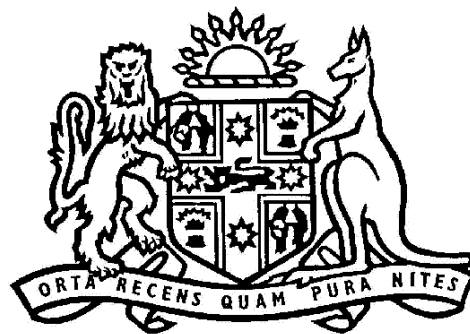


NATIONAL COMPETITION POLICY –
REVIEW OF THE LOCAL GOVERNMENT ACT

NSW Department of Local Government

July 2001



CONTENTS

PART 1: THE REVIEW PROCESS	...	...	...	3
PART 2: OVERVIEW OF SUBMISSIONS	...	...	...	8
PART 3: DISCUSSION AND RECOMMENDATIONS	...			11
(1) Business approvals - undertakers and mortuaries	...			11
(2) Operation of a public car park	...	...	...	14
(3) Tendering - restrictions on bodies providing ‘bulk’ contract arrangements	...	...	...	16
(4) Tendering - other obligations	...	...	...	21
(5) Control by Minister for Land and Water Conservation of water supply, sewerage and stormwater works and facilities	...	...	...	25
(6) Restrictions on councils undertaking private works	...	...	...	26
(7) Setting of fees and charges for business activities	...			28
(7) Rating provisions	...	...	...	33
(8) Controls on borrowing, investment and use of council revenue	...	...	...	36
(9) Disclosure requirements	...	...	...	41
(10) Restrictions on delegation	...	...	...	48
(11) Controls on council liability insurance	...	...	...	49
(12) Restrictions on the formation of corporations by councils	...	...	...	50
(13) Council ownership of all waste	...	...	...	52
(14) Regulation of activities carried out by the Crown	...			54
(15) Reciprocal charging	...	...	...	56
(16) Other comments beyond the scope of this review	...			58
PART 4: SUMMARY OF RECOMMENDATIONS	...	...		60
APPENDIX: LIST OF SUBMISSIONS	...	...	...	64

PART 1: THE REVIEW PROCESS

Introduction: National Competition Policy

The New South Wales Government is committed to the principles of National Competition Policy. The aims of National Competition Policy are to increase consumer and business choice, reduce production and transportation costs in an effort to lower prices for goods and services, and to create an overall business environment in which to improve Australia's international competitiveness.

The elements of National Competition Policy are set out in the *Competition Principles Agreement* signed by Commonwealth, State, Territory Governments in April 1995. The *Competition Principles Agreement* commits all State and Territory Governments to undertake a review, and where appropriate reform, of all State legislation that restricts competition.

The NSW Government laid out its plan for the review of local government legislation as part of its *Policy Statement on the Application of National Competition Policy to Local Government* (June 1996). The Government indicated that there are a number of State laws which, while governing the way local councils perform their regulatory functions, impose restrictions on competition and add to the cost of or prevent market entry.

The Local Government Act 1993 (the Act) is one of the core Acts regulating local and county councils. While the Government indicated in the *Policy Statement* that this Act would be reviewed in the course of 1997-98, subsequently a revised strategy was put into place.

This revised strategy entailed two stages. The first stage involved a general review of the whole Local Government Act in accordance with the requirements of section 747 of that Act. The general review commenced in 1998 and a report was tabled in Parliament in June 1999. It examined the objectives and specific provisions of the Local Government Act and concluded that the objectives were still appropriate. Some minor reforms arising out of that general review were the subject of the Local Government Amendment Act 2000.

This more focussed review comprises the second stage of the review process, and has examined more specifically the interaction between National Competition Policy and the Local Government Act. The review examined possible restrictions on competition imposed by the Act, including:

- approvals to operate businesses, such as a mortuary or an undertakers business, and
- the ability of councils to provide goods, services and other facilities pursuant to section 24 of the Act, and
- competitive neutrality issues.

The Competition Principles Agreement

Competition is not an end in itself, and is therefore not appropriate for all government functions. This is acknowledged in the *Competition Principles Agreement*. The *Agreement* distinguishes between the regulatory and commercial activities of governments, and only advocates exposing the commercial activities to competition.

The *Competition Principles Agreement* requires the NSW Government to review its legislation in the light of National Competition Policy (clause 5). It then sets out the guiding principles for the review of legislation (which includes Acts and regulations). That is, legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs, and
- the objectives of the legislation can only be achieved by restricting competition.

The Agreement recognises that social impacts may result from the introduction of competition in previously restricted areas. It therefore suggests that where costs and benefits are to be assessed, a number of matters are, where relevant, to be taken into account. This is commonly referred to as the ‘public benefit test’. The matters that may be taken into account are listed in clause 1(3) of the Agreement:

- government legislation and policies relating to ecologically sustainable development,
- social welfare and equity considerations, including community service obligations,
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity,
- economic and regional development, including employment and investment growth,
- the interests of consumers generally or of a class of consumers,
- the competitiveness of Australian businesses, and
- the efficient allocation of resources.

As well as its commitment to the Competition Principles Agreement, the NSW Government has committed itself to an ongoing program of ‘red tape’ reduction and regulatory reform. The policy principles of this initiative are established in the NSW Government publication: *From Red Tape to Results - Government Regulation, A Guide to Best Practice*. The central principles are:

- reducing the cost of regulation for business, while maintaining appropriate levels of community protection,
- clarity of objectives,
- objective analysis of the costs and benefits of new proposals,
- demonstration that alternative proposals have been considered, and

- more attention to regulatory design, with a presumption against traditional ‘command and control’ forms of regulation in favour of commercial incentives, where these are feasible and effective.

These principles are complementary to the principles of legislation review under National Competition Policy. This review addresses these concerns, where additional to competition policy.

The scope of this review

This review did not deal with two areas already subject to a program of reform:

- Those matters dealt with as part of the Licence Reduction Program. Parts of the Local Government Act were examined in 1995, including those regulating “places of public entertainment” and other structures. The outcome of that review was that the approval system for those places was retained, issues of public safety being considered to outweigh costs.
- Those matters dealt with as part of the amendments to Part IV of the Environmental Planning and Assessment Act 1979. Amendments to that Act were made in 1997 to introduce an integrated development control system. Certain parts of the development process were opened to competition and councils now compete with ‘accredited certifiers’ in the issuing of complying development certificates and a series of post-approval certificates. However some related issues arising from the introduction of competition in this area were covered within this review - in particular, the issue of the flexibility of council business units to adopt competitive pricing strategies.

Consultation

In conducting this review of the Local Government Act a Review Committee was first established. The Review Committee comprised senior officers from the Department of Local Government, the Cabinet Office and NSW Treasury. The Review Committee guided the development of both an earlier Issues Paper and the recommendations for reform contained in this Report.

A reference group was also established to provide specific stakeholder input with respect to the conduct of the review. The members of the reference group were:

- Mr Murray Kidnie, Secretary of the Local Government & Shires Association (LGSA)
- Mr Rod Oxley, President of the Institute of Municipal Management (IMM)
- Mr Ben Kruse, Legal and Special Projects Officer, Municipal Employees Union NSW Branch (MEU)
- Mr Ian Robertson, Secretary of the Environmental Health and Building Surveyors' Association of New South Wales (EHABSA)

In addition to their submissions following release of the Issues Paper (see below), members of the reference group were provided with earlier drafts of this report and invited to make further comments.

Advertisements

Advertisements publicising the review and calling for public submissions were placed in the following newspapers in July 2000:

- Daily Telegraph
- Sydney Morning Herald (Tuesday and Saturday)
- La Fiamma
- Australian Chinese Daily
- Greek Herald
- Chieu Duong
- El Telegraph

Issues Paper

An Issues Paper was released by the Minister for Local Government on 14 July 2000. The Issues Paper identified the major issues, stimulated discussion and invited responses. It did not purport to be an exhaustive examination of the area, and responses on other issues relevant to the Terms of Reference were welcomed.

A copy of the Issues Paper was distributed with a covering circular to all councils, county councils, auditors, the Local Government & Shires Associations, the Institute of Municipal Management, and all Regional Organisations of Councils.

The Issues Paper was also printed in hard copy format and distributed to the 58 parties on the Department's regular mailing list, as well as members of the public who responded to the newspaper advertisements. Copies were also sent to identified additional stakeholders – for example, as the Issues Paper discussed regulation of mortuaries and undertakers, a copy of the Issues Paper was sent to the Funeral Industry Council with a request for comment. Approximately 40 copies of the Issues Paper were mailed to members of the public following direct requests.

The advertisement publicising the review and calling for public submissions also noted the ability of members of the public to download the Issues Paper from the Department's website. In the period 14 July to 10 October 2000, 392 copies of the Issues Paper were successfully downloaded from the Department's website.

The Issues Paper has remained on the Department's website, and can be viewed at www.dlg.nsw.gov.au.

Submissions received

The closing date for the receipt of submissions was Friday 1 September 2000. However a small number of late submissions were included in consideration of this Report. A total of 43 submissions were received.

PART 2: OVERVIEW OF SUBMISSIONS

Who made submissions?

43 submissions were received in total, comprising the following:

- 24 local councils
- 2 county councils
- 3 NSW government agencies
- 4 private sector competitors (individuals / organisations) of councils (2, 5, 15 & 20)
- 4 private individuals / organisations not competing with council (1, 4, 14 & 26)
- 6 representative organisations: the LGSA, MEU, the Western Sydney Regional Organisation of Councils (WESROC), the Funeral Industry Council, the Kingscliff District Business Corporation and the Hotel Motel & Accommodation Association of NSW Ltd (HMAA).

The Local Government & Shires Associations circulated a draft submission to all councils on 11 August 2000 before providing its final submission to the Department. Many of the submissions made by individual councils therefore refer to the LGSA's position and suggestions as stated in their earlier draft document, as opposed to their actual submission to the Department. There were a few differences between the two.

It should also be noted that broad support for the various positions advocated by the LGSA in its draft submission was expressed by Grafton City Council (16), Fairfield City Council (25) and Manly Council (27). Other councils expressed varying degrees of support on different topics, with their specific comments described in detail below.

To protect the privacy of those individuals who made submissions, submissions may be referred to by their number rather than by the name of their author. The number simply refers to the order in which the submissions were received and processed.

It should be noted that one private individual made two submissions (no.'s 2 & 15), and one council made two submissions (no.'s 38 & 39).

Comments on the review process

One submission from a private sector competitor (2) complained that the review process should have included public hearings in regional areas, that free legal representation should have been afforded to individuals such as himself wanting to make a submission, and that he was unable to properly put his case in writing. That person did nevertheless also make a written submission (15) within the specified time which addressed his matters of concern. In addition the Kingscliff & District Business Corporation (37) submitted that there should be a local hearing in the Tweed district as part of this review.

The MEU raised a concern that proposals for reform arising from the 1998 Review of the Local Government Act 1993 had not yet been implemented prior to this Review. However it should be noted that at the time of writing, the Local Government Amendment Act 2000, which in part comprised the reforms arising from the 1998 Review, had recently received assent.

Broad comments in relation to local government and the application of National Competition Policy

The LGSA (32) noted that due to a tension between NCP - which promotes a more business-like approach for councils - and the accountability constraints on local government in the Local Government Act 1993, various reforms are required. WESROC (36) argued that Councils should not be pressured against their will into turning their core activities, including planning and regulatory functions, environmental protection and the provision of essential and community services, into commercial activities.

The MEU (28), by contrast, submitted that there is no need for significant reform to the Act to meet the Competition Principles Agreement.

Leeton Shire Council (7) submitted that the 'public benefit test' should be applied to NCP decisions more thoroughly, using commonsense. The council also noted that local government, especially in rural areas, will often 'enter the market' with a business activity (such as a swimming pool) for community service reasons. Leeton Shire Council also submitted that local sustainability should be encouraged, such as by offering incentives to business to locate to rural areas, even if such policies do not comply with the "rigid application of economic rationalism".

Grafton City Council (16) submitted that local government must be accountable to its stakeholders in balance with improving competitiveness.

Hume Shire Council (9) submitted that the Review must ensure that there is an appropriate balance between public expectations of accountability and commercial expectations of a 'level playing field'. Hume Shire Council's submission expressed the hope that the Review would stimulate debate about the appropriateness of councils pursuing trading operations or business units which run the risk of substantial losses of public money.

Armidale Dumaresq Council (11) and Fairfield City Council (25) submitted that local government should share in the NCP tranche payments made to NSW by the Commonwealth government.

The Hotel Motel & Accommodation Association of NSW Ltd (HMAA) (24) submitted that it does not object to local or state government entering the tourism market and developing facilities in competition with private sector operators - but that a level playing field must be maintained. The HMAA stated that it is concerned when government

facilities do not comply with competitive neutrality principles because they are cross-subsidised.

The HMAA also expressed a concern that some government facilities create an over-supply in the marketplace, or take market share rather than assist to grow the overall market, because they fail to take into account the 'public benefit test' of the Competition Principles Agreement. Their submission suggested that local government should consult the HMAA before developing accommodation businesses, and that councils shouldn't enter the market unless research shows they will be filling a demand gap, rather than creating an over-supply.

Penrith City Council (33) suggested that the Local Government Act 1993 should attempt to clarify the effect of the Trade Practices Act 1974 on contracts pre-dating the Competition Principles Agreement which might have anti-competitive effects.

PART 3: DISCUSSION AND RECOMMENDATIONS

A: Competitive impacts on non-council businesses

Business approvals - undertakers and mortuaries

Introduction

Section 68 of the Local Government Act requires that council approval is gained in order to operate an undertaker's business (approval F8) and/or operate a mortuary (approval F9). The two approvals are connected, as access to an approved mortuary is a requirement for an approval to carry on an undertaker's business.

Like licensing to carry out an occupation, business approvals impose barriers to entry into a market. Under National Competition Policy it must be demonstrated that the benefits of restrictions on competition outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition.

