



LOCAL GOVERNMENT ACT REVIEW ►► DELIVERING FOR THE COMMUNITY

## Consultation report – Beneficial Enterprises

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## Introduction

Local governments provide a broad array of services to the community which can have a commercial orientation, such as gymnasiums, pools, parking facilities, childcare facilities, sport complexes, caravan parks and regional airports.

While these activities provide a service to the community, they also add to the complexity of the local government's business structure and recordkeeping. In some cases, these services are large enough to be carried on as an individual business in their own right.

The local government sector advocated for additional powers to form independent corporations, known as 'beneficial enterprises'. These entities could be used to manage a local government's existing business activity or pursue new commercial opportunities.

This paper provides an overview of the feedback received on beneficial enterprises during the consultation period.

## How we consulted

Following the release of discussion papers in September 2018, over 100 workshops, forums and meetings were held with community, local governments and stakeholders. This consultation included 28 community workshops across Western Australia and 'pop-up' stalls in shopping centres and community halls.

To ensure all Western Australians had an opportunity to have their say, multiple workshops were held in all Western Australia's regions.

The workshops provided an opportunity for attendees to discuss topics that were of interest to them. All attendees were also encouraged to provide a submission.

Individual council members, local government staff, peak bodies, community organisations, councils and community were invited to have their say by completing online surveys or providing a written submission.

The objective of the consultation was to seek the views of as many interested people as possible, rather than scientifically sampling the population. As a consequence, responses are from people with a keen interest in local government, either because of their working relationship or because of their experiences with local government (often their own).

## Responses received

### Overview

A total of 3,151 responses to the review were received. This was made up of surveys to each of the 11 discussion papers released, written submissions and informal 'post card' responses collected during workshops.

For every topic, residents/ratepayers provided the largest number of responses.

The gender balance among survey responses was reasonably representative (55% male, 45% female), but the sample was skewed heavily towards older age groups. Around 75 per cent of respondents were aged 46 years or over, with nearly half over 55. Less than 12 per cent were aged 35 or under.

### Breakdown of responses on beneficial enterprises

A total of 337 responses addressed the topic of beneficial enterprises, which included 264 survey responses and 73 written submissions.

The 337 responses were drawn from private individuals and residents/ratepayers groups (159); local government councils and zones (52); council members (43); local government staff and chief executive officers (62); government agencies (4); peak bodies (4); and stakeholders from business and civil society (13).

### What we heard

The topic of beneficial enterprises received the highest number of survey responses. This topic also featured the clearest division in the viewpoints represented in responses originating from members of the public and local government.

While there were exceptions, generally members of the public who responded to the review do not support beneficial enterprises, while as a collective, most local governments do.

Key themes or issues highlighted in the feedback included:

- **One-size-fits all:** While most responses advocated for uniform rules across all local governments, others believed that different rules should apply based on the size and location of each government.
- **Operation of beneficial enterprises in other jurisdictions:** Some respondents noted the perceived failure of local government beneficial enterprises in other states. Other submissions noted that WA is one of the few states where local governments lack the ability to form a corporation.
- **Transparency:** Responses reiterated the importance of transparency and strict regulation if the legislation is introduced.
- **Role of local government:** Many comments centred around the role of local governments arguing that the role of local governments is to provide services to the community and that they should focus on increasing efficiency in these areas before seeking additional responsibilities. Some responses further added that it was these services alone that residents are paying rates for, not any other activities local governments wanted to engage in.

- **Appropriate expertise:** One of the most common themes in survey feedback was the perception of councils' lack of expertise to manage beneficial enterprises.
- **Relationship with the private sector:** Many respondents noted the potential impact on the private sector; with some believing local governments would have an unfair advantage being both the regulator and a participant of the market. Many concluded that local governments should not be in competition with the private sector under any circumstances. In contrast, some submissions from local government employees believed that beneficial enterprises provided opportunities for local governments to meet the needs of their communities in new ways, by either providing a service that the private sector has been unable or unwilling to, or by investing the revenue raised through beneficial enterprises back into community projects.

### **Current Legislation**

Under the *Local Government Act 1995* (the Act), local governments have two options for forming independent corporate bodies:

- Regional local governments; and
- Regional subsidiaries.

A local government cannot form or take part in forming, or acquire an interest giving it the control of, an incorporated company or any other body corporate other than a regional local government or a regional subsidiary.

## Regional Councils

A Regional Council is a corporate entity formed by two or more local governments.

