

**LOCAL GOVERNMENT BILL 1999
LOCAL GOVERNMENT (ELECTIONS) BILL 1999
LOCAL GOVERNMENT ACT 1934**

COMPETITION POLICY REVIEW REPORT

1 Introduction

The National Competition Policy (NCP) adopted in April 1995 by the Council of Australian Governments included the Conduct Code Agreement, the Competition Principles Agreement (CPA) and an Agreement to Implement.

Under the Agreements, legislation that restricts competition either by limiting entry to a market or by restricting competitive behaviour by those in a market must be accompanied by evidence that:

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

2 The NCP reforms and the Local Government Act review

Independently of the NCP reforms the South Australian Government has undertaken a comprehensive review of the *Local Government Act 1934*.

A major objective for the new legislation is to support a system of Local Government which is part of an efficient public sector functioning as a competitive advantage for the State by administering low taxes and the minimum necessary legislation. Councils should also be responsive and accountable to their communities, and to others where appropriate, and there should be clear definitions of roles within and beyond Local Government.

A package of draft Bills to replace the Act and associated documents were circulated widely for discussion and comment during May to July 1998. The package comprised the;

- Consultation Draft Local Government Bill 1998;
- Consultation Draft Local Government (Elections) Bill 1998;
- Consultation Draft Local Government (Lands) Bill 1998; and
- the discussion paper on Associated Repeals and Amendments and Transitional Provisions.

The draft Local Government Bills provided that the objects of Local Government include:

- management by councils of their areas on a representative, informed and responsible basis;
- development of the local community and its resources in a socially just and environmentally sustainable manner; and
- encouragement and development of initiatives within the local community for developing and improving the quality of the life of the community.

Throughout the Bills there is a pervasive theme that it is the responsibility of individual councils to ensure that a proper balance exists in the community between economic, environmental, social and cultural considerations, and that council and community property are used fairly, effectively and efficiently.

3 Consultation on provisions with the potential to restrict competition

As part of the consultation package for the Local Government Act review an additional paper was also circulated which invited comment on provisions in the draft Bills that may restrict competition, and matters that should be taken into account in assessing whether the restrictive impact of the provisions is warranted in the public interest.

The main areas of potential restriction were identified as the provisions for approving the use of public land, requiring professional qualifications for valuers and auditors, and the powers and processes for making by-laws. Consideration has also been given more recently as to whether the capacity of a council to rebate rates to assist or support a business in its area potentially restricts competition.

The provisions potentially impact on the operation of business in a wide range of markets. It is not possible however to assess the effects in individual markets. The restrictions are considered to be of intermediate or minor importance and this is reflected in the depth of analysis undertaken.

This review report provides an assessment of provisions that have the potential to restrict competition and an analysis for each such provision of:

- its objectives;
- the nature of the restriction on competition;
- the likely effect of the restriction on competition and the economy;
- the costs and benefits of the restriction; and
- any alternative means for achieving the objective, including non-legislative, except for by-law making provisions where it is argued that the proposed scheme would ensure that by-laws will contain no unnecessary restriction on competition.

4 Response to consultation

The Office of Local Government and the Local Government Association jointly conducted a series of consultation workshops and seminars throughout South Australia to outline the contents of the Bills and to encourage councils, groups and individuals to make submissions. As a result of this process over 100 written submissions were received, some 30% from councils.

Topics generating the most interest during the consultation phase were competitive tendering, mechanisms for boundary review, review of decisions, role of the Minister, rating matters, provisions relating to land management, and elections.

The issues raised in the paper seeking feedback on provisions that may restrict competition were not addressed in submissions from councils or the community.

The following sections of this Report (5 to 8 inclusive) address each area of potential restriction in accordance with the requirements of the CPA.

Section 9 provides comment on the competition policy implications of sections of the current *Local Government Act 1934*, which will remain in operation after the new Local Government Act is enacted, pending policy reviews (including competition policy reviews) by the relevant agencies.

