



COMPETITION POLICY REVIEW DRAFT REPORT

LGAQ SUBMISSION TO THE COMPETITION POLICY REVIEW SECRETARIAT

Local Government Association of Queensland Ltd

17 November 2014

The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association set up solely to serve councils and their individual needs. LGAQ has been advising, supporting and representing local councils since 1896, allowing them to improve their operations and strengthen relationships with their communities. LGAQ does this by connecting councils to people and places that count; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional and political excellence.

The LGAQ is grateful for the opportunity to make a submission in response to the Competition Policy Review Draft Report released by the Review Panel on 22 September 2014.

Before commenting on specific draft recommendations, the LGAQ would like to make some general comments about the Draft Report.

The LGAQ acknowledges the Australian Government's role in ensuring that the National Competition Policy (NCP) continues to deliver benefits to the Australian community through lower prices for consumers, greater choice and higher quality services. However, in the interest of subsidiarity (a fundamental principle underpinning the current Reform of the Federation White Paper review process), it is vital that the NCP not unduly restrict the ability of state governments and local government to govern in the interests of their communities. As the Draft Report itself states: "A key lesson from the National Competition Policy (NCP) experience is the importance of an agreed framework which can then be applied by governments in their own jurisdictions, and as necessary adapted to local conditions" (page 21).

State governments should maintain the ability to implement the NCP through 'fit for purpose' legislation which takes into account circumstances unique to their jurisdictions. The LGAQ welcomes the Panel's statements in that regard, for example: "Acknowledging the diverse circumstances of each jurisdiction, the Panel supports the flexibility built into the NCP for the Commonwealth and state and territory governments to decide how best to implement competition principles in their jurisdictions" (page 24).

Of particular concern to LGAQ members is the impact of NCP on local governments in rural and regional Queensland. Rural and regional councils are disadvantaged by the requirements of NCP as they are often unable to compete on an open market without the ability to cross-subsidise services where full costs are not recoverable, such as water and sewerage in small communities.

At the recent LGAQ Annual Conference in Mackay, on 29 October 2014, Queensland local government delegates passed a resolution calling for the Australian Government to also provide a productivity report on the impact of NCP on local governments in rural and regional Australia. A report specifically focused on the unique needs of these communities may assist in understanding the affordability impacts of NCP on these councils and whether the intended outcomes of giving consumers lower prices, greater choice and higher quality services in these areas are being achieved.

It is essential that changes to NCP as a result of the Harper Review not lead to councils facing additional red tape and financial impacts in applying NCP principles, particularly in relation to council activities where there is no private industry alternative.

Maintaining the flexibility provided to each jurisdiction to determine its priorities consistent with the agreed competition policy principles also means the efforts of jurisdictions that have achieved significant progress need to be recognised. For example, the fact that Queensland already has robust competitive neutrality policies in place should be taken into account in any agreed changes going forward. Addressing differences across jurisdictions in progress under NCP should not come at a cost to, or involve the imposition of additional burdens on, those jurisdictions which have already achieved significant outcomes.

LGAQ CONTACT:

Mr Stephan Bohnen
Principal Advisor – Intergovernmental Relations
Ph: (07) 3000 2203
M: 0409 163 957
E: Stephan_Bohnen@lgaq.asn.au

SERVICE PROVISION

Draft Recommendation 1 — Competition principles

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers. The following principles should guide Commonwealth, state and territory and local governments in implementing competition policy:

- *legislative frameworks and government policies binding the public or private sectors should not restrict competition;*
- *governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;*
- *the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;*
- *governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities;*
- *government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;*
- *a right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest; and*
- *independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.*

Applying these principles should be subject to a ‘public interest’ test, so that:

- *the principle should apply unless the costs outweigh the benefits; and*
- *any legislation or government policy restricting competition must demonstrate that:*
- *it is in the public interest; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*

LGAQ comments:

This recommendation has potentially significant ramifications for Queensland local governments, depending on the selection of services subject to competition policy. It will add another layer of complexity to decision making and could lead to increased costs in service provision where it provides barriers to cost saving opportunities such as regional collaboration in procurement and/or service provision.

The Panel's proposal to encourage a diversity of providers to increase choice, responsiveness and innovation in the provision of government services may require some structural separation within local governments in the delivery of certain activities where the local governments are also responsible for funding and/or regulation.

The proposal to make the funding of community service obligations contestable fails to recognise the composition of, and basis for, the community service obligations applicable to most Queensland local governments, with such a policy unlikely to be able to be applied in the majority of instances.

In many instances, local governments are the service providers of last resort in the absence of service provision by other levels of government, the not-for-profit sector and the for-profit sector. Any extension of competition policy into government services should appropriately consider the potential impacts on the structural and compliance requirements for rural and regional local governments. While this is acknowledged on page 26, it must be addressed in the consideration and implementation of any changes to competition policy.

