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Date

31 October 2018

Subject

Aged Care Services - Competitive Neutrality Considerations

Questions

1. What is the legislative or regulatory instrument that requires Council to comply with competitive neutrality principles in certain circumstances, and can it be amended by the State Government?
2. When the Commonwealth Government ends the 'block funding' model for the Commonwealth Home Support Program (**CHSP**), and a competitive market for aged care services is established, will competitive neutrality principles apply to the services that Council currently provides under the CHSP?
3. If competitive neutrality principles apply to Council's CHSP services after block funding is ended, what are Council's obligations?
4. Would it be in the public interest for Council to continue to provide the CHSP services applying cost-reflective pricing, as applied under competitive neutrality principles?
5. What are the consequences and risks for Council if it does not comply with competitive neutrality principles?

Summary of advice

Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.

1. Council's obligation to comply with the competitive neutrality principles is not enshrined in any legislation or regulatory scheme. Instead, it arises because of the commitment Council has made to the State Government to be bound by the principles – it is, therefore, best described as a significant policy commitment.

Amending the principles themselves is a matter for the State Government, and no consultation with, or approval of, local

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government would be required. Council could (in theory) unilaterally withdraw from, or modify its commitment to, the competitive neutrality principles without the agreement of the State Government or other councils. However, given that the competitive neutrality principles require each State and Territory Government to ensure that the principles apply to local government, such action may impact Council's relationship with the State Government. It may also prompt the introduction of legislative obligations to observe competitive neutrality principles.

2. On balance, we think it more likely than not that Council's CHSP services are properly characterised as a business activity, although the position the Commissioner for Better Regulation (**Commissioner**) would take on this point in the event of a complaint is not entirely clear.

That said, if Council's share of the aged care market is 30% or greater, and it continues to provide subsidised CHSP services once block funding is withdrawn, its activities are quite likely to be a 'significant business activity'.

3. Assuming that competitive neutrality principles apply to Council's CHSP services after Commonwealth block funding is ended, Council must consider implementing competitive neutrality measures. These include:

- 3.1 cost-reflective pricing;
- 3.2 corporatisation; and
- 3.3 commercialisation.

4. Council will need to engage in an open and transparent public consultation process to complete its assessment of the public interest. Absent a public consultation process, it is difficult to offer a firm view as to whether the public interest would support Council continuing to offer a subsidised service.

On the information available alone, we think that a comprehensive public interest test would more likely than not conclude that Council's public policy objectives would not be jeopardised by it providing full cost-reflective CHSP services.

This is primarily because the size and sophistication of the aged care services market would suggest that other providers in the market would be able to deliver the CHSP services – and contribute to Council's policy objectives – if the implementation of cost-reflective services reduced the number of clients that could access Council's services.

It also appears that, if the introduction of cost-reflective services *would* jeopardise Council's public policy objectives, there are a number of alternative ways that it could achieve those objectives.

5. In the event that Council chooses *not* to comply with the competitive neutrality principles and continues to provide subsidised CHSP services following the withdrawal of block funding, the primary risk for Council is a complaint to the Commissioner.

Contact

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PartnerA handwritten signature in black ink, consisting of several fluid, overlapping strokes that form a cursive-like shape.

Kate Oliver

Detailed analysis

Background

1. Council currently provides a range of aged care services to over 3000 clients in its municipal district under a contract with the Commonwealth Government known as the CHSP.
2. We are instructed that:
 - 2.1 the Commonwealth Government provides funding directly to Council on a 'block funding' basis that amounts to approximately \$6 million per year;
 - 2.2 the State Government provides funding directly to Council for services for people under 65 years old;
 - 2.3 Council supplements the Commonwealth Government's funding by providing approximately \$6 million per year of its own funds; and
 - 2.4 client fees for aged care services amount to approximately \$1 million per year.
3. The Commonwealth has announced that it will end block funding of the CHSP in Victoria in 2020. Instead of providing 'block funding' directly to Council, a market-base for aged service providers will be established under a 'consumer directed' care model - i.e. Council.
4. Council is currently conducting a review of its CHSP services, and is considering continuing to provide those services on a subsidised basis.
5. Council is concerned that competitive neutrality principles will apply once the competitive market is established, which may prohibit it from continuing to subsidise the CHSP services it provides.