The corporation is a separate legal entity from the local government that conducts business activities in its own name, has similar powers to that of a local government and is subject to all the financial and auditing requirements which apply to a local government.

Regional Councils are typically created as a way for local governments to streamline and standardise a particular service over multiple districts (for example waste management and recycling facilities). This allows the local governments to pool their resources and take advantage of economies of scale.

## Regional Subsidiaries

A Regional Subsidiary is smaller in scope and subject to less regulation than a Regional Council. The governing board can consist of members who are not elected members or local government staff thus allowing people with special expertise to be engaged to oversee the activities.

A Regional Subsidiary is only required to provide annual budgets and financial statements. All other financial reporting is determined by the subsidiary's charter as set out by the local governments that created the subsidiary.

The Act allows a regional subsidiary to be formed to carry out almost any activity which could be performed by a local government; however, the subsidiary cannot pursue commercial activity, carry out speculative investments or participate in non-essential land transactions.

## WALGA's Proposed Council Controlled Organisations Scheme

The Western Australian Local Government Association (WALGA) supports the ability for local governments to establish beneficial enterprises (formerly known as Council Controlled Organisations (CCOs)) where there has been market failure, and benefit to the public.

The key features of WALGA's proposed CCO scheme are as follows:

- A CCO may be formed by one or more local governments;
- An existing business can be converted into a CCO;
- One (or more) local governments must have a controlling share;
- A CCO will be regulated by the applicable company law to the corporate structure adopted (including the relevant taxation regime);
- CCOs will be required to produce an annual report;
- The local government will be required to refer to the CCO in their annual report;
- Directors are to be appointed based on their skills, knowledge and experience (not just because they are an elected or staff member of the local government);
- There is to be a minimum of three Directors/Trustees regardless of the corporate structure adopted;
- A CCO can borrow money from a commercial lender, Western Australian Treasury Corporation or from a shareholder local government; and

- A CCO will be audited by the Auditor General.

A CCO cannot:

- Be used for core functions (for example regulatory functions).

A local government cannot:

- Provide a guarantee or security for the debts of a CCO;
- Lend money to the CCO unless on market terms (including transaction costs);  
or
- Provide any financial advantage (e.g. subsidised fees, charges and rates).

Prior to creation a local government must:

- Consult widely (community consultation framework is currently being considered as part of the Act Review); and
- Prepare a Statement of Intent (reviewed annually) and a Business Plan.

WALGA suggests that the Statement of Intent should:

- Provide how the entity will engage with community expectations;
- Outline the reporting requirements to the local government;
- Be publicly available; and
- Be reviewed annually.

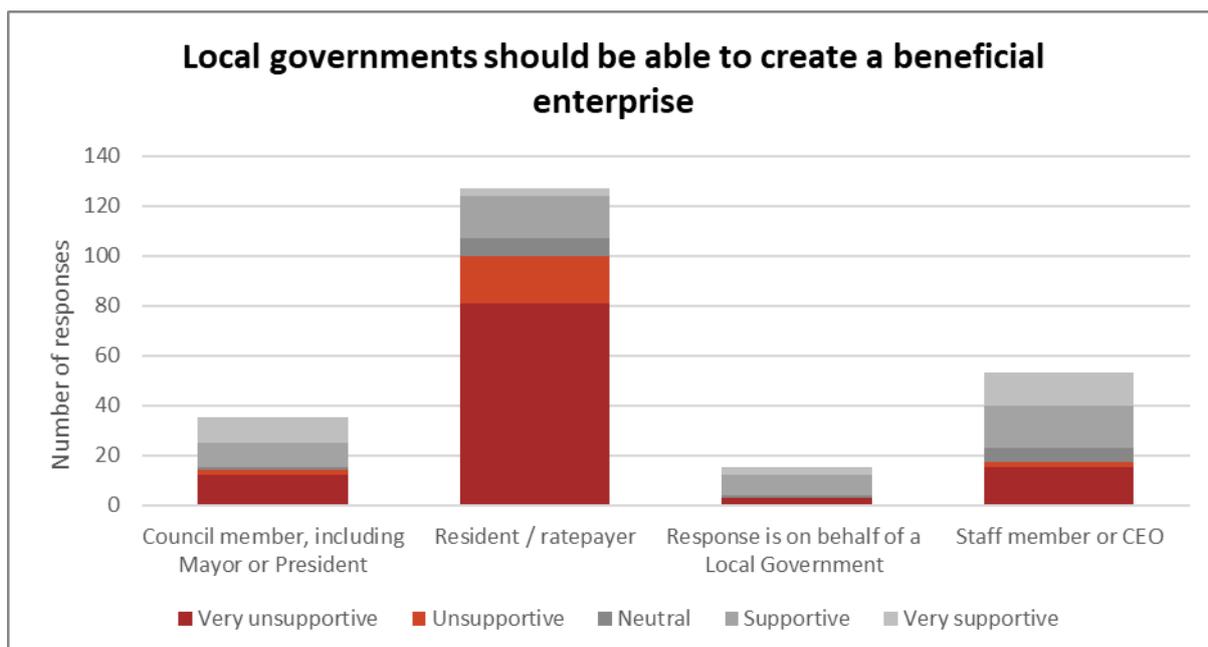
The Business Plan will provide the:

