

LGNSW SUBMISSION

# IPART Draft Report Competitive Neutrality in NSW

FEB 2023

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

# OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs more than **55,000 people**



Local government in NSW looks after more than **\$136 billion of community assets**



Local government in NSW spends more than **\$1.9 billion each year on caring for the environment, including recycling and waste management, stormwater management and preserving and protecting native flora and fauna**



NSW has 450 council-run libraries that attract more than **34.8 million visits each year**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



NSW councils manage an estimated **3.5 million tonnes of waste each year**



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**

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## 1. Introduction

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to respond to the Draft Report of the Independent Pricing and Regulatory Tribunal (IPART) Review of NSW Competitive Neutrality Policies and Processes. This submission focusses on the application of competitive neutrality to local government.

This submission should be read in conjunction with LGNSW's [previous submission](#) in response to the IPART Issues Paper on this subject.

LGNSW commends IPART on the comprehensive consultation undertaken as part of the Review process.

This submission was endorsed by the LGNSW Board in April 2023.

## 2. General Comments

### Background

LGNSW appreciates that the application of Australian National Competition Policy (NCP) and competitive neutrality (CN) principles in NSW have not been reviewed for over 20 years and that a review is overdue. There has been considerable change in the way all spheres of government deliver infrastructure and services over the intervening period and the applicability of the policy needs to be tested. Furthermore, LGNSW maintains that all policy, regulation and legislation should be subject to periodic review.

LGNSW is generally supportive of the Australian National Competition Policy (NCP) and was consulted by NSW Treasury on the introduction of NCP to NSW and particularly on the development of the *NSW Policy Statement on the Application of National Competition Policy to Local Government* that was released in June 1996. LGNSW engagement helped ensure that that NCP as it applied to local government was realistic, proportionate and not unnecessarily onerous.

The NSW Government, in agreement with LGNSW, rejected a prescriptive approach to competition policy in councils. It is recognised that, to be effective, “competition policy must provide cost effective benefits in the wide range of councils from small rural to large urban”. The Guidelines were built on that approach. This included:

- That the Guidelines should be subject to benefit cost analysis – CN actions should only be applied where the net public benefit exceeds cost.
- Recognition that competition policy does not require that all individual businesses compete on an equal footing. Councils and other government agencies will have advantages through size, buying power, specialised expertise assets etc in the same way the private sector will have its own characteristics.
- Recognition that councils have a number of competitive disadvantages compared to the private sector. This includes limitations on borrowings, reduced flexibility to respond to markets, requirements for additional public accountability, legislative duties and Community Service Obligations (CSOs).

- Stressing that the principle of CN applies only to the business activities of councils and not to their non-business, non-profit activities.
- Agreement that CN is only to apply to a council's business activities, not to its non-business and non-profit activities.
- Recognition that a business activity will involve the supply of goods and services for a fee or charge but not all activities involving the supply of goods and services would necessarily be classified as business activities.
- Discretion for local councils to make their own determination as to which of their activities are classed as businesses (other than those classified by the ABS e.g. water and sewerage).

These were sound considerations in developing the Local Government Guidelines and as LGNSW previously submitted, it is essential that IPART apply the same considerations in this Review. Twenty years may have elapsed, but the considerations are still valid.

LGNSW is disappointed that at the Draft Report has departed from these agreed considerations to some extent. For example, the following considerations have been put aside:

- Stressing that the principle of CN applies only to the business activities of councils and not to their non-business, non-profit activities.
- Agreement that CN is only to apply to a council's business activities, not to its non-business and non-profit activities.

### **Justification for the Review**

LGNSW's [previous submission](#) on this Review requested that IPART provide an evidence based case for a major overhaul of the application of CN policy in NSW and justification if proposed changes would result in the expansion of the application of CN and the introduction of a more rigorous enforcement and reporting regime for local government.

LGNSW is concerned that the proposed changes will add to the regulatory and administrative burden on councils and is disappointed that the Draft Report does not quantify the net economic benefits of the proposed changes would deliver.

Furthermore, there is no apparent justification for seeking to expand the application of CN to local government based on business or community demands. Complaints have been all but non-existent and it would appear that there is little to be gained from an expanded regulatory regime. While this may partly reflect a lack of familiarity with the complaints opportunities and processes, particularly among small businesses, it seems incredulous that medium to large businesses and their industry bodies would not have actively explored these avenues.

Finally, there is nothing to demonstrate that the proposed new CN regime represents best practice.

Overall, the proposed CN arrangements would appear to be largely inconsistent with the NSW Government's Better Regulation Principles: the need for government action has not been

established, benefits have not been shown to outweigh costs and the proposed action does not appear to be proportional.<sup>1</sup>

### **Council Business Activities**

NSW councils undertake few activities that they would consider to be business activities. Few if any activities are undertaken with the primary purpose of generating profit although many activities may be priced on a full or partial cost recovery basis.