Qualifications and assumptions

6. Our advice has relied on the information, data and analysis provided by Council regarding the performance of Council's CHSP services.
7. We have not independently interrogated the information and data provided by Council. In the event that the information is incorrect or misleading, our advice may change.
8. We have assumed that the figures referred to in para 2 above are correct and have not undertaken a further assessment of Council's funding arrangements for the CHSP services.

Legal analysis

9. **What is the legislative or regulatory instrument that requires Council to comply with competitive neutrality principles in certain circumstances?**
 - 9.1 The competitive neutrality principles that apply to Council form part of the National Competition Policy (**NCP**).
 - 9.2 The NCP is underpinned by three inter-governmental agreements between the Commonwealth and States and Territories, the most relevant of which is the 'Competition Principles Agreement' (**CPA**) that was agreed on 25 February 1994.

- 9.3 Under cl 7 of the CPA, each State and Territory Government is obliged to introduce and apply competitive neutrality policy and principles to local government. As such, amending the CPA itself is a matter for the State Government, and no consultation with, or approval of, local government would be required.
- 9.4 In June 1996, the Victorian Government published the 'National Competition Policy and Local Government – A Statement of Victorian Government Policy' (**1996 Statement**). The 1996 Statement documented the agreement between the State Government and local government to apply the CPA to local government.
- 9.5 In December 2008, the Victorian Government released a revised version of the 1996 Statement (**2008 Statement**). The 2008 Statement restates local government's continued obligation to comply with the NCP and the CPA, and provides practical advice to councils on how to apply the principles of competitive neutrality.
- 9.6 Beyond the CPA and the agreement documented in the 2008 Statement, there is no legislative or regulatory instrument that requires Council to comply with the competitive neutrality principles in the CPA.
- 9.7 Council's obligation to comply with the NCP amounts, therefore, to a significant policy commitment, and is not embodied in any legislation or regulatory scheme.
- 9.8 There is, however, scope for the State Government to formally amend the application of the CPA in relation to specific goods or services. This occurred in 2003 in respect of Council-owned aquatic and leisure centres, which were exempted from the NCP in respect of recreational aquatic activities (but not other amenities and services provided at a centre).
- 9.9 As the NCP only amounts to a policy commitment, Council could (in theory) unilaterally withdraw from, or modify its individual commitment to, the competitive neutrality principles without the agreement of the State Government or other councils.
- 9.10 However, given that cl 7 of the CPA requires each State and Territory Government to ensure that the principles apply to local government, withdrawing from some or all of the CPA may impact Council's relationship with the State Government and/or give rise to criticism. The State Government might take steps to enforce compliance with the principles through legislation.
- 10. When the Federal Government ends CHSP block funding, and a competitive market for service provision is in place instead, will competitive neutrality principles apply to the services Council provides under the CHSP?**
- 10.1 Whether NCP and the CPA will apply to Council's CHSP services once block funding is withdrawn by the Commonwealth depends on whether the service Council provides under CHSP constitutes a 'significant business activity'.
- 10.2 The principles of competitive neutrality aim to ensure that significant government businesses, including significant business activities of councils, do not enjoy any net competitive advantages simply as a result of their public-sector ownership. In other words, it aims to ensure that government businesses operate on a fair and equitable basis – i.e. it aims to create a 'level playing field'.
- 10.3 Implementation of NCP involves consideration of the following three key questions:
 - 10.4 Is the activity subject to NCP – i.e. is it a significant business activity?
 - 10.5 If so, do the expected benefits of introducing a competitive neutrality measure outweigh the costs?
 - 10.6 If so, is that measure in the public interest?

