal interpretation. It's simply the way that I see local government being constituted and operating on a day-to-day basis.

MRS OWENS: Has it ever been tested in the courts?

MR CLARK: Not to my knowledge.

MRS OWENS: No. As I just said before, if it did it would probably end up being a lengthy process to actually get through this and quite a costly process. So to the extent that you can avoid it, I think all the better.

MR CLARK: I think we would certainly prefer it that way. We pay enough out in legal costs in a year as it is, without having to spend more on fights like that.

MRS OWENS: Yes. I think the point that you're making about certainty is a very important point. I think that to the extent that we can ensure that there is certainty in the interpretation of the Act and avoid litigation, I think that that's an important objective. We have to look at the benefits and the costs of particular provisions. I think that the benefits of certainty, albeit a somewhat intangible benefit, are important and become more important when you get these different views about the interpretation of legislation. So I think that's what has tipped us the other way; to thinking about either retaining 2D or having a direct provision.

That was one of the other issues that we discussed before you came, Mr Clark, was which way we go in terms of either having a direct provision in the act, which isn't there now, basically stating that it's only the business activities of local

government that are covered under Part IV - so you have a direct provision, which is our second option - or whether you forget the direct provision but just retain the exemptions as they stand. Is that something that you have given any thought to?

MR CLARK: We would prefer that option I think, that second option. I think that has been covered in our submission.

MRS OWENS: Yes, it's in the submission. There is a third option which is not in our report, which is to have a direct provision and also have exemptions, which is what the other levels of government have got at the moment under section 2C. We really do raise a question mark as to whether, if you do have a direct provision that says that Part IV only relates to business activities, then do you really need to have another section that says, "Oh, and by the way, we're going to exempt these things," because implicit in the direct provision is that those things are not covered. So it's a bit of legislative overkill, isn't it, to have both?

MR CLARK: I was going to say, it sounds a bit like using a sledgehammer to crack a nut.

MRS OWENS: Yes.

MR McBRIDE: I mean, some of our members may prefer the more comprehensive approach even if it amounts to duplication. But I think we can see the practicality - or the lack of the need to go to that extent, to actually duplicate the general provisions with specific provisions which were already covered by the general provisions.

MRS OWENS: Yes. When you have got specific provisions then you have got to think very carefully about what those specific provisions are. If you miss something then some lawyer somewhere else will say, "Well, that wasn't in the specific exemptions," and hence they will find some reason why that shouldn't be exempted. You know what I mean? There will be an inference, if it's not actually laid out - everything you lay out you have got to define. So you have got to define licences and you have got to define internal transactions et cetera et cetera.

MR CLARK: And we have just got ourselves a local government Act that moves away from doing just that in the service area, because of that situation where under the old act lawyers made a fortune fighting about whether a councillor had a particular power to do something or not.

MRS OWENS: Yes.

MR CLARK: We don't want to see a return to that in any arena.

MRS OWENS: Now, you've raised another really interesting issue and that is that I think - it relates to the definition of local government for the purposes of the Act. You mentioned in your submission and in your comments today and in your new submission the - what are they called - county councils. You quite rightly say that we didn't spend a lot of time discussing the - these are the special purpose councils - that we didn't spend a lot of time talking about these councils. I think - correct me if I'm wrong - are these special purpose councils only a New South Wales phenomenon or are there such things in other states as well?

MR CLARK: I'm not aware of them being a life form in other states. I think they're uniquely a New South Wales animal.

MRS OWENS: I would like to find out a little bit more about what they are and what they do, because we need to think carefully about do these come into our understanding of local government for the purposes of the Act. So what do they do?

MR CLARK: Well, they are certainly constituted under the same act as general purpose councils, broadly for one or more of three or four purposes: water supply, noxious weed control or noxious animal control or both, flood mitigation, and I think there's one abattoir left, isn't there - yes.

MR McBRIDE: One abattoir I think. I mean, they were a bigger entity in New South Wales or bigger organisation in New South Wales when electricity was run by county councils, before that was taken in by the state government. They were probably the largest county councils, in financial terms, of coverage and activity. But since structure of the electricity industries change and they have become part of state corporations, the level of county council activity is much lower and limited to those sort of range of specific purposes that we've mentioned.