- Rationale for its creation;
- Commercial objectives to be achieved; and
- Key financial and risk parameters under which it will operate.

## **Ability for local governments to create a beneficial enterprise Surveys**

Overall, 58 per cent of survey respondents did not support local governments having the ability to create a beneficial enterprise (47 per cent were 'very unsupportive' and 11 per cent were 'unsupportive').

Respondents identifying as residents and ratepayers were the group most opposed with 79 per cent not supporting the concept (63 per cent were 'very unsupportive').



Eleven local governments (73 per cent) that completed the survey were supportive or very supportive of beneficial enterprises.

The responses from local government staff were split with half of the respondents supportive and half opposed.

Council members tended to be supportive (57 per cent), although support from council members was not universal — more than one-third of council members being very unsupportive of the concept.

### *The case for beneficial enterprises*

#### **Written Submissions**

Local governments largely made the case for beneficial enterprises. Some mirrored WALGA’s advocacy position that beneficial enterprises provide greater flexibility to enter into joint ventures and partnerships while protecting ratepayers from legal liability and financial risk.

Others saw beneficial enterprises as a way of supporting small communities where gaps in service delivery occurred.

The prospect of using beneficial enterprises as an alternative revenue source was also presented in local governments’ responses.

The City of Perth argued that beneficial enterprises would enable the City to more efficiently deliver commercial services such as parking and would reduce potential conflicts of interest by separating commercial arms from the local government.

#### **Workshops**

Feedback received from workshops was varied. While some workshops with staff and community members indicated support for the concept of local governments being able to form beneficial enterprises, there was a lack of support in others.

## **Peak Bodies**

Local Government Professionals WA (LG Professionals) support allowing local governments (with capacity) to form council-controlled organisations (beneficial enterprises) for particular commercial activities. They argue this would follow the New Zealand approach and enable local governments to undertake key placemaking activities more efficiently and effectively.

The Chamber of Minerals and Energy of Western Australia (CME) expressed support for local governments to form beneficial enterprises on the condition that there is adequate corporate governance and a strong business case submitted for independent review. It stated that the business case should demonstrate a low investment risk profile in separating the delivery of services.

Civic Legal highlighted the need for beneficial enterprises to make community benefit its primary goal and for strong mechanisms of accountability with regard to the local government's decisions that surround the creation, investment into and continued operation of such enterprises.

### *The case against beneficial enterprises*

#### **Written Submissions**

Responses opposed to beneficial enterprises frequently cited:

- the need for trust, oversight and accountability in local government
- concerns about the capability of local governments, and a belief that ratepayers would "foot the bill" should anything go awry
- concerns about the prospect of 'privatisation' of local government services and reducing the role of elected members in decision making around beneficial enterprises.

## **Peak Bodies**

The Chamber of Commerce and Industry WA (CCIWA) raised concerns regarding competitive neutrality, governance and handling of conflicts of interest.

The Property Council also expressed concerns with competition, arguing that there were inherent conflicts of interest if local government became a regulator and market competitor.

### *Other perspectives on beneficial enterprises*

#### **Written submissions**

Many responses suggested mechanisms where the risks of beneficial enterprises could be managed or circumstances where the limited use of the model would be appropriate.

The Shire of Dandaragan pointed to the rules associated with a Major Trading Undertaking as a model that could be used for beneficial enterprises. Likewise, the City of Bunbury supported the model subject to beneficial enterprises requiring external approval to be established, auditing by the Auditor General and limiting the

local governments able to form beneficial enterprises by a combination of size and risk.