5 Approval for the use of public land

It was proposed in the Consultation Draft Local Government Lands Bill 1998 (the draft Lands Bill) that councils retain the power to regulate activity on roads, and regulate the use of roads and community land for commercial and other purposes. When the Consultation Draft Bills were revised the lands provisions were moved into the Local Government Bill, where they appear as chapter 11.

In summary these measures provide that:

- Community land (as defined in the Bill) must be managed and used in accordance with management plans prepared and adopted by councils. Community land must not be used for commercial purposes unless approved by council and in accordance with the management plan.
- Roads (as defined in the Bill) must not be altered or used for business or other purposes unless approved by council.
- Approval may be in the form of a lease, licence, permit or authorisation and may be given subject to conditions considered appropriate by council.

The objectives of the provision

Roads and community land exist for the benefit, enjoyment and use of both the local and wider community. Authorisation of activities on roads and community land provides an effective method to manage conflicting interests in the use of public space.

The objectives of the restriction include public safety, community amenity, ensuring councils have the means to ensure the appropriate management of public space for the comfort and convenience of users, and equitable access. Councils should take the objectives into account to determine the appropriate type and number of approvals for a specified area or use.

The nature of the restriction on competition

Intermediate examples of the power are the licensing of street traders and outdoor cafes, and restrictions placed on moveable signs. Minor examples include licensing for depasturing stock and cropping on road reserves.

Licensing has the potential to restrict competition by limiting the number of entrants to a market, by controlling the sorts of activities able to be carried out within the market by attaching conditions to approvals and by adding to costs by imposing fees.

In the case of street traders and cafes, the restriction is considered to have an intermediate impact upon competition in markets that involve the exclusive use of public space, particularly footpaths.

In addition to limiting the number of approvals, councils may impose conditions including compliance with specified safety requirements, taking out specified insurance or indemnities, or the payment of a commercial rent to reflect the value of the area being occupied and to avoid providing a competitive advantage over proprietors who do not have access to public land.

In the case of moveable signs, Parliament has previously made a decision that the private use of roads for the placement of moveable business signs should not be subject to a licensing or permit regime if such signs must comply with a council by-law setting standards for their design, structure and location.

The Bill maintains these provisions, ensuring that a by-law that has the effect of prohibiting the placement of moveable signs in particular areas can only be made to protect public safety or to protect and enhance the amenity of a particular locality.

Analysis of the likely effect of the restriction on competition and on the economy generally

For markets where the impact is intermediate such as licensing for cafes, approvals may have to be confined in number with certain conditions, with possible effects in the market such as increased prices. This would in all likelihood be offset by increased revenue for the businesses concerned.

However outdoor restaurant trading is considered to be a desirable feature in the marketing of the State and of Adelaide in particular. Providing a stable, safe and well managed environment via regulation could be argued as assisting this area of the general economy.

Assessment of the costs and benefits of the restriction

Submissions on the costs and benefits of licences for the use of roads and community land were not forthcoming during the consultation phase.

There are different costs and benefits for different parties flowing from the restriction, and these will vary from market to market and between different activities.

In the case of outdoor cafes it is likely that private sector operators would see direct costs in the form of fees and possibly conditions such as insurance or other features of approval conditions, which if large enough and passed on to consumers could reduce competitiveness. There is a cost to the council involved in policing the conditions of the approval which, if the fee is not set at a level to recoup the costs, would be passed on to the community in the form of increased rates. There is also a qualitative cost to the community of reduced or denial of access to the public space being privately used.

There are benefits in the form of increased capacity for turnover and higher public amenity and marketability for the private sector, and revenue from fees to the council. The community benefits, both as patrons of such establishments and as residents and ratepayers, from the proper maintenance and management of public space to locally appropriate levels of safety and amenity.

On balance it is considered that the benefits of a system for regulating the use of roads and other public land outweigh the costs of the restriction.

Alternative means for achieving the same result including non-legislative means

To achieve the objectives of the licensing of public land provisions, enabling regulation by councils appears to be the only feasible alternative. Control of the volume of users and the nature of their activities is clearly desirable given the different needs that the community as a whole has for public space and without regulation responsible land management is likely to be difficult and risky.

