Western Australian Local Government Association

Final submission to the Competition Policy Review – NOVEMBER 2014

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Contents

Executive Summary

This submission presents the views of the Western Australian Local Government Association (WALGA or 'the Association') in response to the 'Competition Policy Review Draft Report'. Local Governments in WA have an interest in the outcomes of the Competition Policy Review due to their regulatory and planning responsibilities and their provision of services to the community.

The submission focuses on the Draft Report's findings and recommendations that are of interest to WA Local Governments. This includes competition principles in general as well as their specific application to various Local Government services.

In principle, the Association mostly agrees with the Draft Report's recommendations on the application of competition principles to government activities and regulation. However, the Competition Policy Review Panel should also be mindful that there may be net costs involved in subjecting Local Governments to onerous compliance processes due to Local Governments' relatively small involvement in 'business' activity and limited regulatory impact on competition.

Appropriate threshold tests should be used so that only significant business activities of Local Governments need to be assessed against competition principles. In the case of local laws, these are already subject to considerable oversight and should not be a high priority for review given their relatively limited impact on markets compared to Federal and State Government legislation.

Local Governments may need support and guidance from other levels of government in complying with competition policies. The Association believes competition payments could play an appropriate role in compensating for the costs of reform.

The Association does not agree with the Draft Report's suggestion that planning and zoning produces poor outcomes for consumers. The planning system has been established to protect and enhance local communities, and it should not be seen purely as a market driven consumer tool. Nonetheless, the planning system in WA does give due consideration to competition issues.

The Competition Policy Review Panel should consider that Local Government provision of human services is often in response to community demand in rural or remote settings where there is no prospect of service provision from any other level of government or the private sector. Overall, it is unlikely that the sector is 'crowding out' private sector provision of such services.

The Draft Report raised some concerns with the competitive neutrality of Local Government waste collection services. However, the assertion that the private sector could provide a cheaper service may be based on insufficient knowledge of the range of waste services that Local Governments provide.

1. Introduction

The Western Australian Local Government Association (WALGA or 'the Association') is the united voice of Local Government in Western Australia. The Association is an independent, membership-based group representing and supporting the work and interests of all 138 mainland Local Governments in Western Australia, plus the Indian Ocean territories of Christmas Island and Cocos (Keeling) Islands.

The Association provides an essential voice for 1,249 elected members and approximately 24,900 Local Government employees as well as over 2 million constituents of Local Governments in Western Australia. The Association also provides professional advice and offers services that provide financial benefits to the Local Governments and the communities they serve.

The Association is grateful to the Review Panel for the opportunity to provide a submission in response to the 'Competition Policy Review Draft Report'. Local Governments in WA have an interest in the outcomes of the Competition Policy Review due to their regulatory and planning responsibilities and their provision of services to the community.

This submission focuses on the Draft Report's findings and recommendations that are of interest to Local Governments. This submission provides the Association's views on competition principles in general as well as their specific application to various Local Government services. These views are presented under the following headings:

- Competition principles;
- Planning and zoning;
- Human services; and
- Waste collection.

2. Competition principles

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).

The Association agrees with this recommendation in principle. In practice, such reviews should have low compliance requirements for Local Governments to reflect that the sector's potential to affect competition outcomes is relatively limited compared to other levels of government.

The regularity of competitive neutrality policy reviews is a particularly important consideration. Where Local Governments have already reviewed their ongoing business activities, these should not need to be reviewed again for quite some time. However, where a Local Government proposes a new business activity it is reasonable to expect this activity to be reviewed before it commences.

Threshold tests are critical in the Local Government sector to ensure competitive neutrality policy reviews do not focus on insignificant activities. Local Governments engaged in significant review activity in 1997-98 under the direction of the WA Department of Local Government. Reviews were required by Local Governments with an operating expenditure greater than $2 million and activities with a user-pays income of over $200,000. These thresholds are outdated and would need to be increased if competitive neutrality policy was once again actively applied to Local Governments in WA.

It is also important to think of the impact of the wider application of competition principles on Local Government's regulatory workload. This is a concern for the Association considering the findings of a recent Productivity Commission study that investigated Local Government's role as a regulator. In particular, the Commission found that Local Government's regulatory workload is dominated by implementing and enforcing state laws, without a commensurate level of support from State Governments. The key gaps in support were:

- insufficient consideration of Local Governments' capacity to administer and enforce regulation before a new regulatory role is delegated to them;
- limited guidance and training on how to administer and enforce regulations; and
- no clear indication and ranking of state regulatory priorities.[1]

These gaps in support would need to be addressed in the event that National Competition Policy (NCP) increases Local Government's regulatory workload.

