Local Government Amendment (National Competition Policy Review) Bill.

Second Reading

The Hon. TONY KELLY (Minister for Rural Affairs, Minister for Local Government, Minister for Emergency Services, and Minister Assisting the Minister for Natural Resources (Lands)) [2.48 p.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 is one of the core Acts regulating local councils and county councils. It deals mainly with the establishment and functioning of local and county councils. It gives council 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 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, because under the Local Government Act the conduct of certain business activities requires the approval of council. Examples include the requirement to obtain a business approval to operate an undertaker's business or a mortuary, or to operate a public car park or a caravan park or a camping ground. The other way in which councils have an impact on competitive neutrality is in relation to councils' own business activities, that is, in the manner in which council businesses operate and interact with private sector competitors, such as private certifiers who certify 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 the 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 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 comprising senior officers from the Department of Local Government, the Cabinet Office, and NSW Treasury. The committee was assisted by a reference group comprising senior officers from Lgov NSW, the Institute of Municipal Management, the Municipal Employees Union New South Wales Branch, and the Environmental Health and Building Surveyors Association.

The committee's report of July 2001 entitled "National Competition Policy—Review of the Local Government Act" was published by the Department of Local Government and has been widely 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.

In relation 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.

In relation to fees and charges for business activities, a number of sections in the Act require councils to set fees in a particular way. Section 608, for example, 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 they are 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 disadvantaged councils against their commercial competitors, including the submission from the former Local Government and Shires Associations. For example, 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 that provides for flexibility in setting fees in response to market conditions for activities that are business activities or contestable.

The bill will insert 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 only affects 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 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.

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 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. These 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. These 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; in other words, a dividend. This mirrors imperatives in the private sector. Category 1 businesses are those having an annual sales turnover or gross operating income of $2 million or more. 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—would 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 deletes section 409 (3) (D) of the Act to remove the restrictions on the use of income raised from the rent of community land.

The bill also inserts subsections (5), (6) and (7) in section 409 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 the council business activity. Under the amendment contained in this 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 report 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, also to pay a dividend. The Water Management Act does not specifically constrain councils, which are water supply authorities, from paying a dividend. Nevertheless, this ability must 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 subsections (6) and (7) of section 409 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 where they can be adequately justified.

Section 68 of the Act requires that council approval be obtained before operating an undertakers business and/or a mortuary. As access to an approved mortuary is a requirement for an approval to carry on an undertakers business, the approvals are effectively connected. Applicants for council approval to operate an undertakers business or a mortuary must comply with public health standards, which are enumerated in schedule 4 to the Local Government (Orders) Regulations 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 who work in such facilities.

Public health legislation in New South Wales also imposes standards with respect to the handling of bodies and the 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 national competition policy 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 be achieved only by restricting competition in this way. The review committee found that the current requirement to obtain prior approval to operate an undertakers 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.

The bill therefore repeals these business approvals, and a consequential amendment of the Local Government (Approvals) Regulation 1999 is also necessary. The Local Government (Orders) Regulation will continue to give councils the power to enforce building standards established for mortuaries on the grounds of public health and safety. This bill identifies and addresses those parts of the Local Government Act that may potentially have anti-competitive effects. By doing so, it continues to promote greater accountability by councils to their communities and provides a clearer distinction between their functions of providing services and regulating activities. Councils will benefit from the removal of the disadvantages to competitiveness currently applying in the legislation. Non-council businesses will also have greater opportunities to compete with local councils and to carry out business with councils. The proposed amendments carefully balance the competing interests of competitiveness and accountability of government, and the community will benefit from the enhancement of competition in relation to local government. I commend the bill to the House.