In order to obtain council approval to operate an undertaker's business or a mortuary, applicants must comply with certain standards relating to adequate public health conditions (set out in Schedule 4, Local Government (Orders) Regulation 1999). Compliance may add to the initial cost of setting up a business and therefore may not necessarily be addressed by operators if there were no regulation. Failure to comply may mean unhealthy working conditions for employees, risks to other persons that enter the premises, and risk of disease spread to others coming into contact with such persons, or who are in the vicinity of the business premises.

The standards for mortuaries set out in the Orders Regulation (Schedule 4) are with respect to construction and layout, so as to ensure permanent water supply, backflow prevention and connection to a water carriage sewerage system (cl.1), the number of water closet and ablution facilities and their physical positioning (cl.2), and construction and positioning of public areas and body preparation rooms (cl.3).

Standards also apply to undertakers and mortuary operators under the Public Health Regulation 1991 with respect to the actual handling of bodies (cl.23-35A), but also to the use of the physical facilities in which bodies may be held, transported or embalmed (cl.19-22). These regulations deal with the use of body preparation rooms, how waste disposal is to be organised and how bodies may be transported. These clauses include penalties for non-compliance, such as a failure to clean a hearse between uses.

The possible alternatives to a business approval identified in the Issues Paper were:

- (a) enforcement of standards through issue of a council order to comply with the standards, rather than requiring a separate business approval as well, or

- (b) incorporation of the relevant requirements under the Public Health Act 1991 and Regulations. It is noted that the Public Health Act and Regulations are currently being reviewed by NSW Health to meet their NCP obligations, or
- (c) no standards or approvals in legislation. Industry self regulation could apply.

Submissions

The general tone of submissions on this issue was that pre-development regulation can be limited to the EP&A Act requirement for development consent, with operational matters going to the Public Health Act. The Funeral Industry Council (43), however, advised that in their view the status quo should be maintained “in order to protect the public interest”.

The LGSA (32) submitted that the local government concern with respect to undertakers and mortuaries is with siting issues, and therefore regulation only needs to be in the EP&A Act through normal planning and development application processes. The LGSA also suggested that operational / health issues be transferred to the Public Health Act. WESROC (36) submitted that industry self-regulation would be inappropriate, but that as the main concern is siting the regulation can move to the EP&A Act, with operational matters going to the Public Health Act.

Eurobodalla Shire Council (29) submitted that undertakers and mortuaries require regulation for public health and safety, but regulation should be in the Public Health Act. Armidale Dumaresq Council (11) stated that the regulation of mortuaries and undertakers under one Act would be supported. Penrith City Council (32) stated that legislative controls such as options (a) and (b) above would provide significant public health safeguards which outweigh the cost of restrictions on competition, and that the option of industry self-regulation (c) would not be supported. Waverley Council (35) submitted that the current regulation of undertakers and mortuaries should remain, arguing that self-regulation or enforcement only through orders powers “is not acceptable”, preferring the preventive approach of requiring approval in the first place.

Discussion

Pursuant to cl.79 of the Local Government (Approvals) Regulation 1999, it is a condition of an approval to operate an undertaker’s business that the operator has access to, and uses, an approved mortuary for the purposes of the business. The Approvals Regulation further provides that it is a condition of an approval to operate a mortuary that the activity approved, and any building or work associated with or carried out in connection with the activity, complies with any applicable standards established for mortuaries by the Local Government (Orders) Regulation 1999.

As noted above, the standards for mortuaries set out in the Orders Regulation (Schedule 4) are with respect to water supply and sewerage, closet and ablution facilities and construction. Standards also apply under the Public Health Regulation 1991 with respect to body preparation rooms, waste disposal and vehicles.

Regardless of the need to comply with the standards for mortuaries (in Schedule 4 to the Orders Regulation) in order to first gain a business approval, compliance with those standards must be on-going. Councils can enforce compliance at any time, using their powers to issue Orders under s.124 of the Act (Order no. 5(f)). By contrast non-compliance with clauses 19-22 of the Public Health Regulation 1991 results in a fine.

To a certain degree the practice of requiring a separate business approval may already have been circumvented by applicants since the amendments to the EP&A Act (s.78A(4)) commenced on 1 July 1998, to subsume the need for a separate Act approval within a development consent. That is, new developments require development consent but no longer a separate business approval under s.68 of the Act. Nevertheless the issue of on-going compliance with the standards has remained covered by s.124 of the Act.

It should also be noted that other jurisdictions do not require business approvals for the funeral industry. Maintenance of both public and occupational health and safety is achieved through enforcement mechanisms without the need for business approvals.

Under the current regime, access to an approved mortuary is a requirement for an approval to carry on an undertaker's business. This is an issue in border areas, as New South Wales councils are not in a position to approve mortuary operations located in Victoria and elsewhere. There have been complaints in the past by NSW funeral directors about opposition from Victoria, but in many areas the service is provided across the State border, albeit illegally. There is no similar regime of regulation in adjoining states, therefore this issue cannot be solved through 'mutual recognition' schemes, but activities in other states appear to operate satisfactorily without local government licensing. This is therefore clearly a restraint of trade issue. Undertakers in New South Wales must already comply with the Public Health Regulation 1991 in terms of their activities.

The view of the Review Committee is that the current requirement to obtain prior approval to operation is anti-competitive, and cannot be justified on other grounds. The ability (through s.124 of the Act) for councils to enforce the standards in the Orders Regulation can continue to be justified on the grounds of public health and safety. The weight of submissions was in favour of deleting the requirement of prior business approval, especially as the development of premises is already subject to the need for development consent under the EP&A Act.

It is not proposed at this stage to transfer the responsibility for enforcing the standards in the Orders Regulation to the Public Health Regulation, as the existence of a secondary method of enforcement focussing on building construction rather than use has some value.

Recommendation

- It is recommended that the s.68 approvals F8 and F9 be deleted from the Local Government Act, with consequential amendments to the Approvals Regulation.
- It is recommended that the standards for mortuaries (Schedule 4 to the Orders Regulation) be retained.

Operation of a public car park

Introduction

This approval (s.68, F1) is not an occupational licence, but is necessary in order to carry on the business of a pay-to-park car park. The Local Government (Approvals) Regulation 1999 fleshes out the matters that must accompany an application under s.68 (cl.55), and matters a council must consider when granting approval to operate a “public car park” (cl.56). The latter includes the views of the Roads and Traffic Authority (RTA), the effect of the car park on traffic and pedestrian movement, the means of ingress and egress, disability access, pedestrian safety, ventilation, stormwater management and pollution. Approval cannot be granted without the concurrence of the RTA under cl.68.

Some further requirements are also applied (cl.57-67), including compliance with provisions relating to number of vehicles, speed limits, entries, exits and driveways, surfaces, fencing, lighting and fire extinguishers. Essentially, the purpose of the approval and Regulation are to ensure that public safety is maintained through conditions relating to design and control of cars in the car park (such as speed limits) and in traffic issues concerning access to and departure from the car-park into public roads.

The matters dealt with under the Act are not generally covered under other pieces of legislation. If a car park requires a development consent (as a new development or a change of use) then similar issues may be considered at that point, under the Environmental Planning and Assessment Act 1979. However, some of the more operational issues may not be covered at this stage (such as the specific provisions mentioned above with respect to speed limits, entries, exits and driveways, etc).

As approvals under the Local Government Act 1993 are personal to the applicant, and are time limited, the renewal process affords councils with an opportunity to periodically review the operation of car parks in terms of their impact on traffic management in the area. The Roads Act 1993 does not provide a ready means of regulating development that impacts on traffic issues.

The possible alternatives to an approval requirement identified in the Issues Paper were:

- amend other legislation to deal with public safety and traffic issues; or
- include this approval in those that are to be transferred to the EP&A Act and incorporate standards and requirements at development consent and construction stages; or
- enforcement of any standards through a council order, rather than requiring a separate approval. This may not be sufficient to deal with traffic issues of access to and from public roads, being issues that must be dealt with at planning and construction stages; or
- no approval. Existing legislation to control certain aspects in limited fashion where able to.

Submissions

The general tone of the submissions was in favour of repeal of this provision.

The LGSA (32) submitted that local government should continue to control the operation of car parks because such control is integral to local planning and traffic management. WESROC (36) submitted that the current legislation should be maintained, as locational, design and safety issues need to be considered, and to ensure that other objectives (such as supporting public transport options) are able to be met.

Armidale Dumaresq Council (11) stated that the regulation of approvals for car parks under the EP&A Act would be supported, with ongoing monitoring achieved through fire safety certification. Eurobodalla Shire Council (29) submitted that car park approvals are essential to maintain council control with respect to local planning and traffic management, but could be part of a development consent. The council argued that the EP&A Act heads of consideration can include public safety and traffic issues, and that the EP&A Act has a better scheme for Notices and Orders. Eurobodalla Shire Council also suggested that the need for RTA concurrence should be reviewed, and only required when car parks are located to impact on major roads. Waverley Council (35) submitted that the regulation of car parks should remain, but that it could be transferred to the EP&A Act.

Discussion

The provisions with respect to car parks are currently in clauses 55-69 of the Approvals Regulation. By virtue of cl.69 the provisions are already overridden if the car park is the subject of a DA – that is, this approval is not necessary if the car park has a development consent. Therefore this approval effectively targets undeveloped sites, and car parks not already the subject to a development consent (that is, those with existing use rights). These two categories of sites therefore cannot be controlled through the ‘heads of consideration’ under the EP&A Act, contrary to the submissions of the various councils.

Therefore the view of the Review Committee is that for those car parks still subject to this provision the approval / renewal system provides a good mechanism for councils to review traffic management and public safety issues periodically as the area around the car park changes.

It should be noted that any attempt by councils to use this approval power in an anti-competitive manner (for example where there is already a council car park that would be in competition to the proposed new car park) is tempered, as with any approval, by the applicant's appeal rights to the Land and Environment Court.

In this context the Review Committee concluded that this approval is not anti-competitive in effect, and should remain as a mechanism for regulating traffic management and public safety.

Recommendation

No change recommended.

Tendering - restrictions on bodies providing 'bulk' contract arrangements

Introduction

Section 55 of the Act currently allows councils to avoid the normal tendering requirements if buying goods or services through a 'bulk' contract arranged by the State Contracts Control Board (SCCB) or the equivalent Commonwealth agency. These agencies have been recognised in the legislation because they follow their own rigorous tendering requirements before making contracts available to other government bodies.

The paramount importance of ensuring probity and transparency in government tendering was recognised in the Issues Paper. The Issues Paper also noted that in the 1998 Review of the Act, the views of the NSW Ombudsman and the Independent Commission Against Corruption (ICAC) were sought, and no change was recommended at that time.

The Issues Paper sought comment on whether the anti-competitive effect of the exclusion of other bulk purchasing arrangements (such as through the LGSA or private sector operators) is outweighed by the benefits of controlling the exemptions available.

Other organisations, both non-profit (such as the LGSA) and private sector (such as Maps Group) have in the past sought similar status within s.55, so that a council would be able to access 'bulk' purchasing arrangements offered by these organisations without undertaking a tender process. The importance of probity and transparency in government tendering has meant that the exemptions to a council's tendering process have been strictly controlled in the past, to the exclusion of other bulk purchasing organisations.

Submissions

The general tone of submissions on this issue was in favour of allowing a widening of the list of organisations which can provide bulk purchasing, although the SCCB submission was a notable exception.

On this issue submissions were made by Maps Group Ltd (5), the SCCB (30), the LGSA (32), Armidale Dumaresq Council (11), Baulkham Hills Shire Council (12), Tweed Shire Council (21), Fairfield City Council (25), Eurobodalla Shire Council (29), Waverley Shire Council (35), and WESROC (36).

Maps Group Ltd is a private sector competitor with the SCCB and the Commonwealth government equivalent - it organises bulk purchasing arrangements for its members. Maps Group is funded by rebates from suppliers when contracts are entered into by members. The submission from Maps stated that 165 councils in NSW are currently members of Maps, and thus have access to 65 contracts ranging from office stationery and temporary staff to bitumen and playground equipment.

However NSW council members currently can only use Maps contracts where the contract value is less than \$100,000 - otherwise s.55 dictates that they must go to public tender or use SCCB or the Commonwealth government equivalent.

The submission from Maps therefore argues that s.55 causes a competitive disadvantage to Maps Group and its council members, which cannot be justified on public benefit grounds. Their submission argues that ratepayers would be better served by councils being able to access Maps contracts, because of the value for money represented and the cost savings from avoiding a public tender process by each council. Maps also argues that SCCB should not be allowed to remain a monopoly, as this is inefficient allocation of resources.

Maps therefore argues that the s.55 exemptions should either (i) be widened to include Maps, or (ii) widened to allow councils absolute discretion, or (iii) instead be prescribed by regulation, based on criteria such as adherence to recognised tendering standards (to be audited by the Department of Local Government periodically). Option (iii) is their preferred option, providing increased flexibility and choice for councils with respect to purchasing.

While Maps was originally formed in 1985 by 14 municipalities in Melbourne, and is recognised in Victoria as being equivalent to the Victorian Government Purchasing Board, it should be noted that Maps is now a private sector organisation.

The SCCB argues that probity and transparency in government tendering are of “paramount importance”, and endorses the need for rigour in ensuring that value for money can be demonstrated where expenditure of public money is involved.

SCCB submits that the current restrictions in s.55 have minimal impact on competition, with substantial public benefits. The SCCB submission also states that a review earlier

this year of the Public Sector Management (Goods and Services) Regulation found that the benefits to the community associated with bulk purchasing arrangements for government outweighed any costs from restrictions placed on competition.

In particular the Board argues that the procedures used by the SCCB and the Commonwealth equivalent are the only bulk purchase arrangements which currently meet the standards required with respect to probity, transparency and value for money.