The Committee for Perth also supports an approach where local governments can establish beneficial enterprises under specific circumstances prescribed in legislation. They suggested including standards that local governments need to meet depending on their financial and operating capacity to ensure the local government does not put ratepayers at risk.

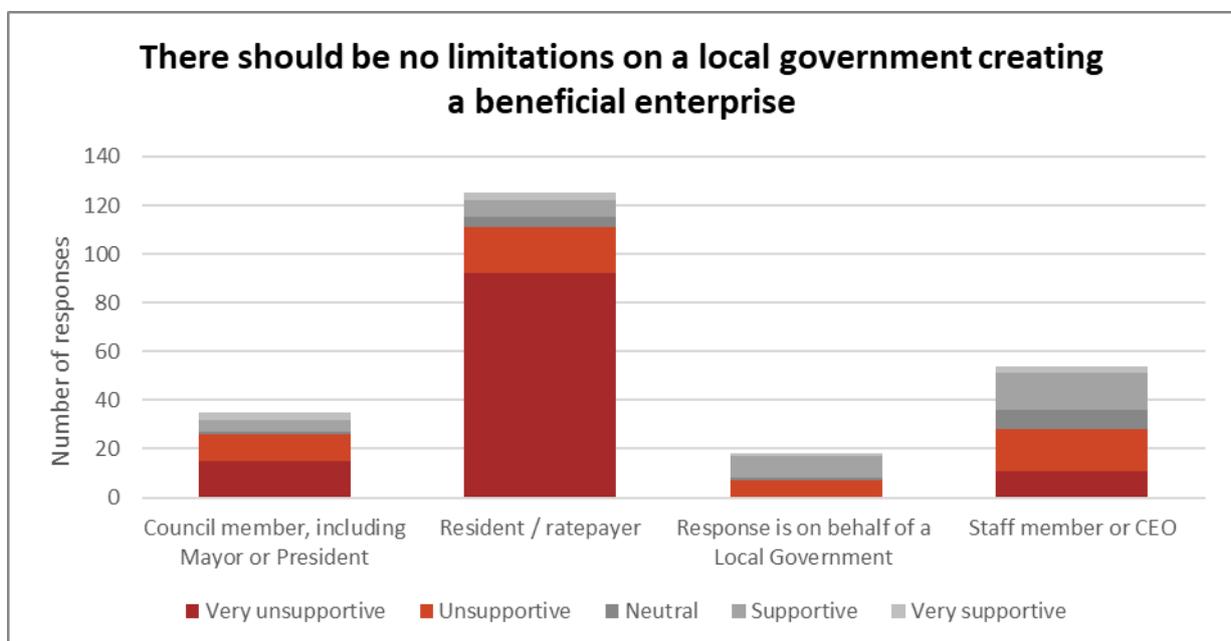
Some responses expressed conditional support for the concept subject to involvement by the community in decision making.

Most respondents did not address the industrial relations implications of the proposal. The City of Swan contended that the model would allow local governments to employ professional directors with business acumen and management experience.

## Limitations on the ability of local governments to form beneficial enterprises

### Surveys and written submissions

Respondents were asked whether they supported a local government being subject to *no* limitations when creating a beneficial enterprise. Eighty nine per cent of residents supported limitations on a local government’s ability to create beneficial enterprises.



Most responses from council members (74 per cent) and staff (52 per cent) also provided that limitations should be placed on the ability of local government to create beneficial enterprises. On the other hand, 56 per cent of responses on behalf of local government supported that there should be no limitations.

### *Low risk local governments*

Assigning a local government's ability to form a beneficial enterprise according to risk may present a means to reward good governance. Currently, local governments are assigned a risk category by the Department annually based on their financial performance and general governance. By expanding and diversifying the factors taken into account, it may be possible to scale the ability to form a beneficial enterprise to meet the diverse capacity of local government.

#### **Surveys and written submissions**

Limiting the ability to create beneficial enterprises to only local governments deemed to be low risk represents one method of controlling risk. From the survey responses, 68 per cent of residents, 49 per cent of council members, 48 per cent of staff members and 65 per cent of responses on behalf of local government did not support limiting the ability of local governments deemed to be low risk to create beneficial enterprises.

### *Financial health of local governments*

The Financial Health Indicator (FHI) is a measurement of a local government's overall financial health. The FHI methodology was developed by the Western Australian Treasury Corporation (WATC) with input from financial professionals working in local governments across Western Australia.

The result is calculated from the seven financial ratios that local governments are required to report annually. The weighted average of the ratios is used to calculate the overall result.