Where councils do undertake activities that may be considered to be business activities, councils are largely responding to CSOs, market failure and gaps in service availability, community needs and demands, or to support regulatory responsibilities.

## **3. Local Government Issues**

### **Regulatory Burden**

**The primary concern of councils is that IPART's draft proposals appear to introduce a higher degree of complexity and a greatly increased regulatory burden on councils.**

The increased regulatory burden on councils would appear to be proportionately much greater on councils than it is on state government entities. State agencies have a narrower scope (or range of activities that would potentially come under CN) and in the case of State-Owned Corporations (SOCs) and Government Trading Enterprises (GTEs), business activities are easily identified.

Council responsibilities are far more diverse and the circumstances in which they operate are widely varied (ranging from Central Darling to City of Sydney and everything in between). What might be identified as a business activity in one council area may clearly not be in another area.

There will need to be 128 individual CN assessments dealing with the numerous activities of individual councils. The complexity and diversity of the task is clearly demonstrated in the pricing schedules of individual councils which often run into the hundreds of individual line items ([refer to Blacktown Goods and Services Pricing Schedule](#)).

IPART's Review of the Reporting and Compliance Burdens on Local Government (2016) found that that councils operate under 67 different Acts and are accountable to 27 different state agencies. No state government agency has such extensive accountability or an equivalent regulatory burden.

Councils are already subject to an immense regulatory and reporting burden and are subject to comprehensive oversight by a range of agencies – OLG, Ombudsman, Auditor General, EPA, DPE, TfNSW, Health, etc. State entities are not subject to such a high level of scrutiny, transparency and accountability.

Councils also operate under the Integrated Planning and Reporting (IP&R) framework and are driven by their communities on what services councils should provide and how they should be

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<sup>1</sup> Guide to Better Regulation, NSW Government, January 2019, ([https://www.productivity.nsw.gov.au/sites/default/files/2022-05/TPP19-01\\_Guide-to-Better-Regulation.pdf](https://www.productivity.nsw.gov.au/sites/default/files/2022-05/TPP19-01_Guide-to-Better-Regulation.pdf))

operated, including pricing. IPART's CN policy proposals appear to conflict with the IP&R framework.

IPART's proposals would appear to greatly add to the existing regulatory burden and community accountability responsibilities, a fact that IPART has only partially acknowledged in its Draft Report and related papers and recognised only as a transition cost. The additional burden may result in councils having to employ additional staff on a permanent basis and invest in new or upgraded reporting software, with councils potentially incurring significant additional costs.

It should be noted that councils are suffering acute skills and workforce shortages. There is no capacity for additional administrative and reporting burdens.

### **Government Ownership Test**

LGNSW considers that in most cases council or other local government entity (e.g. County Councils, Joint Organisations etc) ownership can already be readily determined. Few councils have Public Private Partnership or other commercial arrangements that could complicate this assessment. LGNSW does not object to the proposed harmonisation of the test for state and local government ownership if it will assist businesses or the public, however merging the two may add to complexity and confusion for councils without any benefit.

### **Business Activities Test**

The proposed test appears to potentially cover nearly all non-regulatory goods and services provided by councils. This would potentially expand the current scope of CN and could include a wide range of activities that councils and communities consider to be core activities of councils.

LGNSW is of the view that that the test should be based on whether the activity is being conducted with commercial intent. That includes intention to make a profit or to achieve full cost recovery from the activity.

LGNSW objects to IPART's proposal that the definition of a business activity be determined by whether the activity *"involves the supply of goods and/or services, with system and regularity"*. This appears to be too wide a definition and would capture many activities that councils and the community would consider to be standard council services.

### **Significance Test**

**LGNSW welcomes the proposal to increase the significance threshold from \$2 million (unchanged since the 1990s) to \$3.7m and to introduce indexation into the future. This is long overdue.**

However, LGNSW maintains that the threshold should be higher than the \$3.7 million proposed and calls for the threshold to be set to at least \$5-10 million depending on the activity. This would be a more realistic indicator of significance and is more in line with thresholds set in other states as spelt out in LGNSW's previous submission. This would remove activities that are not material and reduce the overall regulatory burden.

Market impact testing also raises concerns. Determining the market impact of a council activity will be problematic. Assessments will vary across the 128 councils and potentially deliver 128 different assessments. This needs to be multiplied by the number of potential business

activities assessed. It also introduces the complication of defining the catchment for different business activities (the market). One interesting question arises where a council may commence a business activity to introduce competition to a market poorly serviced or exploited by an existing business which may have a monopoly in that area. This would have a substantial market impact on the private business, but the introduction of competition would benefit local communities. Would this be permitted under the Public Interest Test (see below)?

Another difficulty is that market data for small to medium businesses may not be readily available to councils.