The LGSA (32) submitted that bulk purchasing should be allowed by councils operating through the LGSA, with the LGSA bound to follow the Tendering Regulation with oversight by ICAC or the Ombudsman. WESROC (36) submitted that s.55 should be broadened to allow contracts through bulk purchasing arrangements negotiated by local government bodies such as ROCs, as long as such bodies meet the probity arrangements as set in s.55 and the regulations. WESROC (36) further submitted that councils should be allowed to use commercial providers if monitored by a ROC or similar body.

The submission from Armidale Dumaresq Council (11) noted that significant cost savings can be achieved through bulk tendering. Tweed Shire Council (21) submitted that bulk purchasing arrangements are necessary, and Eurobodalla Shire Council (29) argued that councils should continue to have SCCB bulk purchasing arrangements available to them. Waverley Council (35) submitted that current bulk purchasing arrangements allow councils to effectively market-test, and also ensure government can buy at best advantage.

Baulkham Hills Shire Council (12) submitted that bulk tendering should be extended to be made available through bodies associated with local government such as the LGSA, regional organisations of councils (ROCs) and organisations such as Maps, but not through other private sector organisations. Fairfield City Council (25) submitted that councils should have access to other bulk purchase arrangements and supply 'hubs', such as through ROCs and private sector organisations.

Discussion

The Review Committee is of the opinion that the current restriction on the organisations which can provide bulk purchasing is anti-competitive. However it is imperative that accountability be ensured with respect to expenditure of public money.

Recommendation

It is recommended that the Local Government Act be amended to insert a regulation-making power in s.55(3) such that the list of organisations at bullet point 6 can be extended to include any other organisation, with conditions attached. Therefore additional organisations or classes of organisations could be included by regulation, on condition of compliance with tendering requirements and an auditing regime covering both systems and individual transactions. It is not expected that there would be large numbers of organisations in this position. The organisations would have to deliver the

service and comply with probity standards commensurate with those already in the Act and Regulation.

B: Competitive impacts on council businesses

Under the Local Government Act 1993, councils are given a broad general power to provide goods, services and facilities, and to carry out activities appropriate to the current and future needs of their community and the wider public (see section 24). This broad provision replaced the more prescriptive format of the 1919 legislation, and is consistent with the general provisions used in other States. It is wide enough to allow councils to set up business activities, which compete in the private sector. Many councils have taken the opportunity to establish business activities in a variety of fields.

In carrying out any activity, including a business activity, councils must comply with any relevant laws, such as the Local Government Act 1993 and other Acts. The Local Government Act in particular provides a number of public accountability requirements, reporting requirements, restrictions on the way in which councils spend money and so on, that are appropriate to a government agency. However, they apply to councils' business operations in the same way as they do to councils' provision of services or the performance of government functions such as enforcing legislation. This may create a competitive disadvantage because they impose controls that do not apply to private sector competitors. This may or may not be justified under competition policy principles, particularly competitive neutrality. On the other hand, some provisions in the Act may provide competitive advantages by giving powers to councils that are not available to the private sector.

Competitive neutrality

Introduction

The principle of competitive neutrality is one part of National Competition Policy. It is based on the concept of a 'level playing field' between persons competing in a market place, particularly between private and public sector competitors. Public sector businesses have traditionally received exemptions from government taxes and charges. They may also incur more costly industrial conditions and community service obligations in comparison with the private sector. They may not be as free to borrow and invest money, and may have greater public accountability requirements. The principle of competitive neutrality seeks to eliminate, where appropriate, systemic inequality between private and public businesses to promote greater competition and the benefits that come from increased competition.

In relation to local government in NSW, the Government's *Policy on the Application of National Competition Policy to Local Government* (June 1996) sets the basic framework for competitive neutrality in councils. Essentially councils are required to categorise their

business activities, based on turnover. Depending on whether a business is a 'category 1' or 'category 2' business, councils must structure those activities and price their services in particular ways. Some activities are automatically considered to be 'business activities' – these are water and sewerage services, gas production and reticulation services and abattoirs.

The larger and more significant businesses are categorised as 'category 1'. These businesses must be separated from other council activities (separate corporations are not necessary) and must include full cost attribution, with any subsidies being fully disclosed. Councils have more discretion to adopt appropriate structures and pricing models with 'category 2' businesses, these having a smaller turnover than 'category 1' businesses.

More detail about the obligations of councils with respect to ensuring competitive neutrality, including costing methodologies, can be found in the Department of Local Government's publications:

- *Pricing and Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997
- *Guidelines on the Management of Competitive Neutrality Complaints*, November 1997

These documents can be found on the Department's web page, at <http://www.dlg.nsw.gov.au>.

Various provisions of the Local Government Act have been identified as affecting the competitive neutrality of council businesses as compared with private competitors. These are discussed in detail below.

However some of the submissions raised general issues relating to business activities of councils and the ability to achieve competitive neutrality.

Submissions

The LGSA (32) in particular noted that there exists a tension between National Competition Policy which promotes a more business-like approach to council activities, and the accountability constraints on local government contained in the Act. Their submission suggested that non-core trading operations of councils should be able to be more easily corporatised, so that they may be able to be run 'at arm's length' from councils' core service delivery functions. The contention of the LGSA was that such entities should then not be subject to various provisions of the Act, including restrictions on doing private works, disclosure requirements, tendering requirements and so on. These topics are each discussed further below.

The submission from Bankstown City Council (31) recognised the delicate balance in the Act between ensuring accountability obligations and allowing for the commercial focus of business units. The council has found in practice a conflict between the notion of

competitive neutrality and their own policy of ‘no forced redundancies’ within business units.

Grafton City Council (16) submitted that water and sewerage activities should not automatically be considered a ‘business activity’ in terms of NCP requirements, since they are controlled by the Minister for Land and Water Conservation. Wollongong Council (6) submitted that it was difficult to achieve a ‘level playing field’ for council businesses due to higher overheads and not being able to run businesses at a loss for tax or market share advantages.

Eurobodalla Shire Council (29) submitted that the Department should survey councils on the extent and basis of pricing and costing policies for council businesses, and use this data in comparative performance reviews.

WESROC (36) submitted that non-core trading operations (especially category 1 businesses) should be able to operate at arm’s length, not subject to legislative restrictions (such as s.12 access, accountability, fee-setting and reporting requirements), and only report as a public company would to its shareholders. WESROC noted that however there is a problem defining core and non-core – for example private certification is now in an area previously regarded as a regulatory function in which councils were required to protect the public interest.

Discussion

Further discussion with respect to specific provisions is canvassed below. However in passing it should be noted that the Local Government Amendment Act 2000 (not yet commenced at time of writing) will amend s.35 in order to make it easier for councils to compete with other potential buyers of land.

Tendering – other obligations

Introduction

Section 55 requires councils to tender before entering into most kinds of contracts. The detailed requirements for the tender process are set out in the Local Government (Tendering) Regulation 1999. The tendering provisions may affect council through the restriction on council businesses (because of the requirement to tender as compared with the private sector).

As discussed in the context of non-council businesses, tendering requirements are one of the cornerstones of accountability and fairness in the spending of public monies by councils (and other levels of government). In relation to competition policy, the issue to be reviewed is whether any advantages or disadvantages to council businesses that arise through the tendering requirements are sufficiently significant as to outweigh the public interest in maintaining stringent requirements.

Submissions

Submissions were fairly divided on this issue. While a number of submissions argued in favour of raising the dollar threshold over which s.55 applies, and/or exempting council business from s.55 altogether, a number of other submissions argued that probity demands no change to the tendering requirements.

The LGSA (32) suggested that the tendering threshold should be raised to \$200,000 to reflect raised contract prices (due to inflation and the introduction of the GST) since the threshold was set at \$100,000 in 1993. (It should be noted that the draft LGSA submission circulated to councils on 11 August 2000 initially suggested a new limit of \$250,000, and there are therefore some submissions from individual councils which refer to the LGSA's suggestion as being a \$250,000 rather than a \$200,000 threshold.) The LGSA (32) also submitted that consideration of tenders should always be allowed to be in closed meetings (ie, expand the scope of s.10A(2)).

Wollongong Council (6) submitted that the current tendering requirements are too onerous on council businesses because of time and inflexibility involved. Manly Council (27) submitted that the time taken to process tenders puts council at a commercial disadvantage, for example with respect to contracts for waste collection. Waverley Council (35) submitted that tendering could be deregulated for non-core business units, as long as they provide services in an open market and on a level playing field, are set up as separate business entities, and can demonstrate that they are not cross-subsidised.

Gosford City Council (40) submitted that the \$100,000 tendering threshold is too low. Lake Macquarie City Council (41) submitted that a council's commercial activities should not be subject to s.55 as the delay involved can put council at a commercial disadvantage. The council also submitted that the tendering threshold should be increased to \$250,000.

Armidale Dumaresq Council (11) agreed with the LGSA that the \$100,000 threshold for tendering should be reviewed and raised – but suggested that rather than raised to the \$250,000 suggested by the LGSA's draft submission the level should be proportional to the size of the relevant council's budget. The council also argued that trading operations should be exempt from the s.55 tendering requirements.

WESROC (36) submitted that the threshold should be raised to \$250,000 then indexed annually. Baulkham Hills Shire Council (12) and Manly Council (27) also agreed with the LGSA's draft submission that the \$100,000 threshold for tendering should be raised to \$250,000 – but Baulkham Hills Shire Council suggested that there should be a requirement on councils to get 3 written quotes for contracts between \$100,000 and \$250,000. The council further suggested councils should be able to delegate to the General Manager the acceptance of tenders over the threshold amount but under some other dollar limit set by council. Sutherland Shire Council (38) submitted that the tendering threshold should be increased to \$200,000 and then subject to CPI increases.

By contrast, Hume Shire Council (9) submitted that the existing s.55 requirements serve the purpose of accountability and transparency. Hume Shire Council was concerned that any amendments to s.55 to provide business flexibility must ensure that the commercial advantages are sufficiently significant to outweigh the public interest benefit in the current restrictions.

Likewise Goldenfields Water County Council (18) submitted that probity requirements must outweigh any commercial advantages that might arise from a free purchasing system, which could be more easily corruptible. Tweed Shire Council (21) also submitted that the current provisions ensure accountability and should be maintained. Bankstown City Council (31) submitted that the need for transparency would generally be considered to outweigh any current disadvantages. Waverley Council (35) submitted that the tendering limit should be increased but only to about \$150,000 – to increase beyond this will reduce controls on procurement with corresponding increased business risk.

Sutherland Shire Council (39) submitted that the accountability and fairness associated with tendering outweighs any competitive disadvantage and therefore the existing provisions should remain. The MEU (28) submitted that the tendering provisions should be further regulated - or at least not diluted - so as to prevent corruption such as occurred at one council in recent years.

A number of submissions raised the issue of councils tendering for contracts as part of joint ventures. Armidale Dumaresq Council (11) argued that there should be greater freedom for councils to arrange joint ventures. Tumbarumba Shire Council (17) likewise argued that the tendering provisions handicap councils from entering into partnership with private operators for major works, even though partnering with other councils is allowed without the need for tenders. Tumbarumba argued that if tendering is required for sub-contracts (to perform against another contract, not council's own functions) then councils will have difficulty competing with the private sector because they won't be able to form consortiums quickly to compete for large tenders.

It should be noted in this regard that s.55, at the time that these submissions were written, did not require councils to go to public tender when searching for sub-contractors to fulfil obligations arising from a contract entered into by council. For example, if the RTA called for tenders for a road construction contract, and a council won that tender, consequent contracts between council and its sub-contractors were not covered by the s.55 requirements. This was acknowledged in the Tumbarumba Shire Council's submission as being the advice from the Department previously.

As a result of the 1998 Review, however, this situation was identified by the Department as an unintended 'loophole' in s.55, and legislative amendments to rectify this situation formed part of the Local Government Amendment Act 2000, which, at the time of writing, had received assent but had not yet commenced. Nevertheless the views discussed above have been taken into account in this Review.

Discussion

With respect to the threshold dollar value under which the tendering requirements do not apply, it should be noted that while this amount is currently set at \$100,000 it may be amended by regulation. Therefore no Act amendment is required to change this threshold amount. The indexing of the threshold amount is a regulatory issue kept under regular review, and therefore the Minister for Local Government may at any time review the threshold level further, especially in light of changes since 1993 including the introduction of the GST. However it should be noted that State agencies in NSW also have a \$100,000 threshold, and in most other Australian jurisdictions local councils are also required to tender for contracts over certain dollar figures. In Victoria and Queensland the threshold is also \$100,000, while it is set at \$50,000 in Western Australia, Tasmania, the ACT and the Northern Territory. In some cases multiple quotes are also required for contracts under the threshold amount. No threshold is set in South Australia.

With respect to the tendering requirements themselves it is considered paramount that accountability and probity be maintained, regardless of whether the council activity in question is considered a “business activity”. The principle of open decision-making is closely linked to accountability. Councils should strive to conduct the competitive tendering process in as open a way as possible because the community has a fundamental right to know how the council is proposing to manage and deliver its services.

Section 10A(2)(d) of the Act already provides that councils may close that part of a council or committee meeting which deals with commercial information of a confidential nature that would, if disclosed: prejudice the commercial position of the person who supplied it, or confer a commercial advantage on a competitor of the council, or reveal a trade secret.

The Review Committee therefore did not support any change to the current system which would undermine the current levels of probity.

Recommendation

- No change to the Act.
- The Minister for Local Government to continue to review periodically whether the tendering threshold amount of \$100,000 should be amended by Regulation, in light of changes since 1993 including the introduction of the GST.

Control by Minister for Land and Water Conservation of water supply, sewerage and stormwater works and facilities

Introduction

Section 60, and other sections of Division 2 of Part 3 of Chapter 6 of the Act in general, give to the Minister for Land and Water Conservation certain powers to control and direct councils in respect of the provision of water supply, sewerage and stormwater drainage works and facilities. Under the requirements of the *Competition Principles Agreement* water supply and sewerage services provided by councils must be operated as a business, and the principles of competitive neutrality apply.