- 10.7 There is no definitive guidance provided on the meaning of 'significant' in the context of NCP and the CPA, however, the 2008 Statement provides that a council must make its own two-part assessment to determine whether, in each case, an activity is:
- 10.7.1 a business; and, if so
 - 10.7.2 a significant business.
- 10.8 In 2016, the Office of the Commission for Better Regulation (**OCBR**) issued a Guidance Note on the issue of significance, 'Identifying significant business activities for competitive neutrality'. This comments on 'what is a business' and 'what is significant'.
- 10.9 As to 'what is a business', the Guidance Note identifies the following questions to be considered:
- 10.9.1 Do the activities result in the sale of a good or service (e.g. where commercial services are delivered beyond those required by government regulation)?
 - 10.9.2 Are the costs of providing the goods or services predominantly met by users (even if they are not all recovered)?
 - 10.9.3 Is there an actual or potential competitor?
 - 10.9.4 Do the managers of the activity have a degree of independence in producing or supplying the good or service and the price at which it is provided?
- 10.10 Assessing whether the goods or services provided under the CHSP services are *predominantly* met by users is not straightforward. This is especially so given that the bulk of aged care services in Australia receive some form of government funding – i.e. subsidisation is common across the sector, and is not limited to aged care services delivered by local government.¹
- 10.11 In this respect, the Guidance Note provides some further assistance. It states that:
- In applying this criterion, regard must be had to whether the Government's policy intention (for example, as indicated through funding policies) is that the costs of provision mostly be met by end users. Government programs that are funded directly from the budget are not activities for which the costs of provision are met — or intended to be met — by customers.
- In the absence of an explicit Government policy such as this, the premise is that the costs of goods and services sold to the general public, are to be met by the end user (even if, in practice, costs are not fully recovered). For example, recreation centres operated by local councils typically set entry fees and other charges that recover a significant proportion of the costs of the centre and related activities.
- 10.12 So, the significant factors in assessing whether the cost of a good or service is 'predominantly met by the user' are the:
- 10.12.1 underlying policy intention; and
 - 10.12.2 the source of the funding.
- 10.13 It matters less whether the cost of the good or service is fully recovered by government. For example, goods and services that are directly funded by councils with no intention to sell that service to the general public or obtain any return on capital, such as maintaining roads or parks, are unlikely to be considered business activities.

¹ See, Commonwealth Government's summary of aged care funding at <https://agedcare.health.gov.au/aged-care-funding>.

- 10.14 As to whether a business is 'significant', two factors are used to determine this:
- 10.14.1 the size of the relevant business activity in relation to the size of the relevant market; and
 - 10.14.2 the influence or competitive impact of a government business activity in the relevant market.

- 10.15 The 2008 Statement further provides:

Significance is not determined by a council's expenditure or revenue on an activity relative to the council's total expenditure or revenue. Significance is relative to the market in which the service operates. Useful questions for 'significance' are:

- **Size of market share**
How many consumers are there for the services offered by the council business activity compared with those for similar privately provided services? What is the size of the council service compared with the size of the whole market? Sales figures may indicate the relative size of a council's market share. Consider the size of the relevant business activity in relation to the size of the relevant market.
- **Influence in the market**
What is the competitive impact of the council business activity in the relevant market? Is the council service a market leader or a minor player? Is the council service growing? If the council's service performance were to decline, how readily could other providers take over its market share? If it improved, would it draw new customers? Consider also, particularly where the council business is the only local or regional provider of the service, would competitors emerge if the council were to call for tenders?

- 10.16 Having regard to the factors set out in paras 10.7 to 10.15 above, there are several factors that indicate that Council's CHSP services constitute a 'business activity':

- 10.16.1 under the proposed funding model, Council will charge CHSP clients a fee for any service they receive;
- 10.16.2 from 2020, it is anticipated that CHSP services will be delivered under a consumer directed care model, where clients will receive money from the Commonwealth based on an assessment of their needs and providers, such as councils, will invoice clients for services rendered;
- 10.16.3 there are over 150 unique aged care providers in the Northern Metropolitan area that would be considered actual or potential competitors to Council's CHSP services; and
- 10.16.4 the councils' CHSP teams have a degree of responsibility for determining how they deliver their CHSP services, and the price at which they should be provided.

- 10.17 Those factors must be weighed against the fact that, in practice, end users are expected to pay a low proportion of the costs of CHSP services. In relation to Council's CHSP services, we are instructed that, for every \$1.00 paid by the end user, the Commonwealth and Council each directly contribute approximately \$6.00 of funding. This raises some doubt as to whether the CHSP services can be characterised as a business, when they are clearly not 'predominantly' funded by the end user.