MR CLARK: They're constituted by an arrangement between a number of general purpose councils in an area who decide that there is a need for a separate body to do a particular job in those local government areas. So they're a child, if you like, of the general purpose councils.

MRS OWENS: So they're a child of the council. Do they actually perform specific functions or undertake service provision or are they issuing permits or - you don't have licences in New South Wales, do you - but permits or - - -

MR CLARK: Well, they may issue permits to the extent that it is part of their constitution to do so. But it would be permits in what you might call the traditional sense: they are a permission to do something or, possibly closer to the point, they issue directions for particular works to be undertaken. For argument's sake, a

noxious weed - county council will issue directions to clear properties of noxious weeds. Their powers in those areas are largely in the regulatory field.

MRS OWENS: Right, that's what I'm trying to get to. If they are sort of regulatory bodies and just basically undertaking certain regulatory activities on behalf of the general purpose council then it sounds to me as if they should get picked up as being exempted.

MR CLARK: Well, I think if your legislation refers to councils in New South Wales constituted under the Local Government Act, you would pick them up automatically.

MRS OWENS: Well, it would have to be more general. It would have to be councils - so what were your words, "councils constituted under a Local Government Act"?

MR CLARK: Under the Local Government Act - well, from New South Wales' point of view, under the Local Government Act 1993.

MRS OWENS: So what we're really saying - that there needs to be some definitional change in the act, because at the moment there is a definition in the act in relation to 2D which says:

The local government body means a body established by or under a law of a state or territory for the purposes of local government.

Now, would that pick up - - -

MR CLARK: That would pick up counties.

MRS OWENS: That would pick up the counties but then it goes on to say -

other than a body established solely or primarily for the purposes of providing a particular service such as the supply of electricity or water.

So that would pick up your counties already.

MR CLARK: That would pick up the weeds counties. It wouldn't pick up the water supply counties because - - -

MRS OWENS: Because at the moment they're specifically exempted because they're providing a service.

MR CLARK: Yes, they're really - - -

MRS OWENS: So this comes back to - the next issue is - we're probably okay with those county councils then, as we stand. If you had a direct provision saying that the business activities of local government should be only those activities that are covered under Part IV - which I think is really the initial intention of the Act, quite frankly. I mean, I don't think it was ever meant to cover regulatory activities, when you look at the second reading speech and so on. So we think that that particular definition we have got now of local government body would pick up those county councils. So the question arises - you are now saying, and you said in that supplementary submission that you gave us earlier, that the water authorities shouldn't be taken out of that definition.

MR McBRIDE: There were two issues there. The majority of water supply councils in fact under the Local Government Act fall within that. There are only two councils who operate water supply that are under a different act, which is the New South Wales Water Management Act 2000, and they have some concern that they're not specifically acknowledged or there might be some uncertainty about their protection.

MRS OWENS: You see, at the moment they're not protected. I mean, they wouldn't be, because section - well, let's just talk about it in the context of section 2D. Section 2D at the moment only exempts local government bodies, the general purpose local government ones and we're now thinking also the specific purpose councils, but it says:

other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.

So they are not - because I think it would be assumed that those councils supplying electricity or water would be doing so in sort of a commercial sense. The whole intention back in 1995 was to pick up those sort of activities under the Act so that they would be covered under Part IV. But you're arguing that they should be exempted from Part IV?

MR McBRIDE: Well, there is a question about whether the other councils who operate water supply by virtue of the fact that they're council operations are exempted or not. But I take your point there; that they could be perceived as business operations.

MRS OWENS: I think that would be the intention: that they weren't covered in this exemption originally because they were seen as being business activities that could potentially be done by a private body or potentially by a competitor. To that extent they would be seen as commercial operations.

MR McBRIDE: No, I acknowledge that point.

MRS OWENS: But then there's the question in that supplementary submission that you gave us. You talked about the Gosford Wyong Council - you mentioned it in your opening comments also, Shaun - under the New South Wales Water Management Act. Now, I presume those water authorities would be also engaging in some sort of commercial activity as well but just under a different Act.