The provisions of the Bill relating to time limits for the consideration, and reasons for the refusal, of applications for the business and commercial use of public land will ensure that a remedy is available in cases where refusal appears to have been motivated by a desire to protect existing businesses rather than the public purposes outlined above.

6 Professional qualifications for valuers and auditors

The Local Government Bill (the Bill) retains requirements for professional qualifications of auditors and valuers working in Local Government.

In summary the Bill provides that:

- the auditor of a council must be a registered company auditor or a firm of registered company auditors, achieved through membership of a relevant accounting body, and independent accreditation;
- councils must use either the Valuer-General or a valuer under the *Land Valuers Act 1994* (which sets down in regulation the necessary qualifications), or a combination of both providing that each land use category is valued by the same valuer.

The objectives of the restrictive power

The objectives for appropriate professional qualifications are to ensure that accepted competency standards have been reached, that appropriate levels of knowledge, expertise and probity are maintained, and that there is consistent interpretation and application of relevant professional principles.

The technical requirements for professional valuers set out under the *Land Valuers Act 1994* and their impact on competition are the subject of a separate review of that Act by the relevant agency. What will be addressed here is the justification of restricting valuation work in the Local Government sphere to those with professional qualifications.

The nature of the restriction on competition

Requirements for professional qualifications place a restriction on who can be engaged to provide these services to councils.

Analysis of the likely effect of the restriction on competition and on the economy generally

The high number of professional auditors and valuers present would mean that there is no significant reduction in competition. An effect of confining the work of auditors and valuers to people qualified in these fields means that these services are likely to cost more to the council and community.

Assessment of the costs and benefits of the restriction

There are private and public costs and benefits associated with the requirement for qualified professionals in these two areas.

Individuals engaged as auditors or valuers would necessarily have borne some of the costs to achieve the qualifications themselves directly and through forgone wages during tertiary education. These are likely to be offset by private benefits in the form of professional level wages in the longer term. The community as a whole contributes to the cost of education and at the local level meets the cost of valuers and auditors of councils through rates.

The community expects and has a right to high levels of accountability, certainty of methodology, and transparency in the conduct of councils. Requiring professional qualifications benefits the community by ensuring the objectives of the restriction are met, that the potential for dispute and inequity are minimised, and that the conduct of councils' taxation and finance systems is undertaken with levels of skill and probity acceptable to the community.

In the case of valuers the restriction is vital for preserving consistency in the application of the prescribed valuation method across council areas. Inconsistent application would generate appeal costs for property owners and councils, and, if unchallenged, would undermine the fairness of the rates based on those valuations.

Alternative means of achieving the same result, including non legislative means

While the element of probity could perhaps be secured with more strenuous provisions for compliance standards in the criminal law, such a course is likely to have a similar impact on prices and would not secure the other major objectives of the restriction. There are no apparent non-legislative means of reliably securing the appropriate standards that professional qualifications ensure.

7 By-law making powers

The treatment of council's regulatory powers (powers to make by-laws and powers to make orders) in the comprehensive review of the Act is designed -

- to facilitate the development of regulation by Local Government which complies with the principles and features of good regulation now shared by Governments at the national, State and local level, including the avoidance of unnecessary restriction of competition
- to clarify the regulatory responsibilities of councils, particularly in areas in which other government bodies also have a regulatory role.

The potential for over-regulation of local activities or local restrictions of private rights which are not consistent with established public policy is minimised by providing councils with the power to make specified orders which can target and resolve particular cases of local nuisance when they arise.

The scope of by-law making powers provided to councils under the Local Government Bills is generally restricted to powers to manage public land under councils' control.

Other regulatory powers are currently available to councils in the areas of traffic, building, fire prevention, health and the environment, and particular powers to make by-laws which provide for licensing of lodging houses, restaurants, fish shops, sale yards, bazaars, and taxis have been commonly identified by councils in the reviews discussed below as having the potential to restrict competition.