[1] Productivity Commission (2012), *The Role of Local Government as Regulator*.

Draft Recommendation 14 – Competitive neutrality concerns

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.

The Association agrees that the responsibility for investigation of complaints should be assigned to a body independent of government. The Association suggests such bodies should operate at the State level and could investigate complaints in their jurisdiction concerning State and Local Government activities.

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.

The Association agrees that this recommendation would increase accountability and transparency. The Association would support the need to make a competitive neutrality statement annually, though actual compliance activities would not need to occur this regularly. Indeed, WA Local Governments are presently required by the Department of Local Government and Communities to include an NCP statement in their Annual Report.

On the application of competitive neutrality policies, the Draft Report quotes the OECD (p.171):

> It is easier to pursue neutrality when competitive activities are carried out in an entity with an independent identity, operated at arm's length from general government. To achieve this governments can incorporate government businesses according to best practices (i.e. the OECD Guidelines on Corporate Governance of State-Owned Enterprises) or to structurally separate commercial from non-commercial activities. This could also be useful in countering ad-hoc political interventions that might impede competitive neutrality.

The Association agrees that there are advantages in trading enterprises being operated at arm's length from government. This option is available to – and frequently used by – State Governments. For example, the Western Australian Government owns utility corporations such as Western Power and the Water Corporation.

Unfortunately this option is not available to Local Governments in WA. Therefore, the Association has advocated for reforms to State legislation that would enable Local Government to establish Council Controlled Organisations (CCOs). This model is available to Local Governments in New Zealand where they are used for a variety of commercial purposes. The model allows one or more Local Governments to establish a wholly Local Government owned commercial organisation.

In New Zealand, CCOs are employed:

> to carry out a broad range of functions where (in the opinion of the shareholding local authorities) the efficiency of delivering such functions would be enhanced by the creation of professionally governed entities established for the specific purpose and where the appropriate consultation and oversight measures are in place.[2]

One key example of a function that could be undertaken by a Council Controlled Organisation is urban regeneration on a small, localised scale where low financial returns might be justified in pursuit of broader social objectives.

There are a number of benefits of the CCO model. Firstly, the CCO governance structure is flexible and will primarily consist of independent directors with experience relevant to the organisation's purpose and undertakings. Secondly, while the broad purpose and objectives will be set at the Council level, the CCO model removes commercial decisions from the political realm which can lead to improved decision making. Risk can also be reduced by the CCO model by quarantining ratepayers from legal liability and financial risk arising from commercial decisions. Another benefit is the increased oversight that a CCO provides relative to the traditional Local Government approach. The board of the CCO will provide greater oversight to the organisation's undertakings than if the function was undertaken by a business unit inside the Local Government with a hierarchical oversight chain through the Chief Executive Officer to the Council.

Adoption of the CCO model would allow Local Governments the flexibility to pursue commercial objectives, currently passed up by the private sector, with appropriate accountability and transparency to ensure beneficial outcomes for the community. The Association has developed the full legislative amendments required for the CCO model to be implemented in Western Australia. These amendments were included in the Association's 2012 submission to the WA Metropolitan Local Government Review[3].

Draft Recommendation 19 – Application of the law to government activities

The CCA [*Competition and Consumer Act 2010*] 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.

The prospect of competition law applying to trade or commerce activities of government should be tempered against the reality that a range of Local Government trading/commerce activities are delivered on a 'provider of last resort' basis, particularly in remote/rural areas. This includes activities such as: recreation centres, medical services, residential and industrial land development, and aged care.

Further, the commentary in section 3.2 (p.39), which associates commercial transactions to procurement, appears to be a broad generalisation as to the 'potential to harm competition'. This comment does not substantiate the fact that WA Local Government procurement

[2] Western Australian Local Government Association (2010), *Local Government Enterprises as a Means of Improving Local Government Efficiency*

[3] Western Australian Local Government Association (2012), *Submission – Metropolitan Local Government Review.*

operates under the *Local Government Act 1995* and *Local Government (Functions and General) Regulations 1996*. The prescriptive nature of procurement activity results in a transparent and competitive process for the acquisition of goods and services.