- 10.18 That interpretation is supported by a previous case considered by the VCEC, where it found that the cost of a Council-owned museum facility that relied on substantial State Government

funding was a cost that was not 'predominantly met by users'.² In that case, the museum facility charged visitors a fee that covered the minimum day-to-day running cost of the museum only, but did not cover any of the broader, more substantial costs of maintaining and improving the museum, which was entirely reliant on funding from the State Government. On that basis, the VCEC concluded that the museum was not a significant business activity.

- 10.19 However, other cases considered by the VCEC where a council has operated services at a considerable loss have still been considered to be 'predominantly met by the user'. This is primarily because the service is operated on a commercial basis with the intention to recover costs from users. For example, the VCEC has previously concluded that council-owned child care centres that generated \$2.3 million in income but incurred over \$3.1 million in expenses were 'business activities'.
- 10.20 Assuming that the CHSP services will be delivered through a fee-based commercial model we think it more likely than not that Council's aged care services would be considered a business activity.
- 10.21 Assuming that provision of the CHSP services is 'business activity', it is necessary to consider whether it is 'significant'. We think that it probably is, because:
 - 10.21.1 while it is difficult to estimate Council's market share of CHSP services with any accuracy, a conservative estimate based on data available puts it at 30% (although some councils in the region estimate that their current market share would be closer to 100%); and
 - 10.21.2 given its capacity to continue to subsidise the CHSP services, Council could influence the market for those services by offering higher salaries and improved conditions to workers, or by charging lower fees to clients.
- 10.22 In relation to the influence on the market, we do not know whether Council's share of the aged care services market is growing or declining, or whether the service that Council provides could be improved or altered in a specific way to attract more clients.
- 10.23 Based on the information and data provided to us, however, we consider that, if the CHSP funding model is revised as planned, and Council continues to provide subsidised CHSP services, its activities are likely to be a 'significant business activity' for the purposes of NCP.
- 10.24 This means that Council needs to be mindful of NCP in the way in which it delivers the CHSP services. In particular, this is likely to mean that Council will need to ensure that it adopts an appropriate competitive neutrality measure.

Alternative funding models

- 10.25 Council has queried whether an alternative funding model to the replacement model currently proposed by the Commonwealth – where providers are reimbursed for their services by the Commonwealth rather than funding being given directly to clients – would change our view on its CHSP services being characterised as a 'significant business activity' (**Alternative Model**).
- 10.26 Our view is unlikely to change if the Alternative Model is implemented. This is because the Alternative Model would still operate, at least in principle, on a 'user-pays' basis.
- 10.27 We do not think that the Commonwealth reimbursing providers for services substantially changes the assessment of the CHSP services as a 'user-pays' model – i.e. the services

² See, Competitive Neutrality Complaint Investigation - Final Report - Paddlesteamer boat cruises provided by Port of Echuca Authority, Shire of Campaspe Council, 28 June 2007 at <http://www.betterregulation.vic.gov.au/Competitive-Neutrality/Investigation-reports>.

would still be considered an activity which is intended to result in the sale of a good or provision of a service directly to a client.

10.28 The Alternative Model would, therefore, also be likely to meet the key criteria for a 'business' described by the VCEC.

10.29 Similarly, if the Commonwealth 'fixed' the fees payable by clients for CHSP services, the services would remain a 'user-pays' model. This is because the CHSP services would continue to be operated on a commercial basis with the intention to recover costs from users, albeit presumably with a reduced scope for variation in pricing between the competitors.

11. If competitive neutrality principles apply to Council's CHSP services after block funding is ended, what obligations do they place on Council?

11.1 Assuming that competitive neutrality principles apply to Council's CHSP services after Commonwealth block funding is ended, Council has three options when considering competitive neutrality measures:

11.1.1 cost-reflective pricing;

11.1.2 corporatisation; and

11.1.3 commercialisation.

11.2 Each of these options is considered below.

Cost-reflective pricing

11.3 Cost-reflective pricing refers to a pricing model for goods or services whereby government agencies aim to recover the full costs of a business activity over the medium to long term, excluding any subsidies.

11.4 Cost-reflective pricing requires Council to have regard to certain 'notional' costs in addition to the actual costs involved in providing the service. These notional costs include items such as an allocation for corporate overheads (e.g. access to Council's HR, IT and legal services). Once these costs have been determined, they will give an indication as to whether a competitive neutrality subsidy is required.