Not all councils carry out these functions. Councils in the areas of the Sydney and Hunter Water corporations have no responsibility for the provision of water supply and sewerage infrastructure. Outside these areas, a few councils are established as Water Supply Authorities (for example Gosford and Wyong Councils) and operate under separate legislation (the Water Supply Authorities Act 1987). It is councils outside these areas that are subject to section 60 and related provisions.

Councils carry out these business activities as monopoly providers, being the only provider of water and sewerage infrastructure in their own area. They do not therefore 'compete' with each other, or with the Sydney or Hunter Water corporations, for business. Nevertheless, National Competition Policy is concerned to ensure that monopoly businesses are made to be as efficient as possible, and that the discipline of the market be applied or adapted where relevant. More broadly, competition policy (in particular competitive neutrality) is concerned with ensuring that the same kinds of businesses operate under the same rules. Councils providing water services under the Local Government Act may be at a disadvantage as compared with other bodies (such as Sydney Water) providing the same services, if the same controls are not imposed on those other bodies. The Sydney and Hunter Water Corporations operate under different legislative frameworks to councils, recognising their establishment as corporations. While government ownership confers the ability on the State to require outcomes, this operates through a different framework involving community consultation, than requiring direct Ministerial approval of the works themselves.

Responses were invited as to whether the control and powers vested in the Minister for Land and Water Conservation have an anti-competitive effect on council water, sewerage and drainage services.

Submissions

Goldenfields Water County Council (18) suggested that if these provisions are to remain then they should be in legislation administered by DLAWC.

DLAWC (42) argued that the approval powers of the Minister for LAWC were provided in recognition of the need for State government oversight of councils' provision of services to ensure public health and safety and the environment are all protected. That Department further submitted that the system of audit inspections under s.61 has been effective in ensuring appropriate and cost effective operation and maintenance of dams, water treatment works, sewage treatment and management and major flood retarding basins. The audit system also benefits councils by reducing the need for councils to themselves employ specialist engineers and other experts. DLAWC argues that the system of approvals provides quality assurance to the government, councils and the community, and can thus be justified under the public benefit test.

The submission from DLAWC (42) also notes that DLAWC is currently developing changes to water legislation throughout NSW to address the different requirements faced by water suppliers. Through the public consultation process for the Water Management Bill (now the Water Management Act 2000) DLAWC was also reviewing issues such as powers of entry by water utilities, and the approval powers of the Minister for LAWC.

Discussion

Due to the recent review of the Water Management Bill (now the Water Management Act 2000) discussions are continuing with DLAWC on this issue.

Recommendation

Discussions to continue.

Restrictions on councils undertaking private works

Introduction

Section 67(1) of the Act gives a council power, by agreement with the owner or occupier of any private land, to carry out contract work on that private land. This may include road making, kerbing and guttering, fencing and ditching, land clearing and tree felling. Other parts of s.67 impose restraints on council in doing this work. Those restraints may not apply to its private sector competitors for the doing of such work.

Specifically:

- council charges for doing private work must be fixed or set after considering the actual cost of carrying out the work (as well as any current market rates). An amount less than the amount already fixed cannot be charged without first getting the approval of the council in open meeting to carry out the work. Therefore the ability of a council to react to individual situations, match competitors' prices quickly and generally to be flexible is quite limited.
- council charges for work done on private land, and any variations to a charge downwards are made public (through management plans and open council meetings). This may result in disclosure of information (on councils' costs, for example) that, in the hands of a competitor, might prove damaging to future council business. A potential customer might also be less willing to have personal financial circumstances aired in council meetings if a charge below that set is being considered.

Balancing these business considerations are the public policy considerations that support the current restrictions. In using publicly funded resources to do private contract work, councils should charge a rate that recompenses the council for the cost of the work. If councils do not recover the costs of doing private contract work, they may be seen to be using public resources for the benefit of private parties.

Councils vary in their approach to doing private works. While Goldenfields Water County Council (18) noted that they have no desire to undertake private works, Tumbarumba Shire Council (17) earns 20% of its total revenue from conducting private works.

Submissions

The general tone of the submissions on this issue was in favour of more flexibility for councils to undertake private works.

The LGSA (32) submitted that private works by trading operations should not be restricted other than a requirement to report back on work done.

Lake Macquarie City Council (41) submitted that the restrictions on the pricing of private works put council at a commercial disadvantage. The submission from Blue Mountains Council (10) argued that s.67 should be amended to make the setting of fees for private works more flexible. Eurobodalla Shire Council (29) submitted that regular public disclosures of costs and prices of private works undertaken by council may place councils at a competitive disadvantage, because councils may price works to acknowledge a community benefit.

Armidale Dumaresq Council (11) suggested that the management planning process could involve setting criteria for the altering of fees and charges, to provide more flexibility to provide assistance to individuals with respect to undertaking private works. Sutherland Shire Council (38) submitted that adjustment of prices for private works should be possible if the amount is pre-paid and the work is the subject of quarterly reports. The

council also submitted (39) that restrictions on private works should be lifted to enable councils to better compete.

In contrast, Baulkham Hills Shire Council (12) argued that there should be no change to the current accountability requirements.

Discussion

This issue is dealt with below – see ‘Setting of fees and charges for business activities’.

Recommendation

As per below – see ‘Setting of fees and charges for business activities’.

Setting of fees and charges for business activities

Introduction

There are a number of sections in the Local Government Act that require councils to set fees in a particular way. These are equally applicable to the business activities of a council. These provisions do not of course apply to private businesses setting their own fees.

Section 608 gives council the broad power to charge fees for the provision of services such as: giving information, providing a service, product or commodity, allowing admission to any building or enclosure, or providing a service in connection with the exercise of the council's regulatory functions, such as receiving an application for approval, granting an approval, making an inspection and issuing a certificate, or allowing admission to any building or enclosure. Councils rely on s.608 to set fees for business activities.

However:

- in order to set a fee a council must first include the fee in its draft management plan. Public notice of this plan must be given, and submissions invited (s.404 and s.612). Council's competitors are therefore given ample notice of its pricing policy, putting council at a commercial disadvantage.
- a council can only adopt a fee after this process has been undertaken. A management plan is drafted annually. This restriction does not apply in the private sector.
- a council has a limited ability to introduce new fees outside the annual management plan. Council may only set a new fee if a new service is provided or if the nature or extent of an existing service has changed (s.612). Council cannot therefore set a new level of fee for the same service, in response to competitors' pricing, other than through its next annual management plan.

- a council cannot set a fee for a new or changed service until it has given at least 28 days public notice and considered all submissions received (s.612). Again, this provision does not apply in the private sector.

The requirements for setting fees may be considered appropriate for a council's regulatory functions (such as inspection fees connected with an application for approval) or monopoly functions, but they apply equally to council's business activities. They mean that councils are not able to adopt flexible pricing and respond to market trends. On the other hand, a council may be using public monies in order to enter into business and a level of accountability may be important. The question of whether commercial pricing by councils should be either deregulated or special conditions imposed, was explored as part of the review process.

The Issues Paper noted that the legal mechanism exists whereby the Independent Pricing and Regulatory Tribunal (IPART) may set the parameters for council business fees. As yet, the Tribunal has been given a reference only in relation to fees for development control services performed by councils under the Environmental Planning and Assessment Act 1979. The Tribunal has issued a number of reports on this matter, and a number of recommendations have been made, which are currently under consideration by the Government. Fees for those services described as contestable, ie. those fees for certificates and services which councils may provide in competition with private certifiers, are the subject of reports entitled *Review of Fees for Development Control Services – Report on Competitive Neutrality in Pricing* (December 1998) and *Report on Miscellaneous Fees* (February 1999).

Submissions

The vast majority of submissions, including the LGSA (32), Wollongong Council (6), Blacktown City Council (8), Blue Mountains Council (10), Armidale Dumaresq Council (11), Ballina Shire Council (13), Cabonne Council (19), Tweed Shire Council (21), Cudgegong (Abattoir) County Council (22), Fairfield City Council (25), Manly Council (27), Eurobodalla Shire Council (29), WESROC (36), Sutherland Shire Council (38), Gosford City Council (40) and Lake Macquarie City Council (41), submitted that the current requirements disadvantage council businesses against their commercial competitors.

Gosford City Council (40) submitted that statutory prescription of fees does not allow cost-recovery. However the submission from Goldenfields Water County Council (18) questioned whether it was really appropriate that councils be allowed to profiteer by inflating prices in times of high demand. The council suggested that current pricing requirements ensure public benefit without excessive conflict with competition principles. Bankstown City Council (31) submitted that while greater flexibility with respect to setting fees for business units and private works should be considered, the balance between accountability obligations and the commercial focus of business units should be maintained.

Sutherland Shire Council (39) submitted that setting of fees and charges must be more responsive for business activities such as function centres and kiosks. The council argued that fees and charges should be able to be changed because of changed circumstances with a report to council only. However Sutherland Shire Council (38) also submitted that controls on price setting remain appropriate for the community interest.

Grafton City Council noted that s.404(5) of the Act “should be drawn to the attention” of councils which feel their commercial activities are disadvantaged by having to disclose their fees.

The LGSA (32) submitted that fees for trading operations should not be subject to the management planning process.

The submission from Blacktown City Council proposed an alternative system whereby accountability could be maintained by retaining the need for specific council resolutions to set fees, adding a requirement to publish half-yearly reports, but eliminating the need to advertise proposed fees first.

Armidale Dumaresq Council suggested that the management planning process could involve setting criteria for the altering of fees and charges, to provide more flexibility for businesses.

Blue Mountains Council suggested that the process of 28 days public notice to change fees is a significant commercial disadvantage, as numerous adjustments in pricing strategy over each year may be needed in a vigorous market. The council submitted that business activities should only need the approval of the General Manager (not a council resolution) to charge less than actual costs for a period, in order to ‘capture the market’.

Eurobodalla Shire Council (29) submitted that business activities should be able to be delegated the ability to set their own fees, exhibit tenders and expend funds within the adopted budget.

The possibility canvassed in the Issues Paper that IPART could be given the power to regulate or set parameters for council business fees was strongly opposed by Blacktown City Council and WESROC. However WESROC (36) recognised that there may be a role for IPART in identifying the parameters of different classes of operation, eg. how ‘arms length’ commercial operations need to be before Council can set fees without advertising them, and so on.

The submission from the City of Blue Mountains (10) likewise argued that IPART shouldn’t provide detailed price oversight of council businesses – but felt that it would be appropriate for IPART to set broad parameters, with councils resolving any competitive neutrality complaints that arise. Baulkham Hills Shire Council (12) submitted that giving IPART responsibility for regulating fees and charges for business activities could be beneficial if there was agreement within the industry as to the methodology to be used.

The submission from the Department of Urban Affairs and Planning (DUAP) (34) focussed on the issue of fees being charged by councils for contestable development control functions carried out under the EP&A Act – that is, the issuing of various certificates by council in competition with private accredited certifiers.

DUAP noted that it had received complaints from private certifiers that some councils are cross-subsidising their contestable certification services, or using their monopoly power in the development assessment process to encourage applicants to also use the council for the contestable services component of the process.

DUAP's concern therefore was that 'competitive neutrality' is not being addressed by all councils with respect to contestable development control functions. DUAP submitted that there should be a clear split between "responsibilities" being funded by rates, and "services" to be funded by fees. Their submission also suggested that competitive neutrality be enforced for all development control matters through a scheme whereby the General Manager must certify that the fees set by the council meet competitive neutrality requirements, including (i) that the services are being provided by council, (ii) that there is no cross-subsidy from other areas of council, and (iii) that the council has used either the avoidable costs or fully distributed costs methodology to set the fees.

DUAP also submitted that the exhibition of fees in councils' management plans should be accompanied by an explanation of how the fees were derived so that the community and potential competitors can determine whether the fees are transparent, consistently applied, validate the costs of providing the services that they are being charged for, and demonstrate the accounting methods being used.

Furthermore DUAP submitted that there should be a clearer responsibility on councils to investigate complaints with respect to competitive neutrality, and the creation of an appeal mechanism to a body such as the Administrative Decisions Tribunal, the Land and Environment Court, the Independent Pricing and Regulatory Tribunal or a panel from the Local Government and Shires Association.

Discussion

In relation to the submission from Grafton City Council it should be noted that s.404(5) of the Act provides that the statement of fees and the statement of pricing policy within a council's management plan need not include information which could confer a commercial advantage on a competitor of the council. However to a certain extent this sits in conflict with s.612, which requires public notice of fees in the council's draft management plan each year. In effect the actual fee must be contained in the management plan, but the pricing policy (to the extent that its disclosure would confer a commercial advantage on a competitor of the council) need not.

In relation to the submission from DUAP it should be noted that a competitive neutrality complaints mechanism for local government has already been established in NSW. The *NSW Government Policy Statement on the Application of National Competition Policy to*

Local Government states that councils are required to establish and resource their own internal complaints handling processes, and that the Department of Local Government will handle those complaints which councils are unable to or have failed to resolve, and those where, after consideration by the council, the complainant requests a review by the Department and in the circumstances the request is considered reasonable.

The Review Committee has agreed that a model should be developed which provides more flexibility in the setting of fees, whilst still maintaining accountability and probity. In particular, the Review Committee recognised that councils are concerned to be able to change their fees on a day-to-day basis in response to market conditions. There is also a concern with the way in which details of fees are currently forced to be disclosed to private sector competitors. A better resolution of the competing priorities exhibited in s.404 and s.612 is also desirable.

The Review Committee agreed that the proposed changes would not affect the method by which annual charges or special rates for water supply and the like are set. Nor would the proposal affect s.608 fees already set under any Act or regulation or by the Director General.

It was also agreed by the Review Committee that the proposed changes will only affect activities which are 'contestable'. Thus activities which are undertaken purely as a community service and/or where there is no market competition and/or where the activity is a regulatory activity not subject to competition will remain on the existing system.