Local governments that perform better across the seven areas tend to have greater financial health. This method, while useful, can fluctuate significantly from year to year. If this approach was to be adopted as a factor to determine whether a local government can form a beneficial enterprise, an average over a period of time, for example five years, would need to be used.

#### **Surveys and written submissions**

Most residents (66 per cent) did not support using measures of financial health as a determinant for a local government's ability to create beneficial enterprises. Local government staff on the other hand supported this concept (54 per cent). Council members were divided (43 per cent supported the concept and 43 per cent did not).

However, overall this approach received greater support compared to using a risk assessment as a limiting factor.

#### **Peak Bodies**

The Department of Infrastructure, Regional Development and Cities does not support the establishment of local government run beneficial enterprises with low revenue streams. It instead supports the establishment of regional subsidiaries by local governments where practical.

## *Investment in a company*

### **Surveys and written submissions**

Local government staff (including CEOs) were supportive (56 per cent) of limiting investment in a company up to a specific percentage of a local government budget. Council members were more likely to oppose the concept (44 per cent) with a significant proportion (21 per cent) expressing a neutral opinion. Most residents (59 per cent) did not support the concept.

### *Banding*

Another approach would be to set the eligibility threshold based on an assigned band. Banding is currently used by the Salaries and Allowances Tribunal (Tribunal) to set the remuneration of council members and local government Chief Executive Officers. Local governments are categorised into one of four bands based on a model that incorporates factors such as population, diversity of services, significant social, economic and environmental issues and expenditure.

Incorporating Tribunal bands could better reflect the diversity and varying capacity of local government. On the other hand, it could be argued that investment or financial risk is not aligned with the factors used by the Tribunal.

### **Surveys and written submissions**

The use of the Salaries and Allowances Tribunal banding to differentiate local governments was identified prior to, and during, the public submission period. In respect to beneficial enterprises, however, there was very limited support (compared to the other controls considered above) for limiting the ability to create beneficial enterprises to band 1 and 2 local governments.

Of the main respondent categories just 6 per cent of local government staff, 7 per cent of residents, 14 per cent of council members, and no local government responses supported the concept.

## **Competition with private businesses**

Section 5.53(1) of the Act requires local governments to comply with National Competition Policy (NCP).

Local governments are required to observe competitive neutrality principles when setting fees and charges.

Broadly speaking, local government business enterprises:

- should not enjoy any net competitive advantage arising simply as a result of their public ownership; and
- should not subsidise their business activities if to do so limits or prevents the opportunities for more efficient provision of those services by the private sector.

Competition policy recognises that local governments have responsibility for achieving social, environmental, and economic objectives, and may conduct a public interest test to recognise these other public policy objectives.

## **Surveys and written submissions**

Respondents were asked whether local government beneficial enterprises should be able to compete with private businesses (note that the question was not qualified with the NCP provisions that local governments must currently observe).

61 per cent of survey respondents did not support local government beneficial enterprises competing with private businesses. Residents were most opposed to the concept with 76 per cent unsupportive. 60 per cent of council members were also unsupportive.

On the other hand, 61 per cent of responses on behalf of local government and 54 per cent of staff members and CEOs were supportive.