11.5 If, having determined these costs, Council finds that it is, or will be, fixing fees for its services which do not cover all of its costs (ie actual *and* notional), it will be required to undertake a public interest test to determine whether it should provide a subsidised service. The factors that Council must consider in undertaking a public interest test are set out at para 12.4 below.

11.6 Cost-reflective pricing will need to be considered if Council intends to continue providing the relevant service itself under an 'in-house' model and with a subsidy applied.

Corporatisation

11.7 Corporatisation involves Council establishing a separate legal entity to provide the relevant service.

11.8 It will be characterised by the creation of a separate legal entity with:

11.8.1 clear and non-conflicting objectives;

11.8.2 managerial responsibility, authority and autonomy (i.e. independent of Council);

- 11.8.3 independent and objective monitoring of its performance (e.g. if Council establishes a company some oversight is provided by the Australian Securities and Investments Commission);
- 11.8.4 performance-based rewards and sanctions; and
- 11.8.5 competitive neutrality in input and output markets.
- 11.9 Generally, corporatisation involves the adoption of 'private sector equivalent measures', such as the imposition of rate and tax equivalents and compliance with regulations applicable to the private sector.
- 11.10 In most cases, the Board of the separate legal entity that is established will include members from the private sector to assist in ensuring that the entity operates independently of Council. It should not simply be made up of Councillors and members of Council staff.
- 11.11 Corporatisation can be considered if Council chooses to establish a separate legal entity to provide the relevant services.
- 11.12 In that case, Council will be required to comply with s 193 of the *Local Government Act 1989* (**LG Act**).
- 11.13 In this regard, s 193(1) of the LG Act allows Council to create and participate in legal entities such as corporations, trusts and partnerships. If Council decides to establish a separate legal entity for the purpose of providing the CHSP services, it will be required to comply with ss 193(5) to (5C) of the LG Act, which provide:
 - (5) Before a Council does anything under subsection (1), the Council must have regard to the risks involved and comply with subsections (5A) and (5C).
 - (5A) If the Council proposes to exercise any power under subsection (1), the Council must assess the total investment involved and the total risk exposure.
 - (5B) If the proposal involves both an investment and a risk exposure, the sum for the purposes of the application of subsection (5C) is the total of the sum of the total investment involved and the total risk exposure.
 - (5C) If the sum assessed under subsection (5A)—
 - (a) exceeds whichever is the greater of \$100 000 or 1% of the Council's revenue from rates and charges levied under section 158 in the preceding financial year, the Council must consider a risk assessment report (including appropriate reporting arrangements) from an appropriately qualified person;
 - (b) exceeds whichever is the greater of \$500,000 or 5% of the Council's revenue from rates and charges levied under section 158 in the preceding financial year, the Council must –
 - (i) consider a risk assessment report (including appropriate reporting arrangements) from an appropriately qualified person; and
 - (ii) obtain the approval of the Minister...
- 11.14 If Council proceeds with the establishment of a separate legal entity, it will need to have regard to the risks involved with that establishment.

- 11.15 Depending on the outcome of that process, Council may be required to obtain the approval of the Minister for Local Government before proceeding – depending on the sum assessed under s 193(5A) of the LG Act.

Commercialisation

- 11.16 Commercialisation is similar to corporatisation but falls short of full corporatisation. It might include some of the following attributes:
- 11.17 definition of Council's commercial and non-commercial activities (in a business plan);
 - 11.18 clear commercial performance targets;
 - 11.19 separate definition and funding of non-commercial activities;
 - 11.20 removal of regulatory functions from the commercialised section of Council;
 - 11.21 valuation of assets based on fair value;
 - 11.22 introduction of commercial gearing;
 - 11.23 defined reporting requirements; and
 - 11.24 accounts that are separate from Council's.
- 11.25 While commercialisation introduces some elements of corporatisation, it does not involve the establishment of a separate legal entity. Usually, it will involve establishing a separate business unit within Council, devoid of any regulatory functions.
- 11.26 Commercialisation can be challenging to the extent that the relevant business unit must be clearly quarantined from Council's other activities, particularly its regulatory activities, to avoid any perception that Council is somehow subsidising the relevant services.
- 11.27 Commercialisation can be considered if Council chooses to internally establish a separate business unit to provide the relevant services.