Draft Recommendation 19 — Application of the law to government activities

The CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

LGAQ comments:

Applying the CCA to local government purchasing practices could create additional procurement practice compliance requirements. The exact implications are unclear at this stage, but appear to include the requirement for much greater flexibility in the way that services can be provided by the market to meet the objectives of the service being provided.

However, the adoption of less prescriptive procurement requirements may make it more difficult for local governments to select (and justify the selection of) an appropriate contractor.

It is important to note that many local governments, and particularly some rural and regional local governments, will not have the skill sets in-house to adhere to much more stringent competition policy requirements in procurement.

REGULATIONS**Draft Recommendation 11 — Regulation review**

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- *they are in the public interest; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

LGAQ comments:

Queensland local governments are presently already subject to state interest tests for local laws (section 29A of *Local Government Act 2009*). The LGAQ is concerned that this draft recommendation could lead to unnecessarily stringent requirements on existing local government practices and laws, particularly given the review process is recommended to be overseen by the national competition policy body.

The LGAQ is also concerned that it could potentially duplicate existing and planned regulation review efforts in Queensland, for example through the Office of Best Practice Regulation (OBPR). In previous discussions with and submissions to OBPR, the LGAQ has highlighted the need to avoid additional imposts on local government as a result of regulation review and reporting. Where review and reporting is required, duplication should be avoided and processes aligned with existing review and annual reporting requirements, including those contained in the *Local Government Act*.

Draft Recommendation 10 — Planning and zoning

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making”.

The principles should include:

- *a focus on the long-term interests of consumers generally (beyond purely local concerns);*
- *ensuring arrangements do not explicitly or implicitly favour incumbent operators;*
- *internal review processes that can be triggered by new entrants to a local market; and*
- *reducing the cost, complexity and time taken to challenge existing regulations.*

LGAQ comments:

The LGAQ opposes draft recommendation 10. The application of competition principles into planning and zoning decisions, apparently based on supermarket competition, demonstrates a lack of understanding of how town planning works. In addition to increasing the complexity and timeliness of decision-making frameworks, it will reduce local government's ability to implement strategic planning outcomes and frameworks considered most appropriate for their local areas and articulated by democratically elected representatives.

Restrictions on where and when supply can occur exist to ensure orderly development and a least-cost, long-term solution to essential infrastructure and service provision.

COMPETITIVE NEUTRALITY REQUIREMENTS

Draft Recommendation 13 — Competitive neutrality policy

All Australian governments should review their competitive neutrality policies. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).

LGAQ comments:

A review of the threshold tests for significant business activities has the potential to change the number of business activities captured by significant business activity reforms (including Public Benefit Assessments), particularly given the review report discusses a range of scenarios whereby smaller businesses are raising competitive neutrality concerns in potentially competing with selected local government activities.

The comments in the review report contradict the above-mentioned resolution passed by Queensland local governments at the LGAQ Annual Conference in Mackay on 29 October 2014 calling on the Australian Government to reduce the competitive neutrality compliance requirements on remote and regional local governments. In fact, the review report looks to increase the compliance requirements of local governments regarding activities that have the potential to compete with small businesses in addition to broader, non-commercial government service functions.

Overall, it would appear that the resourcing effort required to meet competition policy requirements will increase as a result of the proposed recommendations.

Draft Recommendation 14 — Competitive neutrality complaints

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum:

- *assigning responsibility for investigation of complaints to a body independent of government;*
- *a requirement for the government to respond publicly to the findings of complaint investigations; and*
- *annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Draft Recommendation 39) on the number of complaints received and investigations undertaken.*

LGAQ comments:

In addition to requiring public statements in relation to any complaints made, the proposed changes would likely require amendments to the existing competitive neutrality complaint processes of Queensland local governments,

Draft Recommendation 15 — Competitive neutrality reporting

To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.

LGAQ comments:

There is the potential for slight changes in reporting requirements, although the basis of what is proposed appears to be appropriately covered by existing legislative requirements of Queensland local governments.

Draft Recommendations 39-43 – New national competition body

Draft Recommendation 39: The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy.

The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.

LGAQ comments:

The proposal is to establish a new body that would be an advocate and educator in competition policy, in addition to undertaking market studies at the request of any government (and even possibly market participants) to inform recommendations made to relevant governments on changes to regulations or referrals to the ACCC for investigation of breaches of the law. The establishment of a national body to advocate for competition reform and to oversee the implementation of reforms instituted by governments in the wake of the Review could see some control held by the Queensland government over the review of the application of competition policy transferred to the national body.

Given a national perspective, and from past experience, there is likely a tendency for the body to not appropriately consider Queensland's unique characteristics. While the commentary at the bottom of page 58 indicates that referrals for market studies could be at the request of individual jurisdictions to identify their own concerns, it would still appear that the default position for decision-making would be consideration of cross-jurisdictional consistency.

