Local Government Amendment (National Competition Policy Review) Bill.

Second Reading

Mr TRIPODI (Fairfield—Parliamentary Secretary) [11.40 a.m.]: I move:

That this bill be now read a second time.

This bill provides for the amendment of the Local Government Act 1993 to address certain of its provisions that are inconsistent with the principles of national competition policy and in particular, competitive neutrality. The Local Government Act 1993 is one of the core Acts regulating local and county councils. It deals mainly with the establishment and functioning of local and county councils. It gives councils certain powers to regulate the activities of others as well as granting councils wide powers to undertake services and other functions in the local and wider communities.

The Local Government Act is not directly targeted at regulating markets or affecting competitive forces. However, in carrying out their functions under that Act, councils may affect the operation of businesses and the way that they compete with each other. There are two broad ways in which councils acting under the Local Government Act may affect businesses. The first relates to councils' role in regulating the businesses of others. Non-council businesses are affected in relation to competition policy, as under the Local Government Act certain business activities require the approval of council to conduct the business activity. Examples include the requirement to obtain a business approval to operate an undertaker's business or a mortuary, to operate a public car park or a caravan park or camping ground.

The other way in which councils have an impact on competitive neutrality is in relation to councils' own business activities, that is, the manner in which council businesses operate and interact with private sector competitors, such as private certifiers in relation to certifying development. Competitive neutrality is one of the principles of national competition policy that is being applied throughout Australia at all levels of government. The national competition policy is the subject of the Competition Principles Agreement 1995, developed by the Council of Australian Governments and entered into by the Commonwealth Government and all State and Territory governments.

The objective of competitive neutrality is to remove any net competitive advantages or disadvantages that may be available to significant business activities conducted by government agencies. Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. The policy aims to achieve competitive neutrality between public and private sector businesses and is part of a continuum of measures to foster greater efficiency in the operation of the public sector. The framework for the application of national competition policy to councils in New South Wales was developed by the government in consultation with the Local Government Association of New South Wales [Lgov NSW], formerly the Local Government and Shires Associations.

As required by the national agreement, the Local Government Act has been reviewed to identify any provisions that might unjustifiably restrict competition. That review was conducted by a committee comprised of senior officers from the Department of Local Government, the Cabinet Office and New South Wales Treasury. The committee was assisted by a reference group comprised of senior officers from Lgov NSW, the Institute of Municipal Management, the Municipal Employees Union of New South Wales and the Environmental Health and Building Surveyors Association. The committee's report of July 2001, "National Competition Policy—Review of the Local Government Act", was published by the Department of Local Government and has been publicly released. This bill is based upon the recommendations made in that report. Because competition policy is not about the pursuit of competition as an end in itself, this bill addresses those areas appropriate for reform. Anti-competitive provisions are justified if the benefits to the community as a whole outweigh the costs, or if the objects of the Act cannot be achieved without them.

I turn now to tendering. Section 55 of the Act currently exempts councils from the normal tendering requirements for purchasing when a council buys goods or services through a bulk contract arranged by the State Contracts Control Board or the equivalent Commonwealth agency. Procurement through these agencies has been specifically recognised in the Act because the State Contracts Control Board and equivalent agencies follow their own rigorous tendering and probity requirements before making contracts available to other government bodies. It would be a nonsense to then require effectively the same process that has been undertaken by the State

Contracts Control Board to be replicated by local councils, as would be required were the exempting provision not available.

The review committee reported that the current restriction on the organisations that can provide bulk purchasing is anti-competitive. While the issue of paramount importance is ensuring probity and transparency in government tendering, sufficient controls can be put into place to facilitate competition between bulk purchasing organisations. The bill will amend section 55 to implement the committee's recommendation. A regulation-making power will be inserted in section 55 (3) so that the list of prescribed organisations that enjoy the exemption from tendering requirements can be extended to include any other organisation, subject to such conditions as may be required. Appropriate conditions would need to ensure accountability with respect to the expenditure of public money by requiring, for example, that the organisations in this position comply with probity standards commensurate with those already in the Act and its regulations.