MR McBRIDE: Yes, that's it, they're just under a different Act for whatever reason, probably because they were a larger operation than most of the other council ones and I think at some stage there was an intention or desire on the New South Wales government's part to take them over and move them into Hunter or Sydney as part of the state owned corporation, which was resisted by councils.

MRS OWENS: They certainly wouldn't be exempted from the act.

MR McBRIDE: The Hunter and Sydney - no, well, that would be consistent then.

MRS OWENS: So in my mind those particular bodies probably shouldn't be exempted and they shouldn't come in under a definition of local government if you had a direct provision for local government business activities. They would become part of the local government business activities to which Part IV would apply.

MR McBRIDE: Yes, I can see that but I'm just thinking that there's - probably part of their activities probably remain regulatory as well.

MRS OWENS: Do they?

MR McBRIDE: In terms of environment, health, safety or the environment and health aspects of water supply, management. They would apply fines and penalties and impose standards, provide approvals and permits.

MRS OWENS: But if you had a direct provision that says only the business activities are covered, then - - -

MR McBRIDE: That would probably cover it, that those regulatory activities would - - -

MRS OWENS: I'm just thinking aloud whether those councils then in terms of their non-business activities - they would get picked up under the Act so I think we're okay. I think we'll be okay for those regulatory activities because if you have your direct provision just for your local government, business activities are covered under the Act under Part IV, then anything else wouldn't be regardless.

MR McBRIDE: Yes, the sale of water is obviously a business activity but some of

their other activities are more of a regulatory-type nature but are related to the water supply and management functions and sewerage management function and so on, which is not so much business activity.

MRS OWENS: Yes. The other specific sort of council, the Indigenous Councils - have you got Indigenous Councils in New South Wales?

MR CLARK: We have some land councils but they don't come under the Local Government Act.

MR McBRIDE: They are members of our organisation and we mention that in the sort of opening for our initial submission, and reiterated it here but I don't think they're local government bodies under the interpretation of this Act.

MR CLARK: No, they're certainly not picked up under the Local Government Act.

MRS OWENS: Yes. So I'm just wondering again how they fit into all this in terms of their activities. They would not be undertaking business activities.

MR CLARK: They're not undertaking business for the large - for the majority of what they do anyway. There might be the occasional council that operates a little art shop or something like that but their core activities are essentially social services.

MRS OWENS: Community social service activities, so again they wouldn't get picked up under the act if there was a direct provision. It's interesting - - -

MR McBRIDE: No, other than some business activities like some - you said art galleries and things like that, but some may also operate small tourist facilities and I'm aware of some that may operate cattle stations or agricultural - commercial agricultural activities, although they will often have those registered as charities, some of those business activities, because they're used to fund the social welfare activities.

MRS OWENS: We haven't really had any submissions relating to those sort of bodies at all, and again they wouldn't get picked up under a definition of local government body under the act at the moment you're saying - no. Do you think they should be included in a definition just for certainty or not?

MR McBRIDE: In one respect it may be desirable just for inclusiveness and overall coverage in case some of their activities could be seen as an equivalent of those of a local governing body. which they probably aren't at this stage for practical purposes. However, it could also throw some further confusion into issues about - given that they're significantly different to local government bodies, how do they fit

in under that exemption relating to local government bodies? And then there's people trying to draw parallels that might add to the confusion. Well, if they're included but their activities include this, that and the other but local government activities don't include those, does that mean local government can extend its activities or whatever? Probably not very clear what I'm getting at there but I think it could just lead to further confusion by raising a lot more questions about why they're in there and what activities, but then again it would probably be welcome for inclusiveness in other circles.

MRS OWENS: Yes. We might just have a think further - we'll have a further think about that and maybe get back to you if we - - -

MR CLARK: It would probably be useful to talk to the councils themselves too, to see how they feel about it.

MRS OWENS: Yes, okay.

MR CLARK: It may not be something that's actually occurred to anybody in the Aboriginal Land Council movement but they might - - -

MRS OWENS: Because it's never been - nothing has been tested.