The intention is that these powers will, (if they are not able to be repealed or have not been made redundant by broader reviews of legislative schemes covering those areas at the time new Local Government legislation is introduced), be transferred to and integrated with the functional legislation covering that field.

This approach should clarify the roles of Local and State Government, eliminate fragmentation, gaps and overlaps, and provide scope for simplification and consistency with any national standards. It also has the potential to improve separation of Local Government regulatory functions from other Local Government functions in the interests of transparency and competitive neutrality.

Together with the principles which apply to the making of by-laws, the requirements for councils to review and reform by-laws under national competition policy, and the review mechanism in the form of the Legislative Review Committee of Parliament, this approach should be sufficient to ensure that the by-law making powers retained by councils do not unnecessarily restrict competition. Further details are provided below.

The processes for making by-laws

The Local Government Bill includes principles to be observed by councils when making by-laws under the Local Government Act or any other Act. One of these principles is that by-laws must avoid restricting competition to any significant degree unless the council concerned is satisfied that the objectives of the by-law can only be reasonably achieved by the restriction and that the benefits of the restriction to the community outweigh the costs of the restriction.

In addition councils must provide a report to the Legislative Review Committee of Parliament accompanying any new by-law they make indicating that the cost benefit assessment has been undertaken and the outcome of the assessment.

Reform of existing by-laws

Under the South Australian Statement on the Application of Competition Principles to Local Government ("the Clause 7 Statement") councils identified existing by-laws which may restrict competition and formulated a timetable to address the review and if necessary reform of those by-laws by the year 2000.

The Statement provides for councils to provide reports on their progress annually, beginning with data on their review of by-laws within two months of the close of the 1997/98 financial year.

In addition to the review required by the CPA by-laws made by councils will continue to be subject to automatic revocation provisions which ensure they will be regularly reviewed.

8 Rate rebates to assist or support business in the area

Provision is made in the Local Government Bill to continue the current power of a council to offer discretionary rebates of rates in a range of defined circumstances, including to assist businesses within their area.

In summary the Bill provides that;

- a council may grant a rebate of rates or service charges where such a rebate is desirable for the purpose of assisting or supporting a business in its area;
- the rebate may be on such conditions as the council sees fit and may be for a period of up to 10 years.

The objectives of the restrictive power

The discretionary rate rebate provisions form part of a broad strategy within the draft Bill to ensure that councils are equipped with a range of powers and tools to make their appropriate contribution to the economic development of the State.

The power may be used for example, to attract, support and retain new businesses within a council area or region, or to provide assistance to particular types of business that are supporting the strategic objectives of government in that area.

The nature of the restriction on competition

Two theoretical effects flowing from exercise by councils of the discretionary power for rate rebates are the location of business in such a way that competitiveness is reduced, and the reduction of the competitiveness of some businesses compared with rivals that are able to gain a rebate.

Analysis of the likely effect of the restriction on competition and on the economy generally

In practice the locational decisions of businesses are driven by a range of factors and the temporary reduction in the level of council rates is highly unlikely to be the sole or major driver of such decisions. To the extent that business location reduces competition, the rebate of council rates could not be seen as a major contributing factor. In addition, the effects of any rebate in dollar terms are not likely to be significant within the total costs to business.

The provision is thus seen as having a minor effect on competition.

Assessment of the costs and benefits of the restriction

There are direct benefits in the short term to businesses provided with a rebate in the form of reduced costs, and a corresponding small direct cost to other ratepayers that are, in effect, subsidising the rebate for its term. There is a risk associated with this strategy in the event that the business fails, but the amount in rates forgone is small compared with overall rate revenue.

Possible indirect benefits include an increase or maintenance of employment opportunities within the area associated with the business, an increase in the value of the business in the longer term with ultimate benefits to the council and its community in the form of both rate revenue and increased community wealth.

Councils are expected under the new legislation to link their decisions on rating to their strategic planning processes, and hence the circumstance in which councils are likely to use the capacity to rebate rates to business would be linked to the broad objectives of the area.