### **Public Interest Test**

**LGNSW strongly supports the proposition that a council or government entity should apply a public interest test where the council or government entity suspects that charging the competitively neutral price, or removing a non-cost advantage, would not be in the public interest. This is a critical factor for many council activities.**

LGNSW is pleased that IPART has recognised that local government is likely to have a higher number of smaller business activities on which to undertake a Cost Benefit Analysis and are likely to have fewer resources to undertake such an assessment. All aspects of the Draft Report should be subject to the consideration of the number of council activities and limited skills and resources.

**LGNSW strongly supports IPART's proposal to maintain a simple qualitative test of public interest for local government.**

### **Social and Community (Human) Services**

**LGNSW welcomes IPART's assurance that councils will still be able to choose to deliver social and community (human) services on a subsidised basis, providing the subsidy is transparent and the decisions are supported by a Public Interest Test.**

This assurance will help alleviate council concerns that many social and community services are likely to fall within the definition of significant government business activities. Childcare services, vacation care, aged care and counselling services are examples of activities that are undertaken by state or local government entities and are likely to fall within the proposed definition of significant government business activities.

### **Complaints**

**LGNSW supports provision of a simple and accessible complaints process for CN and believes that the current process for making a competitive neutrality complaint about a council or local government entity largely satisfies these criteria.** This is not to say that there isn't room for improvement.

LGNSW supports continuation of the Office of Local Government (OLG) investigating complaints against councils and local government entities. However, it is recognised that there should be provision for the complaint to be referred to IPART, or other designated entity, should the complaint not be resolved by the OLG within a reasonable time frame. It would seem more appropriate that IPART or other designated entity focus on the larger, more complex complaints that are likely to arise in relation to state government business entities.

It is agreed that the OLG should not be investigating complaints relating to state government business entities.



LGNSW does not support the proposal to remove the requirement for a complaint to be made by an actual or potential competitor. Councils are concerned that this may encourage vexatious complaints.

### **Awareness and Training**

Initial workshops indicated that there was a low level of awareness of CN policy among council staff and councillors, however embedded CN procedures were maintained.

Implementation of the proposed changes will trigger the need for increased education of staff and councillors supported by training in new procedures. Councils participating in the IPART workshops indicated that resources including simple guidelines, checklists and templates would be required along with transitional training and assistance. This should be the responsibility of IPART and/or OLG. The costs of implementation and transition, including ongoing additional staffing costs, should be met by the state government.

LGNSW maintains that there is also a need to increase business awareness of CN and how it is applied by local and state government business activities including understanding provisions of the public interest test before initiating unfounded complaints processes.

There is also a need to raise public awareness of the implications of CN to the pricing of goods and services by councils and state government businesses. The public should be made aware where increases in charges or the withdrawal services are the result of the NSW Government's CN policy.

## **4. Key Points/Conclusion**

LGNSW's key positions on the Draft Report are summarised below.

- The primary concern of councils is that IPART's draft proposals appear to introduce a higher degree of complexity and a greatly increased regulatory burden on councils.
- Councils widely share the view that no additional reporting and regulatory obligations be imposed as a result of the review.
- LGNSW is disappointed that at the Draft Report has departed from the agreed considerations made with the introduction of NCP & CN in the 1990s. For example, the following considerations appear to have been put aside:
  - Stressing that the principle of CN applies only to the business activities of councils and not to their non-business, non-profit activities.
  - Agreement that CN is only to apply to a council's business activities, not to its non-business and non-profit activities.
- The Draft Report does not provide sufficient economic or other evidence to justify increasing the regulatory and administrative burden associated with CN.
- LGNSW objects to IPART's proposal that the definition of a business activity be determined by whether the activity *"involves the supply of goods and/or services, with system and regularity"*.

- LGNSW welcomes the proposal to increase the significance threshold from \$2 million (unchanged since the 1990s) to \$3.7m and to introduce indexation into the future. This is long overdue. However, LGNSW maintains that the threshold should be higher than the \$3.7 million proposed and calls for the threshold to be set at least \$5-10 million depending on the activity.
- LGNSW strongly supports the proposition that a council or government entity should apply a public interest test where the council or government entity suspects that charging the competitively neutral price, or removing a non-cost advantage, would not be in the public interest. This is a critical factor for many council activities.
- LGNSW strongly supports IPART's proposal to maintain a simple qualitative test of public interest for local government.
- LGNSW welcomes IPART's assurance that councils will still be able to choose to deliver social and community (human) services on a subsidised basis, providing the subsidy is transparent and the decision is supported by a public interest test.
- LGNSW supports provision of a simple and accessible complaints process for CN and believes that the current process for making a competitive neutrality complaint about a council or local government entity largely satisfies these criteria, but there is room for improvement.
- The costs of implementation and transition, including training and awareness raising should be met by the state government.

LGNSW looks forward to further consultation with IPART on the issues raised in this submission and in the implementation of any of the proposed changes to the CN compliance and reporting regime.

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