Conclusion

- 11.28 On the above analysis, it is our view that Council's continued provision of the CHSP services will probably constitute a 'significant business activity'.
- 11.29 It follows that NCP and the CPA will apply to Council's provision of the CHSP services. This can be addressed by Council adopting one of the three competitive neutrality measures outlined above, and as discussed below.
- 12. Would it be in the public interest for Council to provide cost-reflective pricing for CHSP services?**
- 12.1 If there is net benefit to Council of full cost-reflective pricing, but Council believes other policy objectives could be jeopardised, Council will need to conduct a public interest test. To determine whether there is a net benefit, Council should weigh up the expected benefits that will accrue to Council over time against the costs of introducing full cost-reflective pricing over that same period.
- 12.2 The outcome of the public interest test will demonstrate whether Council is required to implement full cost-reflective pricing.

- 12.3 If a public interest test is completed and demonstrates that a subsidy is required to achieve a public policy objective (or objectives), Council will not have to comply with the NCP. Put simply, it can continue to subsidise the CHSP services.
- 12.4 A public interest test involves:
- 12.4.1 articulating the relevant policy objectives that Council is seeking to achieve with the service (which have Council endorsement);
 - 12.4.2 assessing whether the achievement of those policy objectives would be jeopardised if the particular competitive neutrality measure under consideration (e.g. cost-reflective pricing) was implemented. The CPA states that factors that may be taken into account in assessing those objectives include:
 - (a) legislation and policies relating to ecologically sustainable development;
 - (b) social welfare and equity considerations, including community service obligations;
 - (c) legislation and policies relating to occupational health and safety, industrial relations and access and equity;
 - (d) economic and regional development, including employment and investment growth;
 - (e) the interests of consumers generally, or a class of consumers;
 - (f) the competitiveness of Australian business; and
 - (g) the efficient allocation of resources;
 - 12.4.3 assessing alternative approaches to achieve the policy objectives (to determine the best available means of achieving the overall policy objectives);
 - 12.4.4 conducting public consultation; and
 - 12.4.5 recording the conduct and outcomes of the public interest test (including whether this demonstrates that the achievement of the policy objective would be jeopardised if the competitive neutrality measure was implemented).
- 12.5 We have considered a summary of Council's public policy objectives for the aged care sector in its municipal district and, on the material and information available, our analysis of the public interest is as follows:
- 12.5.1 *Council's policy objectives* – based on an assessment of the 'Darebin Active and Healthy Ageing Strategy 2011–2021' (**Aged Care Strategy**), Council's public policy objectives for the CHSP services could be summarised as:
 - (a) providing services and facilities to the municipal district's ageing community;
 - (b) planning for the needs of the ageing population and ensuring services are well coordinated through collaborative partnerships;
 - (c) developing internal structures and processes to ensure a whole of council approach to the planning and delivery of services to its older citizens;
 - (d) advocating on behalf of the community; and

(e) building capacity and greater independence in the community.

- 12.5.2 *Effect of full cost-reflective pricing on Council's policy objectives* – figures for the aged care sector in the Northern Metropolitan region suggests that there is a sufficiently broad range of service providers and services available that align with Council's policy objectives such that, if Council were to provide full cost-reflective services, its overall objectives would not be compromised – i.e. the services provided by the private aged care sector align with Council's public policy objectives.
- 12.5.3 In this regard, a further question arises as to whether cost-reflective pricing would have an adverse effect on the employees and contractors that provide CHSP services for Council, such that it could be contrary to the public interest to implement full cost-reflective pricing. We are instructed that Council employees and contractors generally have more favourable employment conditions under the relevant enterprise agreement than equivalent employees and contractors in the private sector.
- 12.5.4 If Council were to implement full cost-reflective pricing, it may not be able to price its CHSP services high enough to cover the higher cost of paying staff under the current enterprise agreement – ie it would not be competitive. Alternatively, if Council was forced to revise staff conditions to implement full cost-reflective pricing for CHSP services at a competitive market rate, it might be arguable that it would no longer be able to retain or attract high quality staff to provide the services it were required.
- 12.5.5 The significant issue, however, is whether providing superior employment conditions for CHSP conditions is one of Council's policy objectives. In our view, it is doubtful that this is the case, based on consideration of the existing Aged Care Strategy.
- 12.5.6 While the CPA states that economic development (including employment) may be a relevant factor in assessing the public interest, preserving or improving economic development is not one of Council's stated policy objectives for the aged care sector. Council's policy objectives in the aged care sector are generally directed to providing a service on behalf of the community, rather than improving or developing employment conditions in the sector or preserving staff conditions.
- 12.5.7 That being so, it seems more likely than not that full cost-reflective pricing would be in the public interest. However, this cannot be determined without the full application of a public interest test.
- 12.5.8 There is nothing in the NCP that would prevent Council from amending the stated policy objectives in the Aged Care Strategy to expressly include the recruitment and retention of staff to improve economic development in the municipal district. We could envisage, however, the broader aged care sector raising strong objections to that course of action on the basis that the sector is well developed in the Northern Metropolitan region and it is unnecessary or unfair for Council to promote economic development by subsidising CHSP services.
- 12.5.9 *Alternative ways for Council to deliver its public policy objectives* – if it is clear that cost-reflective services would jeopardise the Council's public policy objectives, there are a number of alternative ways that it could achieve those objectives, including:
- (a) sub-contracting its services to aged care service providers;
 - (b) identifying CHSP services that the private market may not deliver;