Contributing to strategies for the economic development of the council area and region in which it is situated is now firmly within the accepted roles of local government. Rating policy, including policy on rate rebates, is expected to support these objectives.

On balance it is considered that the benefits of allowing councils a capacity to rebate council rates to assist or support business outweigh any costs associated with the power.

Alternative means of achieving the same result, including non legislative means

The power to offer rebates is already discretionary and as stated above forms part of a range of government policy initiatives to assist councils take their part in economic development. A number of other tools and techniques are already used by councils to promote and foster their areas and the businesses within them in a considered and planned fashion.

9 Provisions of the *Local Government Act 1934* remaining in operation

The provisions of the *Local Government Act 1934* are to be repealed, with the exception of the following regulatory powers of councils (together with any related definitions and interpretative provisions which are necessary for their continued application). Repeal of these provisions and their replacement with revised provisions in other State Acts will occur following reviews of the relevant functional areas, either competition policy reviews occurring in accordance with the Government's timetable, or broader policy reviews which will include competition policy assessments as a matter of course.

- Provisions concerning traffic management and parking control

The Government intends to incorporate Local Government's role in traffic management and parking control into a comprehensive review of the *Road Traffic Act* following the production of national Australian Road Rules.

The *Road Traffic Act* review is now proceeding urgently and it is planned that relevant legislation will be introduced during the forthcoming sitting of Parliament.

The *Statutes Repeal and Amendment (Local Government - Transitional Issues) Bill* will therefore not seek to cover the transfer of Local Government's parking and traffic powers, but will provide for their preservation on an interim basis until replacement provisions come into operation.

The review of the *Road Traffic Act* will incorporate an assessment of the competition policy implications of the replacement legislation.

- Provisions concerning passenger transport regulation
Councils' by-law making powers in relation to the regulation of passenger transport (s667 (1) 3 XX-XLII) are to be retained, pending the competition policy review of the *Passenger Transport Act* which is due to be completed by April 1999.

Councils are under a separate obligation to conduct competition policy reviews of their exercise of these powers irrespective of where they are located (under the Clause 7 Statement on the Application of Competition Principles to Local Government), and hence it is not proposed that the competition policy review of the *Passenger Transport Act* incorporate specific consideration of Local Government by-laws. However the review is expected to provide comment on how councils' powers should be framed and how the integration of those powers into the *Passenger Transport Act* might best be handled.

- Provisions concerning cemeteries
The cemetery provisions are scheduled for comprehensive review in 1999 as part of a separate and broader project to review and replace legislation for the disposal of human remains which will incorporate the necessary competition policy review of regulation in this area.
- Provisions concerning lodging - houses
Councils' by-law making powers in relation to lodging-houses (s667 (1) 3 XVI) are to be retained, pending further consideration of whether any standards need to be established in relation to aspects not covered by the current provisions of the *Public and Environmental Health Act* or the *Supported Residential Facilities Act*. The Discussion Paper on Associated Repeals and Amendments which accompanied the Consultation Draft Bills proposed that, in order to cover this contingency, the regulation-making power under the *Public and Environmental Health Act* be expanded to provide for the prescription of standards which must be observed in relation to lodging houses. However Competition Policy principles for the making/review of legislation would preclude expanding this regulation-making power in the absence of thorough prior consideration of whether it is required and what those standards might entail. It is understood that the SA Health Commission will be conducting a competition policy review of the *Public and Environmental Health Act* in March 1999, during which this issue can be addressed.
- Provisions concerning sale yards and bazaars
Councils' current power to impose annual licensing schemes and to make by-laws in relation to the regulating and licensing of sale yards and bazaars (Part 34 and section 667 (1) 3 XLVI - XLIX) are to be retained, pending further consideration of the adequacy of the current regulatory powers of the *Public and Environmental Health Act* in relation to any public health aspects of the operation of sale yards and bazaars, or whether additional standards or other regulatory mechanisms are required (in which case any competition policy implications would be addressed as part of the formulation of new legislation).