MR CLARK: - - - be drawing the attention of the Trade Practices Act to themselves by some of their activities.

MRS OWENS: It's just whether that would be ever likely to happen. I suppose, as you said before, you know, anything could happen in the future. It's a matter of plugging the holes now.

MR CLARK: Well, I think as Shaun said though, the majority of them, if not all of them, do have their commercial activities set up as charities on the basis that the profit they derive from those activities goes back into their social welfare activities rather than being distributed to shareholders.

MRS OWENS: So to that extent they're really not commercial activities in the way we tend to think of commercial activities.

MR CLARK: No.

MRS OWENS: Although you could have business activities that are for profit and not for profit under the act.

MR McBRIDE: Yes, there can be activities of both kinds conducted obviously.

MRS OWENS: We'll have a bit more of a think about it and maybe we might take up your suggestion that we talk to one or two of the councils and see what they say. Another issue we raised in our report related to whether local government could use its licensing powers currently to favour its own business activities at the expense of a private sector competitor and we did ask the people to give us any examples and we argued that it would probably - any of that sort of behaviour would be in breach of competitive neutrality provisions, arrangements in the different jurisdictions. One of the issues we'd just like to explore with you is whether you see that the competitive neutrality arrangements in this state are working well, whether they would be effective in those sort of situations. We just wanted to get a bit of a feel for how well they're working currently.

MR McBRIDE: They appear to be working quite well to our knowledge, or to my knowledge at least. There have been very few actions under the guidelines that have been followed through to a conclusion. Most have been settled quite quickly or found to be without substance. I was checking on this sometime back in relation to a different aspect of competition policy and it was very hard to find one complaint, competitive neutrality principles that had actually been sustained. So it would appear that there's not substantial evidence of councils misusing their licensing powers for - or approvals powers or permit powers for commercial gain or to manipulate competition. I think that would be borne out by the ACCC and the state bodies and the Department of Local Government through their procedures and the structures they've set up to deal with these types of claims. You know, it's acknowledged that those powers could potentially provide councils with - an unscrupulous council with the ability to exploit its powers. It doesn't appear to actually become a big issue and yes, the evidence just doesn't seem to be there to sustain it and it appears that the mechanisms that are in place for dealing with it are working quite adequately.

MRS OWENS: Do you have any unscrupulous councils?

MR CLARK: Absolutely not.

MR McBRIDE: No.

MRS OWENS: I thought I'd throw that one in.

MR CLARK: That such wickedness should be.

MR McBRIDE: I mean, a lot of complaints against councils in those areas are probably of vexatious or narky nature. It's people who didn't succeed with tenders or people who had some other problem with council or will frequently want to blame somebody and blame council, but the substance of the claims is usually found to be

absent.

MRS OWENS: Yes.

MR McBRIDE: I mean, there is a tendency just to sort of blame the council or, "There must be something wrong there," or, "They're doing me in," you know, that's - - -

MR CLARK: I think the tendering situation is probably the most common, certainly in my experience, and it's the disgruntled tenderer who has missed out and said, "I didn't get the tender. Mine was the cheapest. Obviously somebody is on the take." Well, I think councils are at last discovering that the cheapest tender isn't always the best.

MRS OWENS: No.

MR CLARK: And that a proper tender evaluation process actually throws up who the best tenderer is who will not necessarily be the one who has come in cheapest.

MRS OWENS: Indeed.

MR CLARK: Because it's been traditionally the way with local government until recently that the cheapest normally got the guernsey, those who come in as the cheapest are now finding that they're missing out and they're asking why.

MRS OWENS: So are they complaining under the competitive neutrality provision or are they just whingeing?

MR CLARK: I think they're either just whingeing or they're taking it up with state bodies like the ombudsman at ICAC on the basis that it's valid administration or corruption.

MRS OWENS: Now, some of your regulatory activities are done under state legislation, you're really regulating on behalf of the state, so in some instances rather than going through CN-type complaints mechanisms, there are these other state based mechanisms that they can fall back on. So what did you say you've got at the moment?