It is therefore proposed to use a combination of prescription and the existing guidelines (*Pricing and Costing for Council Businesses*) published in July 1997 to define the scope of activities for which a council may take advantage of a new, more flexible fee-setting model.

Recommendation

It is recommended that a new fee-setting system for (otherwise unregulated) s.608 fees be developed, limited to the following activities:

- (a) all private works done under s.67 of the Local Government Act
- (b) water supply activities other than those for which charges attach to the land (ie, *not* annual charges, special rates or user charges)
- (c) sewerage services other than those for which charges attach to the land (ie, *not* annual charges, special rates or user charges)
- (d) abattoirs
- (e) gas production and reticulation
- (f) any contestable regulatory activity that council has classified as a Category 1 or 2 business activity (eg. contestable development control services such as the issuing of construction certificates)

(g) any non-regulatory activity that council has classified as a Category 1 or 2 business activity

The actual fee-setting system proposed is as follows:

- a costing methodology must be applied which sets a floor price of ‘avoidable costs’
- council’s management plan to explain the above cost methodology, but need not show the actual floor price (or other prices) for each activity
- council’s management plan to identify and budget for any community service obligations (CSOs) to be funded for each activity
- normal public consultation period for the management plan
- requires a council resolution to adopt the management plan before the costing methodology can be applied
- fees can be set and changed day-to-day, as long as they are:
 - (1) within the cost methodology; or
 - (2) subject to a CSO identified and budgeted for within the management plan; or
 - (3) subject to a specific council resolution. (NB: A specific council resolution might be used in this context to develop a new or one-off CSO, or to allow a business activity to temporarily charge below floor price in order to gain market share in a developing market.)
- for new or significantly different services arising during the year, council must either (i) apply the costing methodology adopted in the most recent management plan (ie, no need to report back), or (ii) follow the existing system of 28 days public notice (s.612).

Rating provisions

Introduction

In addition to setting fees, councils also levy rates and charges on all land owners in their areas. Rates are based on land value, while annual charges, which can only be made for water supply, sewerage, drainage and waste management services, may be set according to the level of use of the service. Some business activities of council will be funded through rates and charges, most notably, the provision of water and sewerage services. Other examples include the provision of domestic waste management services, although rates cannot be used to subsidise domestic waste management services. The rating provisions may give council both a competitive disadvantage and a competitive advantage.

Competitive advantage to councils may be gained through:

- the compulsory nature of rates and charges. Once a rate is levied for a service that is provided or proposed to be provided, the land owner must pay. There is no option to refuse to pay if the service is not used (eg domestic waste removal); and
- unpaid rates and charges become a “charge on the land” (s.550) and council may sell land to recover the unpaid amounts (s.713).

Private sector competitors do not have the same powers of revenue raising. Further, while a person is not prevented from using another competitor’s services the compulsory nature of council rates provides a barrier in practice to a person choosing to do so. For example, the ability to levy a charge for making a domestic waste service available has effectively given councils a monopoly in this area.

Councils may be under a competitive disadvantage through:

- annual making of rates and charges. Once set, rates and charges may not be altered; and
- Council must make and levy rates for the year 1 July – 30 June and may only issue rates notices at certain intervals throughout the year.

Council rates and charges are a form of tax, and fund essential services such as road control, law enforcement, maintenance of public spaces, community services, natural resource management, environmental protection, public health regulation and so on. Councils are also limited in the way that they may spend this revenue (see below). However, rates may also be raised for a few business activities and the issue to be explored is whether the commercial advantages are justified, or sufficiently balanced by the disadvantages discussed above, and further below.

Submissions

The general tone of submissions is in favour of no change other than a review of rate-pegging.

WESROC (36) submitted that the principle of funding core operations and essential services through rates and levies should be strongly defended - even with respect to charges for domestic waste collection there is a strong community interest from a public health and environmental perspective in councils being able to make a compulsory levy and ensuring that such waste is properly dealt with.

Manly Council (27) and Gosford City Council (40) submitted that the Review should examine limitations such as rate-pegging to ensure council operations are not restricted. Kyogle Council (3) submitted that rate-pegging should be removed, so as to allow a more ‘level playing field’ across councils. The MEU (28) submitted that rate pegging should be lifted, as the restriction on the generation of rating income impacts on employment in local government.

Leeton Shire Council (7) submitted that there should be no change to the rating system which would undermine councils' financial viability, and that state or federal government should fund pensioner rate rebates fully.

Goldenfields Water County Council (18) noted that they receive a benefit from having water charges attach to the land; but submitted that if water charges were customer-based then financing issues (eg. credit checks and deposits) could disadvantage those least able to afford it. Thus Goldenfields Water County Council submitted that the public benefit of the current system outweighs any unfair advantages over any theoretical private sector competitors.

Tweed Shire Council (21) submitted that current rating provisions should remain, and that councils should have discretion over water and sewerage pricing, so they don't have to apply full water user charges, or can offer subsidies to sections of the community.

DUAP (34) noted a concern that councils have insufficient funds from their rating revenue to carry out strategic planning.

Discussion

As the advantages that accrue to council businesses able to levy specific charges against the land relate mostly to monopoly businesses (such as water and sewerage services) there is no practical anti-competitive effect. While the domestic waste management service is effectively a monopoly because of the compulsory nature of its charges, councils are limited to only charging their reasonable costs (see s.504(3) of the Act). Thus annual charges for the domestic waste management service cannot be used for profiteering, and therefore domestic waste management services may not necessarily be classified by a council as a 'business activity'.

It should be noted that residents are not prevented from contracting with other parties for the removal of their domestic waste, and the annual charge for domestic waste management services may be set according to the actual use of the service. However the compulsory nature of the domestic waste management service charge is considered necessary to ensure the viability of the activity at lowest cost to the community as a whole, and to ensure that public health and environmental objectives are consistently met across the areas in which domestic waste management services are available. That is, the compulsory nature of the domestic waste management service charge effectively ensures that no resources are wasted in having a number of different waste removal services, each targeting just a few houses in one area.

Councils are also discouraged from using rating revenue to cross-subsidise their other business activities, and any such subsidies must be made explicit to ensure competitive neutrality and accountability to the community. Therefore the degree to which these provisions have an anti-competitive effect is considered to be minimal. For this reason the benefits of the rating system as a means of funding essential services are seen as outweighing any anti-competitive effects.

Recommendation

No change is recommended.

Controls on borrowing, investment and use of council revenue*Introduction*

Strict controls are placed on the use of council revenue and the ways in which councils can borrow:

- each council's borrowing limit is set by the Minister (s.624).
- a council may only give security through a charge on the income of the council. It may not mortgage property (cl.23, Local Government (Financial Management) Regulation 1999).
- a council may only borrow by way of overdraft or loan (s.622).
- a council may only invest money in limited ways specified by the Minister (s.625).
- restrictions apply for money raised from the rent of community land (s.409)
- procedures apply to the setting of charges and use of money for domestic waste removal services (s.504).
- a council must use rate and charge revenue only for the purpose for which it was obtained. The Minister may allow an 'internal loan' if the money is not immediately required (s.409, s.410).

These restrictions are based on the responsibilities that a council has in its use of public funds, to ensure accountability, ensure the community receives best value for its money, and to ensure the best management of the public assets held by the council in trust for the community. These requirements are not applicable to the private sector, and therefore place council business operations at a disadvantage by comparison. That is, council businesses cannot take some of the financial risks (or expect the resulting higher financial returns which may be possible) available to their private sector counterparts.

It is also noted that councils that operate "Category 1" businesses in particular are required to price services to include tax equivalent payments, debt guarantee fees and a return on capital invested (dividends). This mirrors cost imperatives in the private sector. There is some question as to whether the Local Government Act (particularly s.409) currently allows councils to deal with these requirements, through the transfer of dividend payments between council funds (from restricted use funds to unrestricted use funds).

The Review Committee examined the question of how the legislation should deal with revenue from business activities

Submissions

(i) BORROWING

The LGSA (32) submitted that trading operations should not have their borrowing restricted, other than under corporations law. Eurobodalla Shire Council (29) submitted that controls on borrowings should be lifted for Category 1 and 2 businesses / trading enterprises. WESROC (36) submitted that councils should be given more flexibility in relation to borrowing for commercial operations, especially Category 1 businesses.

Cudgong (Abattoir) County Council (22) submitted that restrictions on borrowing and investment make it difficult for the organisation (a trading abattoir) to respond to its environment in a timely manner, and that some financial institutions do not accept the types of mortgages which the council is restricted to offering.

Goldenfields Water County Council (18) noted that financial controls on delegations do not unduly impact on council's business practices. Hume Shire Council (9) submitted that the general view in the community is that councils are 'not for profit', and therefore current accountability measures with respect to spending public money are appropriate.

Wollongong Council (6) submitted that the current requirements with respect to limitations on borrowings and investments are restrictive but reasonable and balanced against the need to secure public monies. Bankstown City Council (31) submitted that restrictions on use of income could be commercially disadvantageous, but this should be balanced against accountability obligations. Likewise Baulkham Hills Shire Council (12) submitted that current controls on borrowing and investment are essential for accountability and transparency.

(ii) INVESTMENTS

Grafton City Council (16) stated that the recent introduction of the 'prudent person' test for investments has already allowed councils to invest in a broader range of securities.

(iii) DIVIDENDS

The LGSA (32) submitted that a resolution is needed of the current problem with respect to payments of dividends between funds - ie, the philosophy of NCP would suggest that dividends be paid to the owner of infrastructure, but the Local Government Act prohibits transfers from the water fund to the general fund. Eurobodalla Shire Council (29) submitted that councils operating water and/or sewerage services should be able to draw a dividend from their assets (if user charges apply), and the return should be untied for use on any council activity.

Wollongong Council (6) submitted that the current requirements with respect to domestic waste management services (which prevent income for domestic waste management

services exceeding reasonable cost to council) disadvantage council businesses as against their competitors.

DLAWC (42) noted that s.409 prevents councils from paying tax equivalents and dividends from their water supply and sewerage businesses, while private sector competitors must make such payments.

Discussion

(i) BORROWINGS

Controls over borrowings reflect two issues. Loans raised by councils form part of the State's borrowing allocation under the Commonwealth / State financial arrangements. It is therefore necessary to have some allocative method to ensure that the limit is not exceeded. It should be noted that in recent years the full allocation has not been used in any year. As a result no council could claim to have suffered a competitive disadvantage by having to apply for a loan allocation. Therefore it is not proposed to change councils' borrowing limits.

The securing of loans against income rather than individual assets prevents councils from risking public assets or defaulting on loans. While there is an argument for being able to mortgage, for example, land in a commercial venture the bulk of council businesses involve water and sewerage works. Clearly, putting essential facilities at risk is inappropriate.

Other than from Cudgegong there is no serious suggestions presented in the submissions that there is any impediment caused by this requirement. Cudgegong is already the subject of a special legislative provision allowing a mortgage because of its unique circumstances as the only remaining abattoir county council – see s.400A of the Local Government Act. Therefore no change is proposed to the provision which says that a council may only give security through a charge on the income of the council; this provision is not considered to have an anti-competitive effect.

It is not proposed to allow councils to borrow by issuing debentures, as this would require the issuing of prospectuses under corporations law and the costs and complications arising would outweigh any benefits.

(ii) INVESTMENTS

Despite the statement in the submission from Grafton City Council, it is not accurate to state that the “prudent person” test is the only investment limitation on councils in New South Wales.

Section 625 of the Local Government Act previously allowed councils to invest in any listed security authorised by the Trustee Act 1925, or in any form of investment notified in an Order of the Minister. However the Trustee Amendment (Discretionary

Investments) Act 1997 amended the Trustee Act 1925 to abolish the list of securities and replace them with the provision that all trustees must invest in a prudent manner (the “prudent person rule”).

It was recognised that when the list of securities was abolished from the Trustee Act 1925, such amendment was not appropriate for the public sector. (The Trustee Act covered the private sector and local government only; the State public sector was already, and continues to be, governed by the Public Authorities (Financial Arrangements) Act 1987.)

This change therefore prompted a review of the investment powers of councils. The review included industry consultation and research. The Minister subsequently approved an amendment to the Local Government Act 1993 to delete the reference to the Trustee Act 1925; this amendment was contained in the Statute Law (Miscellaneous Provisions) Act 2000 and commenced on 29 June 2000. Therefore councils may now only invest money in a form of investment notified by Minister’s Order.

The most recent Minister’s Order was published in the Government Gazette on 24 March 2000 and took effect on and from that date. The Order continues to provide a wide range of authorised investment options, similar to the previous list authorised by the Trustee Act 1925. The comprehensive list of authorised investments can be found on the Department’s website - see Circular to Councils No. 00/16.

The purpose of the Minister’s Order is to provide councils with a level of prescription concerning invested funds. It is the responsibility of each individual council to determine whether its investments are authorised in terms of the listed securities.

Guidelines for councils were prepared with the Minister’s Order in March 2000, and provided to councils by way of circular. Those guidelines noted that investments authorised in the Minister’s Order are by no means guaranteed, and councils should therefore still act prudently in choosing investments.

The guidelines state:

A council or entity acting on its behalf should exercise the care, diligence and skill that a prudent person would exercise in investing council funds. A prudent person is expected to act with considerable duty of care, not as an average person would act, but as a wise, cautious and judicious person would.

Councils are therefore in a similar position to State agencies, which can only invest in investments listed in a schedule to the Public Authorities (Financial Arrangements) Act 1987. The recent review of this area found that councils appreciate this level of prescription, to help ensure that only prudent investments are made. Nevertheless some flexibility is allowed within this scheme for councils to develop their own investment portfolios and strategies.

Given the thorough review of this area in the past few years, and the necessity of ensuring the proper stewardship of public monies, it is not considered appropriate to further amend this provision.