I turn now to fees and charges for business activities because they are also covered by the legislation. There are a number of sections in the Act that require councils to set fees in a particular way. Section 608 provides councils with a broad power to charge fees for the provision of services, such as receiving an application for approval or issuing a certificate. In order to set fees under the current provision, a council must first include the fee in its management plan. Public consultation must occur in relation to the plan. This provides councils' competitors with detailed information about councils' pricing policy, putting councils at a commercial disadvantage. By setting fees as part of the management planning process, councils have a limited ability to introduce new fees outside this process, and cannot therefore set a new fee in response to competitive pricing, other than in the next annual management plan. In terms of national competition policy, the fee-setting restrictions in the Act mean that councils are not able to adopt flexible pricing and respond to market trends. Of course, such restrictions do not apply to private businesses when setting their own fees and charges.

The requirements for setting fees in this way are appropriate for regulatory functions, such as inspection fees connected with an application for approval. They are also appropriate in relation to monopoly functions of councils, such as the annual charge for domestic waste removal services. However the restrictions apply to councils business activities also. The vast majority of submissions on this issue to the review committee argued that the current provisions seriously disadvantage councils against their commercial competitors, including the submission from the former Local Government and Shires Associations. One example was that Sutherland Shire Council submitted that fees and charges must be able to be set in a more responsive way for business activities, such as function centres and kiosks.

The review committee agreed that a new model should be developed which provides for flexibility in setting fees in response to market conditions for those activities which are business activities or contestable. The bill proposes the insertion of new divisions 1, 2 and 3 in part 10 of chapter 15 of the Act to facilitate increased flexibility in the setting of fees, in accordance with the recommendations of the review committee. The new fee setting system is applicable to the operation of an abattoir, the operation of a gas production or reticulation service, the carrying out of water supply or sewerage services, the carrying out of private work under Section 67, the carrying out of graffiti removal work under Section 67A, and any other prescribed business activity.

The new fee-setting system affects only those activities that are contestable. This means that activities undertaken as a community service, or where there is no market competition, or where the activity is a regulatory activity not subject to competition will continue to set and apply fees according to the current provisions. The new fee-setting system will also not affect the method by which annual charges or special rates for water supply and the like are set, or section 608 fees that are already set under any Act or regulation by the director-general. These charges are already appropriately regulated.

The new, more flexible fee-setting model proposed in the bill allows a pricing methodology to be adopted and explained by council in its management plan, but does not require the actual price for each activity to be disclosed in the management plan. The normal public consultation period applies to the plan and the plan must be adopted by council resolution. The proposed amendment also allows fees to be set and adjusted quickly as needed in the circumstances, as long as they are within the costing methodology set out in the management plan, or subject to a specific council resolution.

For new or different services arising throughout the year and after the adoption of the management plan, council may either apply the costing methodology adopted in the management plan, or set a fee in accordance with the current section 612, providing 28 days public notice of the amount of the fee. To cater for the new content of management plans, consequential amendments to section 404 of the Act are also proposed. In relation to the carrying out of private works under section 67, the requirement that if the council wishes to charge less than the amount set, the decision to carry out the work must be made by resolution of the council at an open meeting prior to the work being done, will be retained.

I turn now to controls on use of council revenue. The Local Government Act places strict controls on the use of certain council revenue. Section 409 imposes restrictions on money raised from the rent, profits or other proceeds from a lease, licence or other estate in respect of community land, so that this revenue must be expended on

community land acquisition and maintenance. That section also imposes the restriction that money that has been received as a result of the levying of a special rate or charge may not be used for a purpose other than the purpose for which it was levied. This applies to charges including water supply and sewerage charges. The Minister may, however, allow an internal loan if the money is not immediately required for the purpose for which it was received.

Those restrictions are based on the responsibilities that a council has in its use of public funds, namely to ensure accountability, that the community receives best value for its money, and the best possible management of public assets held in trust for the community. Those restrictions are not applicable to the private sector and, therefore, place council business operations at a disadvantage by comparison. Councils that operate Category 1 businesses in particular are required by the National Competition Policy Agreement to include a return on capital invested, that is, dividends. This mirrors imperatives in the private sector. Category 1 businesses are those having an annual sales turnover or gross operating income of $2 million and above. There is some question as to whether the Act currently allows councils to deal with these requirements through the transfer of dividend payments between council funds, from restricted use funds to unrestricted use general funds.