MR CLARK: We've got the ombudsman.

MRS OWENS: Ombudsman.

MR CLARK: And the Independent Commission Against Corruption.

MR McBRIDE: And there is a competitive neutrality appeals procedure through the Department of Local Government - - -

MR CLARK: Which I don't think has ever been invoked, has it?

MR McBRIDE: Not that I'm - - -

MR CLARK: I'm not aware of it - - -

MR McBRIDE: Nothing has ever been right through it. It's usually finished before it got very far.

MRS OWENS: But it's there, it's available.

MR McBRIDE: It's there, it's available, yes, people can make those complaints via the department.

MRS OWENS: We felt while you've got those sort of provisions at a state level, you don't really need to then be using your Trade Practices Act. It's a better way to go in these sort of circumstances than trying to cover all these factors within the Trade Practices Act itself.

MR McBRIDE: It certainly would appear to be, given that the mechanisms appear to be working. They are less costly and probably a more efficient way of dealing with matters and we think that's desirable from a public policy point of view.

MR CLARK: Particularly with ICAC. Inevitably, as you might have noticed in the Sydney press at least recently, when it makes an investigation and finds something out, it gets maximum publicity and that's probably as good a way of pulling the less than perfect council into line than anything else.

MRS OWENS: With the fear of exposure.

MR CLARK: Yes.

MRS OWENS: In the public domain, yes. It's highly visible. Even in Victoria we get to hear what's happening in New South Wales.

MR CLARK: They're not all like Rockdale, I promise you.

MRS OWENS: Now, I'm just looking to see whether there was anything else you raised in today's submission that you tabled. I think we've covered most of the issues

that you brought before us. We've talked about the water authorities, 2A, 2B, 2C. I'll put it back to you. Is there anything else that you'd like to raise with us or you feel I haven't explored sufficiently well with you this morning that you'd like to return to?

MR McBRIDE: No, not from my point of view. I think we've covered our issues comprehensively.

MRS OWENS: You also, in response to our issues paper, in your first submission said that - we asked whether it would be possible instead of having specific exemptions, whether you could fall back on things like the authorisation process under Part VII, and I think that your initial submission said no, that would be a very inefficient way to go. You still believe that?

MR McBRIDE: Yes, we'd hold to that view.

MRS OWENS: I think everybody basically said that.

MR McBRIDE: Yes, we still hold to that.

MRS OWENS: Okay. I know you've got something else you have to get to by 11.00 so I'm just keeping my eye on the clock. I think I've covered everything. I'll just see whether I've - yes, okay. Well, thank you both very much for coming and if there is anything else you'd like to say to us at any stage - we may get back to you on the issues of the land councils or we might ask you who we should talk to there and, as you suggested, we might just check with the government solicitor on the second option and see what they think.

MR McBRIDE: Yes, we'd be interested to - well, just to be certain that that achieves what you obviously intended to achieve. We'd be disturbed if the Australian Government Solicitor threw up another conflicting opinion on that one as well, so we just want - yes, again in the interests of certainty we would be pleased if that was undertaken.

MRS OWENS: I'll just see if there's anything else I was going to ask you about the other submissions from the - the Australian Local Government Association, just before you go.

MR McBRIDE: Yes.

MRS OWENS: This will just take a minute because you may not have a view on this. The Australian Local Government Association's submission asks for an extension of the definition of - if we were to retain the first option, they had a

concern about the definition of "internal transactions" in the act and said that they would like to see the definition of "internal transaction" extended to those between local governments and corporate bodies belonging to local government. The argument was that that would be on the same footing as transactions between related corporations in the private sector. I was wondering, do you have a particular view on that one? I think we would probably reject that as an argument because that would then be going against the intention of the changes to the act under national competition policy. Do you have a view on that issue?

MR McBRIDE: Well, we would have supported their initial view, again looking at it - looking for consistency with internal transactions between related corporations, and in this case we could be talking about related corporations where, you know, a council may have a corporatised water and sewerage authority and a corporatised works team or waste management team and we'd say they are equivalent to - relate to corporate entities in fact owned by the same core entity, being council.