(iii) DIVIDENDS

It is proposed that the restrictions that apply to money raised from the rent of community land be lifted. The current requirement was inserted in 1998, and concerns have been raised with the Department of Local Government that the various community land reforms in 1998 were overly prescriptive. Some of these requirements, in Chapter 6 Part 2 of the Act, have been lessened as of 1 April 2001, by virtue of the Local Government Amendment Act 2000. It is considered that rental income from community land (as opposed to operational land) will always be far outweighed by the costs of community land management, and therefore s.409(2)(d) is unnecessary - and its requirement for separate accounting procedures for the small amounts raised is administratively inefficient.

With respect to the ability of council businesses to pay dividends, there is some discrepancy between councils. Gosford and Wyong councils, for example, operate statutory corporations under the Water Supply Authorities Act, while the majority of councils running water or sewerage businesses do so under the Local Government Act. Some councils have attempted to transfer funds from special funds to general funds by a variety of means. There is some lack of clarity about the legality of these schemes.

Section 409(3)(a) of the Local Government Act provides that money that has been received as a result of the levying of a special rate or charge may not be used otherwise than 'for the purpose for which the rate or charge was levied'. Advice from the Crown Solicitor has noted that there are conflicting interpretations of the scope of s.409, and suggests legislative amendment to clarify the situation.

It is considered appropriate within the philosophy of competitive neutrality to allow the payments of dividends, but only within a regulated framework. Legislative amendment is therefore required to define the proper relationship between restricted funds held under s.409 and a council's general funds, including the circumstances in which community service obligations are funded.

With respect to procedures that apply to the setting of charges and use of money for domestic waste removal services - this issue requires further consideration following finalisation of the EPA's review of the Waste Minimisation and Management Act 1995 in relation to the setting of fees. The use of funds should be reviewed further as part of the wider issue of the payment of dividends, as above. However a minor definitional issue can be dealt with immediately.

Recommendation

- Amend s.409 to delete the restrictions on the use of income raised from the rent of community land.
- The Minister for Local Government to prepare, in consultation with the Minister for Land and Water Conservation, a Bill to define the proper relationship between restricted funds held under s.409 and a council's general funds, including the circumstances in which dividends may be paid by a council business activity, and the circumstances in which community service obligations are funded.
- Consequent on the outcome of the EPA's review of the Waste Minimisation and Management Act 1995, the Department of Local Government to conduct a further review in relation to the setting of fees for domestic waste management services.
- Amend the definition of 'domestic waste' in the Dictionary to the Local Government Act to clarify that it only applies to household garbage (including recycling), not household effluent waste.

Disclosure requirements

Introduction

As a related issue to the question of pricing, councils are under more broad obligations to publicly plan and report on the strategic and financial direction of all their activities, including businesses. Sections 403 and 404 of the Act, supplemented by clause 7A of the Local Government (General) Regulation, require that council's management plan for each year include certain information for the benefit of the public. This information includes statements about the objectives and performance targets of each of council's principal activities, statements containing a detailed estimate of council's income and expenditure, statements of council's pricing policies with respect to the goods and services to be provided by it, and statements with respect to each charge or fee that is to be charged or levied.

The Department of Local Government's *Pricing and Costing Guidelines* indicate that council Category 1 business activities should be viewed as principal activities. Once again, council businesses could be said to be subject to unfair impediments not faced by their counterparts in the private sector. The private sector is not generally required to make advance disclosure of such matters to the public in general and to competitors in particular.

Further, the public (including competitors) have extremely broad access to council documents and other information under s.12 of the Act. Rights of access under s.12 are wider than 'freedom of information' legislation that applies to other public sector agencies. While the Freedom of Information Act 1989 allows an agency to withhold sensitive business information, s.12 only allows the information to be withheld if it falls into one of the following categories:

- commercial information contained in a development application that would prejudice the commercial position of the person who supplied it

- residential building plans showing internal layouts and the like
- personnel matters concerning particular individuals
- the personal hardship of any resident or ratepayer
- trade secrets
- a matter the disclosure of which would constitute an offence against an Act
- a matter the disclosure of which would found an action for breach of confidence
- a matter the disclosure of which would be contrary to the public interest

Therefore, a council's competitor may well have access to business information that doesn't fit into any of the categories listed above.

History of s.12 of the LGA

Prior to the enactment of s.12 of the LGA, access to council information was governed by cl.54 of Ordinance No. 1, made under the old Local Government Act 1919. Clause 54 empowered the Mayor to decide whether a fellow councillor might access any particular document; upon refusal by the Mayor the councillor could give notice and move for the production of the document by resolution of the council.

In relation to cl.54, the NSW Supreme Court held that a councillor has, in addition to the ability to request any document under cl.54, a common law *right* to see a document which is "necessary for him to view in order to exercise his office as a councillor" or "necessary for the purpose of discussion in a council meeting" (*Drummoyne Municipal Council v Marshall* (1989) 68 LGRA 258 at 261 per Young J), and that this right may be enforced by mandamus. The right does not extend to matters about which the councillor "is merely curious". The Department endorses this principle, and the case was quoted as continued authority more recently in *Styles v Wollondilly Shire Council* [2001] NSW LEC 18.

With the implementation of the new Local Government Act 1993, s.12(1) was introduced on 1 July 1993. It created a new, alternative regime to provide access to documents held by councils, parallel to the FOI Act. It addressed a need for a cheaper, faster and more informal system than FOI applications.

Section 12(1) lists a number of documents which must be made available for inspection free of charge to everyone. The documents listed in s.12(1) are those documents considered essential for members of the public to be able to see quickly and free of charge to ensure proper accountability of the council, as well as to enable full public participation in councils' decision-making processes – for example the register of pecuniary interest returns made by councillors and designated staff.

In addition to s.12(1), the Local Government (Meetings) Regulation 1993 was enacted and included clause 41, which allowed the General Manager the discretion to allow (or

refuse to allow) a councillor to inspect any record of the council. Clause 41 did not include any criteria on which to base this decision, although the decision in *Marshall* was persuasive in this regard. The decision of the General Manager could in turn be reviewed and overturned by the council.

In addition to the list of documents provided at s.12(1), new sub-sections (6)-(8) were added (and cl.41 of the Meetings Regulation repealed) in 1997, commencing on 1 March 1998:

(6) The council must allow inspection of its other documents free of charge unless, in the case of a particular document, it is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest.

(7) However, subsection (6) does not apply to the part (if any) of a document that deals with any of the following:

- (a) personnel matters concerning particular individuals,
- (b) the personal hardship of any resident or ratepayer,
- (c) trade secrets,
- (d) a matter the disclosure of which would:
 - (i) constitute an offence against an Act, or
 - (ii) found an action for breach of confidence.

It should be noted that, as with both cl.54 of Ordinance 1 and cl.41 of the Meetings Regulation before it, s.12(6) did not distinguish between applications being made for information by councillors asserting their need for the information in order to fulfil their functions or role as a councillor, and councillors who were “merely curious” about the information. Indeed it did not limit general members of the public who were “merely curious” either.

Section 12(6)-(8) went beyond the initial proposal in an earlier 1996 Discussion Paper, which was to regulate privacy and councillors’ access to information only. The effect was to place a wide onus on councils to make other documents – that is, those not listed at s.12(1) – available to the public for inspection free of charge, subject only to a ‘public interest’ test. The ‘public interest’ is not defined, although s.12(8) provides:

(8) For the purpose of determining whether allowing inspection of a document would be contrary to the public interest, it is irrelevant that the inspection of the document may:

- (a) cause embarrassment to the council or to councillors or to employees of the council, or
- (b) cause a loss of confidence in the council, or
- (c) cause a person to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

Therefore councils must rely on general principles of administrative law as to what constitutes the 'public interest' in the particular circumstances of a request for access to a document, having regard also to the terms of s.12(8).

Submissions

The general tone of submissions on this issue is that s.12 should be amended to bring it into line with the FOI Act so as to exclude commercial operations. However the MEU's submission was a notable exception.

The LGSA (32) submitted that consideration of tenders should always be allowed to be in closed meetings (ie, expand scope of s.10A(2)). The LGSA also submitted that requirements to disclose economic forecasts for council business activities should be reviewed, as s.12 and the management planning provisions of the Act give an unfair advantage to a council's competitors through the compulsory disclosure of pricing decisions, estimated income and expenditure – as well as the quarterly and annual accounting and performance reporting required under the Act and Regulations.

Lake Macquarie City Council (41) submitted that the disclosure of information required under s.12 is too extensive; s.12 should be amended to align it with the Freedom of Information Act. Wollongong Council (6) and Bankstown City Council (31) likewise submitted that s.12 of the Act should be amended to more closely mirror the FOI exemptions, so as to protect business / sensitive information from competitors.

Eurobodalla Shire Council (29) submitted that s.12 should exclude Category 1 businesses from disclosure requirements, to prevent commercial disadvantage. Tumbarumba Shire Council (17) submitted that disclosure requirements (both the s.12 public access and annual reporting requirements) in relation to costs and prices unfairly advantage council's competitors.

Blue Mountains Council (10) argued that council businesses shouldn't have to put their objectives and plans in the council's management plan.

Cudgegong (Abattoir) County Council (22) submitted that disclosure requirements with respect to management planning and s.12 (eg. fees, charges, performance targets and strategic plans for the organisation) confer a commercial advantage on council's competitors. The council argued that as their core activity is a regional abattoir, they should be exempted from disclosure provisions relating to commercially sensitive data being made public.

Fairfield City Council (25) submitted that s.12 means council's competitors can access business and marketing plans. They suggested that s.12(7) should be amended to exclude information that would confer a competitive advantage on a competitor of Council - and to ensure better consistency with s.10A2(d)(ii) with respect to grounds for closing council meetings.

However the MEU (28) submitted that “the public interest in requiring full disclosure as regards the conduct of publicly owned business far outweighs any restrictions that might arise in terms of competition”. Goldenfields Water County Council (18) also noted that disclosure requirements do not unduly impact on its business practices.

Discussion

With the commencement of the Privacy and Personal Information Protection Act 1998 in July 2000, together with the existing FOI legislation, the issue of disclosure provisions under the Act has become more complicated.

The FOI Act provides a formal mechanism whereby applicants can seek information not otherwise made available to them. However councils, like State agencies, may also choose to make a large range of material available to the general public, either automatically through wide publication or upon request, such that FOI applications would not be required for such information.

Therefore s.12 of the LGA may be characterised as regulating a council’s discretion to disclose information *outside* the formal FOI system. Such decisions must however also be made in the context of any other relevant legislation – not only general legislation such as PPIPA, but legislation covering special areas of information (eg. disclosure of information on the NSW Companion Animals Register is regulated by s.89 of the Companion Animals Act 1998).

It is therefore in the relationship between s.12 LGA and the much newer PPIPA, rather than the relationship between these two Acts and the FOI Act, that the Department has found the most difficulties. Even in this regard it is worth remembering that many of the documents held by councils do not contain ‘personal information’, and therefore PPIPA applies to only a sub-set of the documents to which s.12 of the LGA applies.

Nevertheless, there have been some instances of confusion since the introduction of PPIPA, and a more streamlined system of regulating access to information could be beneficial for both members of the public and council staff.

A system in which the commercial secrets of the business activities of a council are afforded better protection would also be in line with competitive neutrality principles. In any reforms an appropriate balance must be struck between the competing interests of the protection of individuals’ privacy and commercially sensitive matters on the one hand, and open and transparent governance on the other.

In May 2001 the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission launched an Access to Information Inquiry. The Department of Local Government has made a submission to that Inquiry, focussing on suggestions for amendment to s.12 of the LGA.

One of the difficulties found with the implementation of PPIPA since July 2000 is the different regimes for third party disclosures of personal information. Information that is not held on a 'public register' is governed by Information Protection Principle 11 (s.18 of PPIPA), which may be overridden by a Privacy Code of Practice, or whenever non-compliance is permitted, necessarily implied or reasonably contemplated by any other legislation (see s.25 of PPIPA).

Section 12(1) of the LGA obviously permits non-compliance with s.18 of PPIPA with respect to any documents listed in that sub-section. It can also be argued that s.12(6) implies or reasonably contemplates third party disclosures except as provided in s.12(7) or by the 'public interest' test, discussed above. Thus s.12 of the LGA would allow much personal information to be disclosed just as it was before the introduction of PPIPA.

Current problems with s.12(6)-(8) of the LGA, which have been identified in more detail in the Department's submission to the Access to Information Inquiry, include:

- it has the effect of overriding s.18 of PPIPA
- there is little guidance in how to apply the 'public interest' test
- there are inconsistencies between matters which can be restricted from public discussion in open meetings under s.10A(2) of the LGA and matters which can be withheld under s.12(6) or (7)
- councils' business competitors can find out commercially sensitive information
- it can be extremely costly to councils to process bulky requests
- receipt of a number of complaints from members of the public about councils wanting to charge search / retrieval from archives fees for s.12(6) requests

However this is not an argument for outright repeal of s.12(6)-(8). The Department is of the view that the original aim of s.12(6) – to provide a simple and free alternative to making FOI applications – remains an important objective. It is noted however that there could be a better balance between the need to ensure open and accountable government on the one hand, and the protection of commercially sensitive business information held by councils and the avoidance of unreasonable expense for councils (and by extension the community) on the other.

Since, as discussed above, the protection of privacy is now well covered by the information protection principles contained in PPIPA, and given the problems identified above and by the Ombudsman and councils alike, it is timely that s.12(6)-(8) be reviewed. It is submitted that any changes should recognise the common law (*Drummoyne v Marshall*, as above) and therefore provide for the differing levels of access required by councillors as opposed to general members of the public.

Amongst other issues, the Department's submission to the Access to Information Inquiry suggests that legislative amendments are made to expand the matters covered by exemptions at s.12(7), such that all matters which are considered best discussed in closed

rather than open council meetings (see s.10A(2)(a)-(g) of the LGA) should also be exempt from automatic public disclosure under s.12. The proposal goes on to suggest that members of the public should have no right of access under the LGA to matters listed in s.12(7) (although they still apply under other legislation such as the FOI Act). However councillors may have a right to inspect such material, but only if inspection of the document is necessary for the councillor to fulfil his or her role as a member of the governing body.