There are conflicting interpretations of the scope of section 409, and legislative amendment is proposed to clarify the situation. It is proposed that the restrictions that apply to money raised from the rents, profits or other proceeds from a lease, licence or other estate in respect of community land be lifted. The review committee considered that rental income from community land, as opposed to operational land, will always be far outweighed by the costs of community land management. The committee also considered that the requirement in section 409 for separate accounting procedures for the small amounts raised is administratively inefficient. Consequently, the bill proposes deletion of subsection (3) (d) of section 409 of the Act to remove the restrictions on the use of income raised from the rent of community land. The bill also proposes the insertion of subsections (5) to (7) into section 409 of the Act to define the proper relationship between restricted funds held under section 409 and a council's general funds, including the circumstances in which dividends may be paid by a council business activity.

Under the amendments contained in the bill, a council may choose to deduct from the money which is restricted in its use for the purpose of water supply or sewerage services, an amount in the nature of a dividend, and to apply that money to any purpose under the Act or any other Act. That is, the dividend payment becomes available for use at council's discretion. However, it is critical to the operation of the provision that the transfer of such payments is regulated properly. Therefore, the Minister for Energy and Utilities, with my concurrence, will publish guidelines relating to the management of the provision of water supply and sewerage services. A council must comply with those guidelines before any deduction from the restricted use funds is made, and must record its compliance by resolution of council in an open meeting. If a council is found not to have complied with those guidelines, the Minister for Energy and Utilities may, with my concurrence, direct the council to comply with the guidelines before any further deduction is made.

A further amendment relates to the ability of councils which are water supply authorities under the Water Management Act 2000 to also pay a dividend. The Water Management Act does not specifically constrain councils which are water supply authorities from paying a dividend. Nevertheless this ability needs to be put beyond doubt. The bill will specifically provide that the ability to pay a dividend as per the amendments to section 409 (5) and the constraints on such a payment under section 409 (6) and (7) also apply to local councils which are water supply authorities under the Water Management Act.

Amendment of the definition of "domestic waste" in the dictionary to the Act is also proposed, to clarify that the term "domestic waste" applies only to household garbage, including recyclables, but does not apply to household effluent waste. The anti-competitive nature of the annual charge for domestic waste management services can be justified on the basis that it is in the interests of the community to provide an effective low-cost waste removal service. However the same justification does not apply to household effluent waste, which may be the subject of commercial sewerage works. The amendment of the definition ensures that anti-competitive provisions are retained only when they can be adequately justified.

I turn now to business approvals. Section 68 of the Act requires that council approval be obtained before operating an undertaker's business and/or a mortuary. As access to an approved mortuary is a requirement for an approval to carry on an undertaker's business, the approvals are effectively connected. Applicants for council approval to operate an undertaker's business or a mortuary must comply with public health standards, which are enumerated in schedule 4 to the Local Government (Orders) Regulation 1999. The standards relate to the construction of mortuaries, water supply and sewerage, and closet and ablution facilities. These standards are critical to the maintenance of public health and safety and the occupational health and safety of staff that work in such facilities.

Public health legislation in New South Wales also imposes standards with respect to the handling of bodies and related matters. It can be seen that quite apart from the business approval, undertakers and mortuaries are regulated to ensure that the business is conducted in appropriate and secure ways. It is worth noting that other Australian jurisdictions do not require business approvals for the funeral industry. Maintenance of both public and

occupational health and safety is achieved through enforcement mechanisms without the need for business approvals. In terms of national competition policy principles, business approvals impose barriers to entry into a market, because competition is restricted to those persons who are able to obtain the necessary approval from a local council.

Under the National Competition Policy Agreement it must be demonstrated that the benefits to society of restrictions on competition outweigh the costs of those restrictions, and that the objectives of the legislation can only be achieved by restricting competition in this way. The review committee found that the current requirement to obtain prior approval to operate an undertaker's business or a mortuary facility is anti-competitive, and cannot be justified on other grounds, given the regulation of health and safety matters by the Local Government (Orders) Regulation and public health legislation. Predevelopment regulation can be limited to the requirements of the Environmental Planning and Assessment Act 1979 for development consent, with operational matters continuing to be regulated under the Public Health Act. I commend the bill.