MRS OWENS: But wouldn't it undermine the intention of the national competition reforms to cover all businesses, because in that case it's a transaction between a local government and a body out there which could be, you know, your water authority but it's still there potentially competing out there in the real world. Couldn't that undermine the intentions of those changes?

MR McBRIDE: Well, to some extent I would see that again as trying to get consistency with two private related organisations who are out there competing, or presently competing.

MRS OWENS: But within a private body as I understand it, it might be two corporations within the same company but they're still basically within the same company so it's just a transfer between one part of the company and another. They're two related corporations within an overall corporate structure with an overall profit for the organisation. It would be like some sort of transaction within Mayne between its logistics company and Mayne Health for example. It's still Mayne.

MR McBRIDE: We would see that in many respects as sort of parallel to the council because while it is council's corporate entity - and often they're not a registered corporate entity, it's just a structural thing - - -

MR CLARK: It's still the council acting to deliver a service - for argument's sake, a waste management service or - - -

MRS OWENS: Yes, but somebody else could deliver that service, whereas you can't imagine Mayne Health going to another logistics company, going to Fox to get some transport done. Mayne Health would only use the logistics function of its own.

It's not going to go outside the organisation to get its transport done, whereas for waste management the local council doesn't have to use the council - potentially, there are other potential competitors out there. I'm just exploring this because it's one issue that was raised and I think that we wouldn't look too kindly on it. I just wondered if - but you would argue that you feel that that should be - - -

MR McBRIDE: That was our interpretation.

MRS OWENS: Those transactions should be exempted.

MR McBRIDE: Yes, partly on the basis that in most cases these entities or corporate units are not legally separate entities. Only in some cases are they, in very few cases in New South Wales, and that's sort of governed by the competition principles agreement in New South Wales that I think council corporations with turnovers from memory over 20 million have to take a more formalised corporate structure. But most of them don't reach that size so they're not formally separate entities.

A lot of this so-called business unit or corporate entity stuff is like an internal structural thing. A lot of it is just based on contemporary management jargon and approaches about, "We'll call that a business," you know, while it's still just the engineering department of council.

MRS OWENS: I think that would be a legitimate internal transaction that under the current act would be exempted if it was the engineering department or whatever. But it's really when you have a transaction between the local government and the water authority or the local government and waste management - - -

MR CLARK: Yes, well, it might be at some measure we're at cross-purposes here because I would say a situation where there's a deal between a council and, for argument's sake, a water supply authority as not coming into the same category as an arrangement between the council's engineering division which is called Council Works and is said to be a separate corporate structure and the council's administrative division for the delivery of administrative services.

MRS OWENS: No, that would be - - -

MR CLARK: I think that's what ALGA is getting at, that second situation where councils call various parts of their operation different things and say that they're corporatised, when in fact they are still operating within the overall structure of the council. They are not in fact separate bodies from a legal sense but they are viewed by the council, for its accounting and other bookkeeping purposes, as being a stand-alone unit within its own structure.

MRS OWENS: I see. If it's that, I think that there's no problem. But if it was those other activities I think there is a problem. But again, if we went down our second route of just having a direct provision in the act and you get away from all these issues about having to worry about defining what is an internal transaction, it means it alleviates the pressure on you to get that right, I think.

MR CLARK: Yes.

MRS OWENS: Okay, thank you for that. Thanks for clarifying that one. But we might go back to the Local Government Association on that and just check whether that's what they meant in their original submission on that one, because I think that's important, just to tease that one out.

MR CLARK: Yes.

MRS OWENS: Thank you both very much for coming. At this stage I will be adjourning today, unless our other member of the audience would like to come up and - would you like to say anything on behalf of - - -

MR: No, that's okay.

MRS OWENS: Okay, good. I will adjourn the hearings today and we resume in Melbourne on Monday, 1 July. So I would like to thank you both very much for coming. I think it was a very good discussion and you have clarified a few things for us so that's great, thank you.

MR CLARK: Thank you.

AT 10.41 AM THE INQUIRY WAS ADJOURNED UNTIL
MONDAY, 1 JULY 2002

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