However it is appropriate that the current Inquiry conclude before any proposals to amend s.12 are further developed by the Department.

Recommendation

The Department of Local Government to review s.12 of the Local Government Act to examine the possibility of better alignment with the broader State objectives in the privacy and FOI legislation. Such review to include input from the Local Government Privacy Working Party, and take into consideration any recommendations from the Access to Information Inquiry by the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, the report of which is due in approximately August 2001. Any legislative amendments to the Act to be tabled second session 2001 or first session 2002.

Restrictions on delegation

Introduction

Section 377 allows a council to delegate a wide range of powers to the general manager (who may then delegate further) or to committees, persons outside council and so on. There are significant restrictions, however, that prevent a council from delegating the power to make a fee, rate or charge, the power to accept tenders or the power to expend money.

This creates impediments for those involved in a council business activity, reducing autonomy, creating delays and restricting flexibility to respond to the market. For example the manager of a business activity such as a nursery cannot accept tenders for a contract over \$100,000 to purchase soil and gravel - the final decision must be made by the elected councillors. Nor can the manager independently set the prices for plants sold by the nursery - these must be set by the council.

Submissions

Wollongong Council (6) submitted that the current restrictions on delegations can disadvantage council businesses, making them less responsive than their competitors. WESROC (36) submitted that councils should be able to delegate more powers either

within Council to a business unit, or to external organisations such as ROCs. Manly Council (27) submitted that limitations on delegations should be reviewed.

However Goldenfields Water County Council (18) noted that restrictions on delegations do not unduly impact on their business practices. Bankstown City Council (31) submitted that the s.377 restrictions on delegations should be reviewed, but that the balance between accountability obligations and the commercial focus of business units should be maintained.

Discussion

Cognate amendments will be required with respect to the setting and changing of fees for business activities, as per 'Setting of fees and charges for business activities', so as to allow managers of business activities to set and amend fees on a day-to-day basis (within the proper costing methodology). The Review Committee agreed that there should be no change to the delegation restrictions with respect to setting rates or annual charges, or the acceptance of tenders over \$100,000, as these are matters more appropriate for the elected councillors to review in order to ensure community input and enhance accountability.

Recommendation

Amend s.377 to make any amendments consequential upon the proposal at ‘Setting of fees and charges for business activities’ being adopted (ie, allow the setting of fees and charges to be delegated in certain circumstances).

Controls on council liability insurance

Introduction

Section 382 of the Act obliges a council to make arrangements for its adequate insurance against public liability and professional liability. This applies equally in respect of council businesses, and while questions of prudence and accountability may arise, a question arises as to whether this imposes an unfair competitive disadvantage on a council business, when compared with its private sector counterparts who may for various reasons choose to self-insure.

Submissions

WESROC (36) submitted that self-insurance should be permitted, subject to appropriate safeguards. Fairfield City Council (25) submitted that corporatisation of council services could ameliorate the view that council is a ‘deep pocket’ defendant, and thus assist councils with respect to their insurance costs which are higher than the private sector equivalents.

However Goldenfields Water County Council (18) noted that insurance requirements do not unduly impact on council’s business practices. Wollongong Council (6) submitted that the current provisions with respect to insurance are adequate.

Discussion

Section 382 of the Act obliges councils to make arrangements for their “adequate insurance against public liability and professional liability”. While a regulation-making power is including, such as to allow regulations to prescribe matters such as arrangements for insurance and minimum amounts of insurance, no such regulations have been made to date. Therefore councils currently have a wide discretion to arrange their insurance matters, including negotiations on levels of excess under contracts of insurance, as they deem appropriate.

In practice therefore this provision is not considered to have an anti-competitive effect on council businesses. With respect to the regulation-making power, it is considered that as accountability to the community is paramount, should a need to exercise this power arise in the future, its use would be in the public interest and would therefore outweigh any anti-competitive effect.

With the recent placing of HIH Insurance into provisional liquidation, the importance of adequate insurance has been highlighted. Many New South Wales councils were insured with HIH prior to 1998, and there are some large outstanding claims yet to be settled from that period. While the full impact on local government is not yet known, it may be necessary at some point in the future to prescribe minimum types of insurance and/or reinsurance for councils in the future, including retrospective cover.

Recommendation

No change.

Restrictions on the formation of corporations by councils

Introduction

Section 358 of the Act provides that a council must not form or participate in the formation of a corporation, or acquire a controlling interest in a corporation, unless the Minister has consented, or one of the limited exceptions allowed by the Act applies. The principle of competitive neutrality has as one of its elements the encouragement of a 'corporatisation model' in order to adequately separate business from other activities. This is developed in the *Pricing and Costing Guidelines for Council Businesses*. This does not mean that it is necessary to incorporate a separate company through which to carry out the particular business activity. Rather, it is one option that a council may consider.

Two issues arise - first, whether the need for Ministerial consent has anti-competitive effects in unnecessarily restricting councils from forming corporations and second, whether councils are placed at a competitive disadvantage with private sector competitors which may structure activities to return the most benefit. There are however some important public policy issues involved in regulating councils' ability to form corporations and remove council staff and property to the corporation, outside the checks and balances of the Local Government Act and the public sector generally. (See below for further discussion of this issue.)

Submissions

The LGSA (32) submitted that non-core trading operations should be able to be run at arm's length – that is, there should be an easier corporatisation process for non-core activities.

WESROC (36) submitted that the ability of Councils under s.358 to participate in the formation of non-profit corporations such as ROCs, joint purchase groups etc, should be clarified. WESROC further submitted that councils should be able to form corporations for commercial purposes, subject to the provision of appropriate safeguards and

accountability mechanisms. Such corporations should not be able to be used as shields to protect councils' core operations from public scrutiny.

Cudgegong (Abattoir) County Council (22) submitted that the need for the Minister's consent before entering into relationships or partnership agreements restricts the ability of the organisation to grow. Armidale Dumaresq Council (11) argued that there should be greater freedom for councils to arrange sponsorship arrangements and joint ventures. Blue Mountains Council (10) submitted that the requirement of the Minister's consent to form corporations should be removed, and replaced with parameters for the constitution of companies of which councils have a controlling interest.

However Wollongong Council (6) submitted that the current restrictions should be maintained to minimise the risk of loss of public money. Baulkham Hills Shire Council (12) submitted that the issues of probity and accountability should be considered by the Minister when a council proposes to establish a corporation under s.358.

Hume Shire Council (9) noted that there is an inherent danger in the creation of government-owned businesses - that corporatised entities such as business units can be "smug" in the knowledge that any losses will be subsidised by council. The council's submission noted that this can leave council open to public criticism.

The MEU (28) submitted that current restrictions on the formation of corporations represent an appropriate buffer against misuse. The MEU argued that councils should not be allowed to more easily set up private corporations to provide services, because such entities could be utilised to avoid existing industrial relations obligations and establish alternative labour hire arrangements.

Penrith City Council (33) noted that while the need for Ministerial consent was not objected to, the provision by the Department of guidelines to councils in this regard would be of assistance.

Discussion

Section 358 represented a significant loosening of restrictions on councils when introduced in 1993. The need for Ministerial consent however was seen as necessary "because the Government does not want councils to be risking ratepayers money in unrestricted business activities" (2nd reading speech, *Hansard*, Legislative Assembly, 27 November 1992, p.96).

Section 358 only applies to the formation of (or acquisition of a controlling interest in) a corporation. It does not prevent a council from being a member of a cooperative society or a company limited by guarantee and licensed not to use the word 'Limited' in its name. The justification for this distinction is not explained in the 2nd reading speech for the 1993 Act, but is understood to be because of the non-profit nature of cooperative societies and companies limited by guarantee. It can only be assumed that less risk is involved as decisions will be made for the public good rather than for the purpose of enhancing

shareholder value. The reporting requirements for cooperative societies in particular have quite stringent prudential oversight through the Minister for Fair Trading.

Once a council has formed or acquired a controlling interest in a corporation it can effectively alienate public assets, including staff and property. This exposes staff in particular to greater risk of losing their employment and entitlements if the corporation fails. In addition there is a loss of accountability in decision-making, with corporations not covered by administrative law remedies, freedom of information laws and so on. Matters pertaining to a council-owned corporation are invariably discussed in closed meetings, thus limiting public participation in decision-making.

The Review Committee recognises the difficulties inherent in deregulating this area, in terms of maintaining employment security and community accountability. It is considered paramount that both financial and political accountability be maintained. Therefore the need for Ministerial approval before a council can participate in the formation of (or acquisition of a controlling interest in) a corporation is seen as an important and necessary method of ensuring an independent third party assesses the project before public funds are committed. The assessment looks at the appropriateness of the level of risk inherent in the commercial activity, the degree to which the proposal alienates assets and transfers staff, and the appropriateness of substituting corporate reporting requirements for the accountability requirements of the Act.

It should be noted however that the Ministerial approval does not involve any warranty as to the project's financial viability.

It is therefore proposed not to further deregulate this area. However it is also recognised that councils would prefer greater certainty in making their applications for Ministerial approval.

Recommendation

- No legislative change required.
- The Department of Local Government to develop guidelines by December 2001 to assist councils draft their s.358 applications to the Minister.

Council ownership of all waste

Introduction

Section 743 of the Act vests in a council the ownership of all waste removed by it (or on its behalf) from any land or premises, or that is received at a depot of the council. Given the liabilities that flow under the provisions of the Environmental Offences and Penalties Act 1989, in particular under sections 5, 6 and 6A of that Act, on the owners of waste, and given that private sector competitors in the waste removal market do not statutorily acquire property in waste that they collect, a question arises as to whether section 743

imposes unfair anti-competitive constraints on a council where it is in the business of waste removal.

Submissions

The LGSA (32) submitted that there are unrealistic constraints imposed on councils with respect to waste, as councils don't have the resources for strict enforcement of the present provisions. However Eurobodalla Shire Council (29) submitted that the s.743 restriction should continue.

WESROC (36) submitted that there are both advantages and disadvantages in relationship to the ownership of waste, and that the review should be subject to broader environmental and public health considerations than just National Competition Policy.

Discussion

It was not clear from the LGSA submission how ownership of waste was tied to enforcement of other provisions.

The rationale for s.743 was the creation of an administrative and legal convenience for councils. By acquiring the ownership of all waste collected, councils can take kerb-side waste without the (former) owner's express permission, and it reduces the potential for argument from former owners who might otherwise request their property be returned. This regime in itself does not confer a competitive advantage on councils, as private competitors could insert such a provision in their contracts with clients.

A particular aspect of this convenience is that councils may recycle or sell waste without claims for compensation from the former owners. While for a period in the early 1990s a local government cooperative was able to return earnings above cost to its member councils (see the Government Pricing Tribunal Issues Paper on *Pricing Policies of the Waste Recycling and Processing Service of NSW*, August 1995, p.18), it is understood that this is no longer the case. Recycling activities are subsidised through a waste levy, and therefore recycling should be seen as a community service in pursuance of environmental objectives. Councils therefore do not receive a competitive advantage by virtue of their acquisition of ownership of all waste collected.

A further disadvantage to councils presented by s.743 is that, in acquiring ownership of waste, councils also take on the liabilities associated with that waste. The costs incurred in disposing toxic waste in particular can be very high.

The Review Committee agreed that the current system has no practical anti-competitive effect, and there is no compelling reason to justify amendment. Informal discussions at senior officer level with the Director of Waste Services at the EPA indicated that in the absence of any evidence of substantial problems with s.743, the EPA was satisfied with the Review Committee's recommendations.

Recommendation

No change.

C: Provisions affecting competitive neutrality for both council and non-council businesses

Regulation of activities carried out by the Crown

Introduction

Section 69 exempts the Crown from obtaining council approval for matters “incidental to the erection or demolition of a building”. This may apply to various parts of s.68 such as approvals to carry out plumbing or drainage work (s.68, Part B). In addition, under s.71, where a Crown agency applies for an approval (s.68, A3) to use a building as a place of public entertainment (such as for a meeting hall or entertainment), the Minister for Local Government, rather than the local council, is responsible for approving such a use.

In relation to all other matters the Crown must make an application for approval to conduct an activity under s.68 as would a private party, but under ss.72-74 the council cannot refuse an application without the permission of the Minister for Local Government, or place conditions on a development consent without the permission of the Minister for Local Government or the Crown applicant.

These provisions may give the Crown a particular advantage (saved costs and time by not requiring council approval) in carrying out an activity for which a private business may require a council approval. The inability of a council to refuse an application or place conditions of consent on an application without the consent of the applicant or the Minister may create advantages for a Crown business activity (as there is an onus on a council to justify its decision to the Minister), but could also be a disadvantage (time delays caused by council seeking the Minister’s approval to impose conditions of consent on the applicant Crown; the Crown cannot appeal against the Minister’s decision). However, in some cases, the Crown may not be competing with the private sector when carrying out the activity to which these provisions apply.

However these provisions will be affected by the staggered transfer of building-related approvals to the Environmental Planning and Assessment Act, which is the subject of the Local Government and Environmental Planning and Assessment Amendment (Transfer of Functions) Bill 2001, due to be tabled in Parliament in June 2001. Since 1998 the need for “building approval” in addition to a development consent has been deleted from the Local Government Act, with its replacement “construction certificate” now being regulated under the Environmental Planning and Assessment Act. This new Transfer of Functions Bill contains the transfer of most of the remaining incidental matters, such as approvals to use a building as a place of public entertainment, from the Local Government Act to the Environmental Planning and Assessment Act.

Section 71 will therefore be repealed once this Bill is enacted. (It should be noted that the need for premises plumbing approval is not to be transferred under this Bill, although it may be transferred at some point in the future, depending on the outcome of the review of plumbing regulation currently being conducted by an Inter-Departmental Committee chaired by the Cabinet Office.)