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.

The Association agrees that all levels of government need to review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed. However, it is important to note that Local Government regulation in WA is limited to local law-making powers incorporated in the *Local Government Act 1995*, which incorporates the NCP assessment process. Therefore, there is already significant oversight of the competition implications of local laws.

It is also very important that the regularity, priority and compliance requirements of regulatory reviews are commensurate with the level of government and the potential for its regulations to influence competition. While some local laws may negatively affect competition, their impacts would be insignificant compared to regulation at other levels of government – for example, State regulations on trading hours.

Draft Recommendation 44 – Competition payments

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, the Panel favours competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the

reform.

Reform effort would be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

The Association believes there is a role for competition payments to Local Governments when reform measures are implemented. This is because the benefits of local regulatory reform will be shared by the local, state and national economies. But without appropriate compensatory incentives, the costs of these reforms will only be incurred by Local Governments.

3. Planning and zoning

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.

The introduction to the Draft Report's section on planning and zoning (p.93) fails to highlight that the planning system was originally set up to counter the extremely negative health and social consequences of the 'unfettered market' in early industrial times. The system has evolved over the last 200 years but still reflects this premise, protecting the community from inappropriate and incompatible land uses. The Competition Policy Review should acknowledge this rather than focus on the complaints within the submissions which are driven from solely an economic rationale.

Local governments would agree that any 'excessive and complex zoning' should be minimised to provide greater clarity for the community. The WA State Government is in the process of reviewing the Model Scheme Text and it is expected that the number of zones, definitions and provisions will be streamlined to reduce the amount of complexity currently within the WA Planning System.

It is inappropriate to state that restrictions on competition can arise from 'taking inappropriate account of impacts on established businesses when considering new competitor proposals' (p.93). Numerous court cases have clearly outlined the role of the planning system in considering the objections received on 'competition' grounds. The main case referenced is *Kentucky Fried Chicken Pty Ltd v Gantidis*, where the presiding judge stated that 'the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration'.[4]

Therefore, it is not whether a proposed retail development will result in direct competition with another retailer but whether it will detrimentally impact upon a services or a centre which the community currently enjoys; so if those services are put in jeopardy, then this becomes a relevant planning consideration when determining an application. Further, based on determinations by WA's State Administrative Tribunal, only public submissions that have valid planning merit can be included in the consideration of a planning application. So although submissions to this review on planning and zoning have shown dissatisfaction with the current system, and it is noted that the example sited (p.95, footnote 70) relates to residential land not commercial or industrial developments, the legal framework within which the planning system operates has been found to be clear in the type of issues that it can consider. The Association recommends that the section on planning and zoning be amended

[4] (1979) 140 CLR 675

to properly reflect the types of economic and planning considerations that can be included during an assessment of an application.

The Competition Policy Review should acknowledge that WA has reviewed its State Planning Policy relating to Activity Centres in 2010, which has removed the previous cap on metropolitan floor space.[5] A hierarchy still exists, to ensure that the order of centres caters for the population catchment within which it operates in, and provides the strategic economic objective for the Perth and Peel region, but it has seen a change in the previous restriction on GLA. An example of a Local government who has translated the SPP into a practical guide for each centre is the City of Cockburn's Commercial and Activity Centres Strategy.[6] This document rates each centre in terms of its balance of land uses for the community that it is serving, providing a very clear outline of the existing and future development potential of each commercial centre. These positive planning responses should be included in the Competition Policy Review as proactive mechanisms to include economic analysis within the planning system.

Therefore, due to the reasons outlined above, the Association does not agree with the Draft Report's statement that 'it is important that the competitive impacts of planning and zoning are understood and considered by local planning authorities. It is recommended that competition analysis be incorporated into planning decisions in a manner that considers the benefits to consumers for competition' (p.96). Competition analysis does occur at the State Level, which is then translated into local measures and setting the framework for local governments to work within. This must be balanced by the legal framework and court determinations as to how competition can be incorporated into the assessment of a planning application, rather than purely the focus of this review being on the benefit to consumers for competition.