- (c) delivering services, or facilitating the delivery of services, in specific geographies or to specific cohorts that are not serviced by the private sector; and
- (d) delivering alternative services outside the remit of the CHSP that realise Council's ageing policy objectives.

It is not clear from the information available that the alternative options for service delivery available to Council mean that cost-reflective pricing would *not* jeopardise Council's policy objectives.

However, given that cost-reflective pricing would not appear to jeopardise Council's policy objectives generally, the availability of alternative options is arguably less relevant to Council's assessment of the public interest.

- 12.6 Council will need to engage in an open and transparent public consultation process in order to complete its assessment of the public interest. Absent a public consultation process, it is difficult to offer a firm view as to whether the public interest would support Council continuing to offer a subsidised service.
- 12.7 On the information available, however, we are inclined to conclude that Council's public policy objectives would not appear to be fundamentally compromised by the provision of cost-reflective CHSP services.
- 12.8 While full cost-reflective pricing would undoubtedly require Council to raise its prices, the relative size and sophistication of the aged care market would suggest that the remaining providers would be able to deliver the CHSP services – and contribute to Council's policy objectives – if less clients could access Council's cost-reflective services.

13. If Council did not comply with competitive neutrality principle, what are the consequences and risks for Council?

- 13.1 In the event that Council chooses *not* to comply with NCP and continues to provide subsidised CHSP services following the withdrawal by the Commonwealth of block funding, the primary risk for Council is a complaint to the Commissioner.
- 13.2 Under the CPA, the Government is obliged to investigate complaints regarding councils' adherence to competitive neutrality. The Government has assigned this task to the Commissioner. The complaint resolution process operates as follows:³
 - 13.2.1 the Commissioner accepts complaints about the extent to which a council's actions comply with NCP from a directly affected person or business, as well as from industry or community groups. The Commissioner cannot initiate an 'own-motion' investigation;
 - 13.2.2 complaints are assessed in accordance with NCP;
 - 13.2.3 the Commissioner will attempt to mediate a resolution between the council and the complainant, and, failing this, the Commissioner will ask the council to produce evidence of its compliance with NCP;
 - 13.2.4 where the Commissioner recommends a course of action which a council should take to comply with NCP, it will follow up on how on the council has achieved compliance;
 - 13.2.5 final investigation reports are published on the Commissioner's website; and

³ See 2008 Statement, p 15.

- 13.2.6 the Commissioner has no enforcement power and does not make any recommendations relating to compensation or termination of contractual arrangements.
- 13.3 Beyond the Commissioner's complaint resolution process, there is no formal mechanism for the Commonwealth or State Government to take action against a council in respect of non-compliance with NCP.
- 13.4 As far as we are aware, the Commissioner has not investigated since her Office's predecessor, the VCEC, investigated a complaint that Hobsons Bay City Council had departed from the correct application of the CNP by not applying fully cost-reflective pricing to two of its long-day child care services. In that investigation, the VCEC concluded that the council's long-day child care service was a significant business under the CNP.

Contact

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