Submissions

Bankstown City Council (31) submitted that Crown exemptions should be reviewed. WESROC (36) submitted that the exemption for Crown activities from Council approval should be removed, particularly in relation to commercial activities. The LGSA (32) submitted that there should be no Crown exemptions where the Crown is competing with the private sector. Eurobodalla Shire Council (29) submitted that s.69 should be amended to remove Crown exemptions with respect to approvals for places of public entertainment and erection / demolition of buildings.

One submission from a private sector operator (15) submitted that Crown exemptions from development requirements such as development application processes and environmental impact statements placed government businesses (such as caravan parks and luxury cabins on Crown reserves) at a competitive advantage as against private sector operators. (However it should be noted that under the Environmental Planning & Assessment Act the Crown is not exempt from requiring a development consent - although under Part 5A of that Act the council cannot refuse an application, or place conditions on a development consent, without the permission of the Minister for Urban Affairs and Planning.) That submission also argued that the use of Crown land to compete with private sector operators is unjustified.

The submission from the Kingscliff & District Business Corporation (37) noted their concern about the “unfair advantage” the local council / Reserve Trust has over local businesses “in regard to land tax, rates, running costs etc”. Their concern is that two council-run caravan parks on the Crown Reserve beachfront have had considerable impact on local accommodation houses’ occupancy.

Discussion

Since 1999, following the first set of transfers of building-related matters to the EP&A Act and the transfer of former Building Branch staff from the Department of Local Government to the Department of Urban Affairs and Planning, no applications have been received by the Minister for Local Government under ss.72-74. It would therefore appear that any applications for s.68 approvals by Crown developers are being dealt with at the council level, with conditions imposed on approvals consented to by the Crown applicant.

Under the EP&A Act, the Crown as developer must make an application for development consent as would a private developer, but under Part 5A of that Act the council cannot refuse an application, or place conditions on a development consent, without the

permission of the Minister for Urban Affairs and Planning or the Crown applicant. The Review Group considers that ideally there should be consistency between the Local Government Act and the Environmental Planning & Assessment Act as to any advantages that accrue to the Crown when involved in development and related matters. In this respect the Environmental Planning & Assessment Act is the primary piece of legislation regulating this area.

However ss.72-74 of the Local Government Act clearly treat Crown developers differently to private sector developers. The Review Group noted that no submissions were made in favour of retaining these provisions. Section 69 in particular is even inconsistent with the need for the Crown to seek development consent for work under the EP&A Act.

It should be noted that the effect of repealing ss.72-74 will be to put the treatment of Crown developers under the Local Government Act at odds with their treatment under the Environmental Planning & Assessment Act 1979.

Recommendation

- Sections 69 and 72-74 of the Local Government Act should be repealed.

D: Reciprocal charging

Introduction

Certain sections of the Local Government Act grant State government bodies exemptions from fees, rates and charges set by councils (eg. ss.555-558, s.611). They affect State business and non-business activities. Councils also benefit from similar exemptions in other legislation. The Government has given a commitment to examine these reciprocal arrangements. The matter is currently with a working party chaired by NSW Treasury for consideration.

Submissions

The LGSA (32) submitted that reciprocal charging needs to be progressed. WESROC (36) agreed, and further submitted that the exemption of Federal and State government bodies undertaking commercial activities should be removed.

Three submissions, from a private sector operator (15), the HMAA (24) and the Kingscliff & District Business Corporation (37), submitted that Crown exemptions from rates and other charges placed government businesses (such as caravan parks and luxury cabins on Crown reserves) at a competitive advantage as against private sector operators.

Kyogle Council (3) submitted that rates exemptions for national parks should be removed so that the wider (NSW) community pays for parks, rather than just the local community.

Kyogle Council also submitted that rates exemptions for state forests should be removed so that the local community need no longer subsidise the maintenance of infrastructure required by these state government businesses, and also to allow a level playing field for government and non-government operators of logging activities.

Leeton Shire Council (7) submitted that state government agencies should lose any rating relief because they use local government services like the private sector. Cabonne Council (19) submitted that reciprocal charging arrangements are essential to NCP reform. Their submission argued that Cabonne Council forgoes approximately \$250,000 pa in rates from State Forests yet has to maintain infrastructure for the state body, while commercial forestry operators have to pay council rates.

Eurobodalla Shire Council (29) submitted that state bodies shouldn't be exempt from rates, fees and charges where they receive a service from the council.

Baulkham Hills Shire Council (12) submitted that current exemptions from rating for businesses that used to be statutory bodies (such as telecommunication carriers) should be removed. However the council also argued that other exemptions should remain, noting that if local government were to start charging state and federal government rates and charges then the federal government might start applying GST to local government activities that are currently exempt.

Discussion

Reciprocal charging is part of a separate review process, with Treasury due to report back to Cabinet by the end of 2001.

Recommendation

No amendment at this stage – subject to a separate review.

E: Other comments beyond the scope of this review

Blacktown City Council (8) and WESROC (36) submitted that councils' experience with private certification since 1997 reforms to the EP&A Act has shown that industry regulation is limited, without adequate mechanisms to support public health and safety, infrastructure or social impacts (eg. auditing and review), such that councils have to be the 'regulator' without any recoupment of costs. This is a matter for the Department of Urban Affairs and Planning and is therefore beyond the scope of this Review.

One submission (1) raised a complaint that (unnamed) councils abused their regulatory power by imposing conditions of consent upon developers which forced the developers to use council to do works (such as road restoration), rather than allowing the developers to do works themselves to council's satisfaction. This is essentially a matter for the Australian Competition and Consumer Commission (ACCC) to review in terms of a possible breach of the Trade Practices Act 1974, although the wider issues surrounding councils' conflicting roles as regulator and 'market player' are noted, and are taken into account in this Review.

One submission from an individual (4) raised diverse issues including whether 'freedom of information' legislation should be extended to the private sector, whether the Independent Commission Against Corruption should also regulate the private sector, whether there should be a national approach to risk management by government, and issues relating to child protection and drug abuse. This submission was not considered to raise matters within the Terms of Reference for this Review.

One submission from an individual (14) suggested that the NCP 'policy' of contracting out is not always a suitable solution to service provision. That submission also raised a specific complaint that a particular Council should not have contracted out concrete repair works to a pool. Dealing with this specific complaint is beyond the Terms of Reference for this Review, and while the comments with respect to the suitability of contracting out are taken into account in this Review, it should be noted that in NSW 'contracting out' by councils is not compulsory.

One submission (20) raised a complaint that their local council, through inaction, continues to allow people to camp (using caravans, motor homes and tents) illegally at a particular site, which is impacting on private sector operators of caravan parks. As this complaint raises a regulatory matter for the individual council it has not been dealt with as part of this Review.

One submission (26) stated that councils, when processing DAs, focus too much on protecting the market for existing businesses, rather than allowing new businesses to enter the market. This submission argued that competition is good for the community with respect to employment training and the flow-on effect of wages and salaries. The submission suggested that the Act should have clearer wording so that council officers are not so subjective in their assessments of DAs in terms of the impact a new development will have on its competitors. As the 'heads of consideration' used by councils to

determine planning and development matters are in the EP&A Act, this is a matter for the Department of Urban Affairs and Planning and is therefore beyond the scope of this Review.

Sutherland Shire Council (39) submitted that monopoly services such as public pools should not have to be treated as Category 1 or 2 business activities. Sutherland Shire Council also submitted that because NCP forces council to categorise its swimming pools as a business then Sydney Water charges more for water supply. However this statement is not correct – the *Pricing and Costing* guidelines released to councils in July 1997 do not make swimming pools automatically a ‘business activity’. This submission is therefore considered not to raise a significant issue.

PART 4: SUMMARY OF RECOMMENDATIONS

1. Business approvals – undertakers and mortuaries

- It is recommended that the s.68 approvals F8 and F9 be deleted from the Local Government Act, with consequential amendments to the Approvals Regulation.
- It is recommended that the standards for mortuaries (Schedule 4 to the Orders Regulation) be retained.

2. Operation of a public car park

No change.

3. Tendering – restrictions on bodies providing ‘bulk’ contract arrangements

It is recommended that the Local Government Act be amended to insert a regulation-making power in s.55(3) such that the list of organisations at bullet point 6 can be extended to include any other organisation, with conditions attached. Therefore additional organisations or classes of organisations could be included by regulation, on condition of compliance with tendering requirements and an auditing regime covering both systems and individual transactions. It is not expected that there would be large numbers of organisations in this position. The organisations would have to deliver the service and comply with probity standards commensurate with those already in the Act and Regulation.

4. Tendering – other obligations

- No change to the Act.
- The Minister for Local Government to continue to review periodically whether the tendering threshold amount of \$100,000 should be amended by Regulation, in light of changes since 1993 including the introduction of the GST.

5. Control by Minister for Land and Water Conservation of water supply, sewerage and stormwater works and facilities

Discussions to continue.

6. Restrictions on councils undertaking private works, and setting of fees and charges for business activities

It is recommended that a new fee-setting system for (otherwise unregulated) s.608 fees be developed, limited to the following activities:

- (a) all private works done under s.67 of the Local Government Act
- (b) water supply activities other than those for which charges attach to the land (ie, *not* annual charges, special rates or user charges)

- (c) sewerage services other than those for which charges attach to the land (ie, *not* annual charges, special rates or user charges)
- (d) abattoirs
- (e) gas production and reticulation
- (f) any contestable regulatory activity that council has classified as a Category 1 or 2 business activity (eg. contestable development control services such as the issuing of construction certificates)
- (g) any non-regulatory activity that council has classified as a Category 1 or 2 business activity

The actual fee-setting system proposed is as follows:

- a costing methodology must be applied which sets a floor price of ‘avoidable costs’
- council’s management plan to explain the above cost methodology, but need not show the actual floor price (or other prices) for each activity
- council’s management plan to identify and budget for any community service obligations (CSOs) to be funded for each activity
- normal public consultation period for the management plan
- requires a council resolution to adopt the management plan before the costing methodology can be applied
- fees can be set and changed day-to-day, as long as they are:
 - (4) within the cost methodology; or
 - (5) subject to a CSO identified and budgeted for within the management plan; or
 - (6) subject to a specific council resolution. (NB: A specific council resolution might be used in this context to develop a new or one-off CSO, or to allow a business activity to temporarily charge below floor price in order to gain market share in a developing market.)
- for new or significantly different services arising during the year, council must either (i) apply the costing methodology adopted in the most recent management plan (ie, no need to report back), or (ii) follow the existing system of 28 days public notice (s.612).

7. Rating provisions

No change is recommended.

8. Controls on borrowing, investment and use of council revenue

- Amend s.409 to delete the restrictions on the use of income raised from the rent of community land.

- The Minister for Local Government to prepare, in consultation with the Minister for Land and Water Conservation, a Bill to define the proper relationship between restricted funds held under s.409 and a council's general funds, including the circumstances in which community service obligations are funded.
- Consequent on the outcome of the EPA's review of the Waste Minimisation and Management Act 1995, the Department of Local Government to conduct a further review in relation to the setting of fees for domestic waste management services.
- Amend the definition of 'domestic waste' in the Dictionary to the Local Government Act to clarify that it only applies to household garbage (including recycling), not household effluent waste.

9. Disclosure requirements

The Department of Local Government to review s.12 of the Local Government Act to examine the possibility of better alignment with the broader State objectives in the privacy and FOI legislation. Such review to include input from the Local Government Privacy Working Party, and take into consideration any recommendations from the Access to Information Inquiry by the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, the report of which is due in approximately August 2001. Any legislative amendments to the Act to be tabled second session 2001 or first session 2002.

10. Restrictions on delegation

Amend s.377 to make any amendments consequential upon the proposal at 'Setting of fees and charges for business activities' being adopted (ie, allow the setting of fees and charges to be delegated in certain circumstances).

11. Controls on council liability insurance

No change is recommended.

12. Restrictions on the formation of corporations by councils

- No legislative change required.
- The Department of Local Government to develop guidelines by December 2001 to assist councils draft their s.358 applications to the Minister.

13. Council ownership of all waste

No change is recommended.

14. Regulation of activities carried out by the Crown

Sections 69 and 72-74 of the Local Government Act should be repealed.

15. Reciprocal charging

No amendment at this stage – subject to a separate review.

APPENDIX: LIST OF SUBMISSIONS RECEIVED

Document number	Date	Author
1	26/7	Private individual
2	6/8	Private individual (as per no. 15)
3	14/8	Kyogle Council
4	15/8	Private individual
5	16/8	Maps Group Ltd
6	18/8	Wollongong City Council
7	21/8	Leeton Shire Council
8	22/8	Blacktown City Council
9	23/8	Hume Shire Council
10	23/8	City of Blue Mountains
11	23/8	Armidale Dumaresq Council
12	23/8	Baulkham Hills Shire Council
13	23/8	Ballina Shire Council
14	24/8	Private individual
15	24/8	Private individual (as per no. 2)
16	25/8	Council of the City of Grafton
17	25/8	Tumbarumba Shire Council
18	28/8	Goldenfields Water County Council
19	29/8	Cabonne Council
20	29/8	Private individuals
21	29/8	Tweed Shire Council

22	30/8	Cudgegong (Abattoir) County Council
23	30/8	City of Sydney
24	31/8	HMAA (Hotel Motel & Accommodation Association of NSW Ltd)
25	31/8	Fairfield City Council
26	1/9	Private individual
27	1/9	Manly Council
28	1/9	MEU
29	4/9	Eurobodalla Shire Council
30	4/9	State Contracts Control Board (DPWS)
31	30/8	Bankstown City Council
32	1/9	LGSA (Local Government & Shires Associations)
33	8/9	Penrith City Council
34	8/9	DUAP (Department of Urban Affairs and Planning)
35	6/9	Waverley Council
36	11/9	WESROC (Western Sydney Regional Organisation of Councils)
37	11/9	Kingscliff & District Business Corporation
38	13/9	Sutherland Shire Council
39	15/9	Sutherland Shire Council
40	18/9	Gosford City Council
41	6/9	Lake Macquarie City Council
42	13/10	Department of Land and Water Conservation
43	18/10	Funeral Industry Council