Box 8.8 Planning restrictions on child care (p.96), seems to imply that the regulations imposed by the Education and Care Services National Regulations are sufficient to guide the development of a child care centre. This fails to understand the difference in what Planning considerations must be addressed for the location of a child care centre within a residential area. In WA, guidance for the location of a child care centre is provided in WAPC'S Planning Bulletin No.72.[7] This policy guide includes noise attenuation issues, as covered by the Health Act, which can alter the location and design of outdoor play spaces, parking areas, air-conditioning units, etc., so it is an important consideration to address at the planning stage. Therefore, a planning approval may state that additional physical environment restrictions may be required, in order for the centre to comply with the requirements of the State's Health Act. The example used within the Draft Report is too simplistic and fails to understand the interaction of other legislation within the consideration of a planning application for a child care centre.

The Association therefore does not support the concluding view of the panel for planning and zoning issues, which states that it produces poor outcomes for consumers. The planning

[5] WAPC, *State Planning Policy 4.2 Activity Centres for Perth and Peel.* <http://www.planning.wa.gov.au/publications/1178.asp>, accessed 29 October 2014.
[6] City of Cockburn, *Local Commercial and Activity Centres Strategy*. <http://www.cockburn.wa.gov.au/Council_Services/City_Development/Projects/Local_Commercial_and_Activity_Centres_Strategy_/default.asp>, accessed 29 October 2014.
[7] WAPC (2009), *Planning bulletin 72/2009: Child Care Centres*, <http://www.planning.wa.gov.au/dop_pub_pdf/Planning_Bulletin_72_2009.pdf>, accessed 29 October 2014.

system has been established to protect and enhance local communities, and it should not be seen purely as a market driven consumer tool.

4. Human services

Draft Recommendation 2 – Human services

Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.

The guiding principles should include:

- user choice should be placed at the heart of service delivery;
- funding, regulation and service delivery should be separate;
- a diversity of providers should be encouraged, while not crowding out community and voluntary services; and
- innovation in service provision should be stimulated, while ensuring access to high-quality human services.

Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.

The Association accepts these principles, but suggests other human services objectives are as important as choice and also belong 'at the heart of service delivery'. These other principles are identified in the Draft Report (p.26): equity of access, universal service provision and minimum quality.

The inclusion of these principles in the proposed intergovernmental agreement would acknowledge situations where user choice cannot be applied. For example, WA has many rural and remote areas where there is little chance of a market for human services developing. As mentioned previously in this submission, these Local Governments often become the 'provider of last resort' in a range of human services, including: aged care, child care, recreation facilities and medical services.

The rationale for Local Government's involvement in such services is usually simple: (1) community expectations and (2) neither the private sector, nor any other level of Government will provide the service. There will be very few occasions where Local Governments' provision of such services is 'crowding out' the private sector.

Therefore, the application of competitive neutrality principles in such communities should be administratively simple to ensure compliance costs are kept to a minimum. Otherwise, any potential gains from the possible (though unlikely) involvement of private sector providers will be outweighed by the increased compliance burden across the Local Government sector. For this reason, the Association considers the application of thresholds to Local Government activities, to determine whether or not the activity needs assessing against competition principles, to be entirely appropriate.

5. Waste collection

The Draft Report discusses competitive neutrality concerns with Local Government waste collection services that were raised in a submission in response to the review's Issues Paper (p.171). While the Association cannot speak for what occurs in other States, such concerns generally do not apply to WA.

For example, Local Governments frequently go out to tender in order to appoint waste collection contractors. This is a rigorous test of the market. Often if the Local Government is providing the service themselves, they will still be required to bid. Additionally, in many cases Local Governments actively promote competition by disaggregating parts of their waste contract into different services thus allowing smaller operators to be cost effective in competition with the big operators. Furthermore, the assertion that the private sector could provide a cheaper service may be based on insufficient knowledge of the range of services that Local Government provides:

- The private sector costings may not be based on servicing each and every property in a district; some areas are more costly to service. In contrast, Local Governments ensure that a service is provided to everyone and usually charges will be based on average costs of the service over the whole district.

- The Local Government is likely to include more than just waste collection in rubbish charges. The charge may also include costs for education of the community, other waste facilities they provide, etc. Therefore, it is not appropriate to compare a private sector waste collection charge to the charges for a Local Government waste service.

- Local Governments may be providing a higher quality service than the private sector, using longer lasting equipment, so the short term cost may be higher but the longer term cost will be cheaper.