WATER

Draft Recommendation 16 — Electricity, gas and water

State and territory governments should finalise the energy reform agenda, including through:

- *application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;*
- *deregulation of both electricity and gas retail prices; and*
- *the transfer of responsibility for reliability standards to a national framework.*

The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration.

All governments should re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:

- *economic regulation of the sector; and*
- *harmonisation of state and territory regulations where appropriate.*

Where water regulation is made national, the body responsible for its implementation should be the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).

LGAQ comments:

The establishment of a national regulator would increase the compliance requirements of local government water businesses not currently subject to any formal price monitoring practices. Additional water reform could also mean additional structural changes in the sector, with consequential governance, structural and financial implications for Queensland local governments.

The push for further pricing reform and cost-reflective pricing will have greatest impacts on rural and regional areas where practical experience shows that small schemes will never pay for their operation let alone the recovery of their capital costs (even if substantially funded through grants and/or subsidies).

Draft Recommendation 46 — Access and pricing regulator functions

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national access and pricing regulator:

- *the powers given to the NCC and the ACCC under the National Access Regime;*
- *the powers given to the NCC under the National Gas Law;*
- *the functions undertaken by the Australian Energy Regulator under the National Electricity Law and the National Gas Law;*
- *the telecommunications access and pricing functions of the ACCC;*
- *price regulation and related advisory roles under the Water Act 2007 (Cth).*

Consumer protection and competition functions should remain with the ACCC.

The access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.

LGAQ comments:

There is potential for national water pricing regulation, which would more than likely mean an unjustified increase in compliance requirements for Queensland local governments outside of South-East Queensland.

ROADS

Draft Recommendation 3 — Road transport

Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, there should be a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.

LGAQ comments:

The implications for local governments are unclear, although it would appear that such a pricing structure would require intergovernmental agreements relating to the utilisation and charging of different roads under different ownership. Queensland's geography means that there are many roads that are costly to provide on a per user basis, and the equity in charging would need to be appropriately considered.

Local governments also have limited funding capacity and the current focus of local governments is on the appropriate management of existing assets and new infrastructure required to service an expanding population base. The responsibility for facilitating infrastructure for user pays charging in the provision of roads is unclear, along with any funding implications for local governments noting that they are the service provider of last resort in most rural and regional areas.

REGIONAL COLLABORATION

Draft Recommendation 22 — Cartel conduct prohibition

The prohibitions against cartel conduct should be simplified and the following specific changes made:

- *the provisions should apply to cartel conduct affecting goods or services supplied or acquired in Australian markets;*
- *the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility;*
- *a broad exemption should be included for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services), recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition; and*
- *an exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing), recognising that such conduct will be prohibited by section 47 of the CCA (revised in accordance with Draft Recommendation 28) if it has the purpose, or has or is likely to have the effect or likely effect of substantially lessening competition.*

Draft Recommendation 34 — Authorisation and notification

The authorisation and notification provisions in the CCA should be simplified:

- *to ensure that only a single authorisation application is required for a single business transaction or arrangement; and*
- *to empower the ACCC to grant an exemption (including for per se prohibitions) if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or that the proposed conduct is likely to result in a net public benefit.*

LGAQ comments:

In certain circumstances in the past, local governments have had to approach the ACCC for exemption and/or approval for regional collaboration opportunities such as the tendering of service contracts across a number of local government areas given that they have had the potential to breach the CCA.

It makes sense for local governments to have no significant barriers to adopting regional collaboration strategies that have the effect of minimising service delivery costs to their communities. Some form of broad exemption for regional collaboration would remove some of the barriers that presently exist.

Overall, any obstacles to cost savings by local governments through regional collaboration, procurement or resource sharing should be removed, with such actions exempted from competition policy.

ADDITIONAL ISSUES NOT ADDRESSED IN THE DRAFT REPORT

Queensland local governments passed a resolution at the LGAQ Annual Conference in Mackay on 29 October 2014 calling on the Australian Government to approve the application of the NCP (including full cost pricing principals) to restoration works completed under Natural Disaster Relief and Recovery Arrangements (NDRRA) retrospectively and into the future.

The use of full cost pricing based on the NCP does currently not apply to NDRRA works. Local governments apply on-costs for all other works, including Queensland Department of Transport and Main Roads contract works, with no issue to effectively apportion these costs over the jobs that staff work on during the year. This also applies to the determination of plant hire rates for machinery used on NDRRA works, including the ability to recover capital and operating costs of the machine. The inability to recover the true cost of undertaking NDRRA work results in councils meeting these costs and negatively impacts on the financial sustainability of local governments, particularly smaller councils.

The LGAQ respectfully requests that the Panel's final report include a recommendation on this issue.