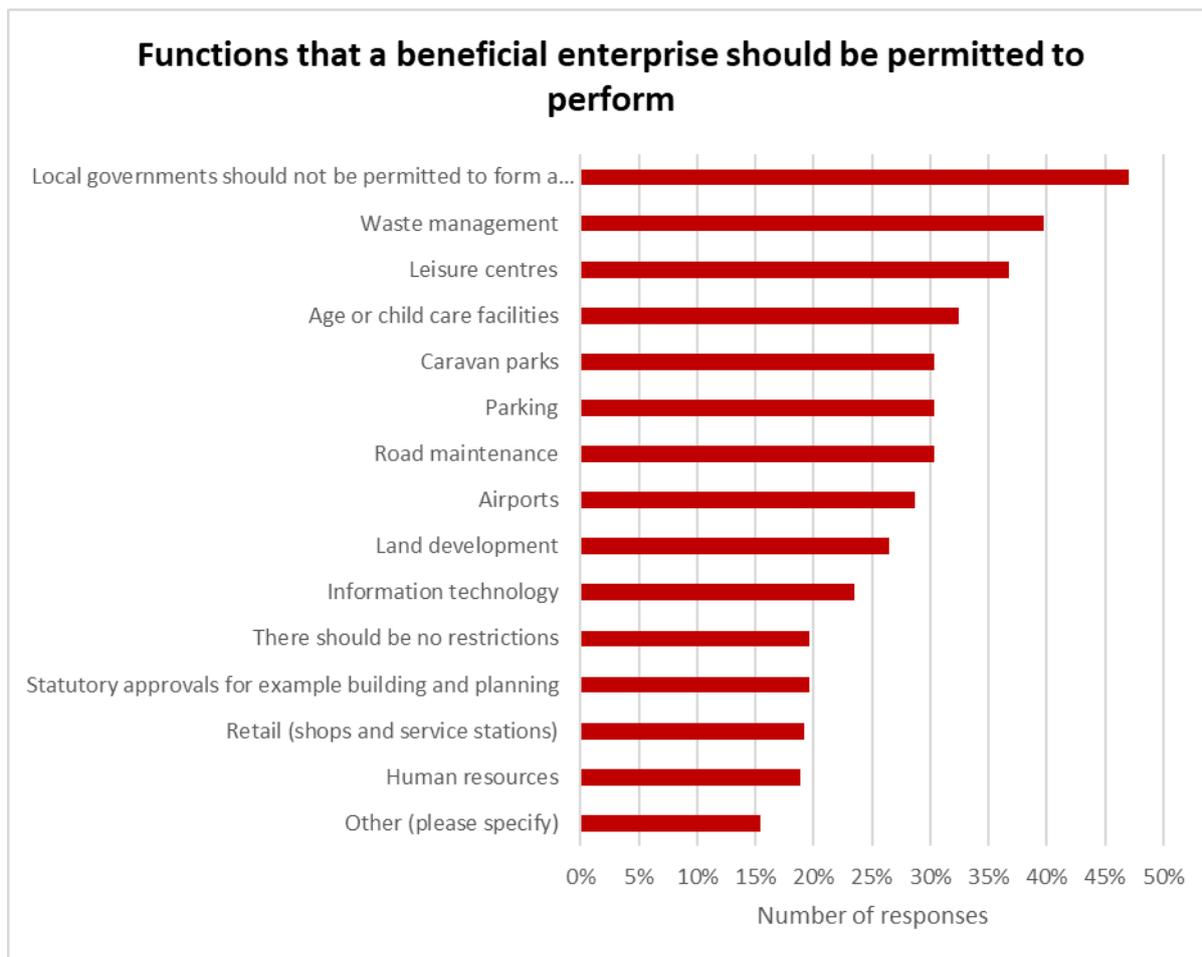
## **Functions of beneficial enterprises**

### **Surveys and written submissions**

The issue of what functions a local government beneficial enterprise should undertake was considered. The most common response (47 per cent) was that local governments should not be permitted to form a company.

Waste management (40 per cent), leisure centres (37 per cent) and age or child-care facilities (32 per cent) were the most frequent responses. Statutory approvals (20 per cent), retail (19 per cent) and human resources (19 per cent) were the least popular responses. Other suggestions included:

- only circumstances where market failure has occurred
- cemeteries, property management, and shared services
- amusement parks, showgrounds and tourism facilities
- art centres and co-working spaces
- environmental services
- renewable energy
- footpaths, street lighting and verge maintenance.



Responses in favour of beneficial enterprises occasionally provided examples of what beneficial enterprises would be used for. The Cities of Wanneroo and Belmont identified land development, while the Cities of Greater Geraldton and Canning proposed using the model for renewable energy projects. The City of Perth highlighted parking services.

Some respondents suggested that beneficial enterprises should be permitted in regional Western Australia where market failure had occurred.

### Peak bodies

CCIWA submitted that that the use of beneficial enterprises should be limited to instances of market failure and when the benefits of intervention outweigh the costs.

CME submitted that beneficial enterprises should not apply to core services where it is in the community's interest to remain as a cost centre. CME also does not currently support establishment of beneficial enterprises involving unregulated regular passenger transport routes.

### Conditions and pay of staff employed by a beneficial enterprise

During the consultation period, concerns were raised that beneficial enterprises will result in:

- Lower wages;

- Less secure employment conditions;
- Employees being employed outside the protection of the Western Australian industrial relations system;
- Use of labour hire agreements; and
- Less accountability of public money.

### Surveys and written submissions

Respondents were asked whether local government beneficial enterprises should be required to employ staff under the same pay rates and conditions as employees of local governments.

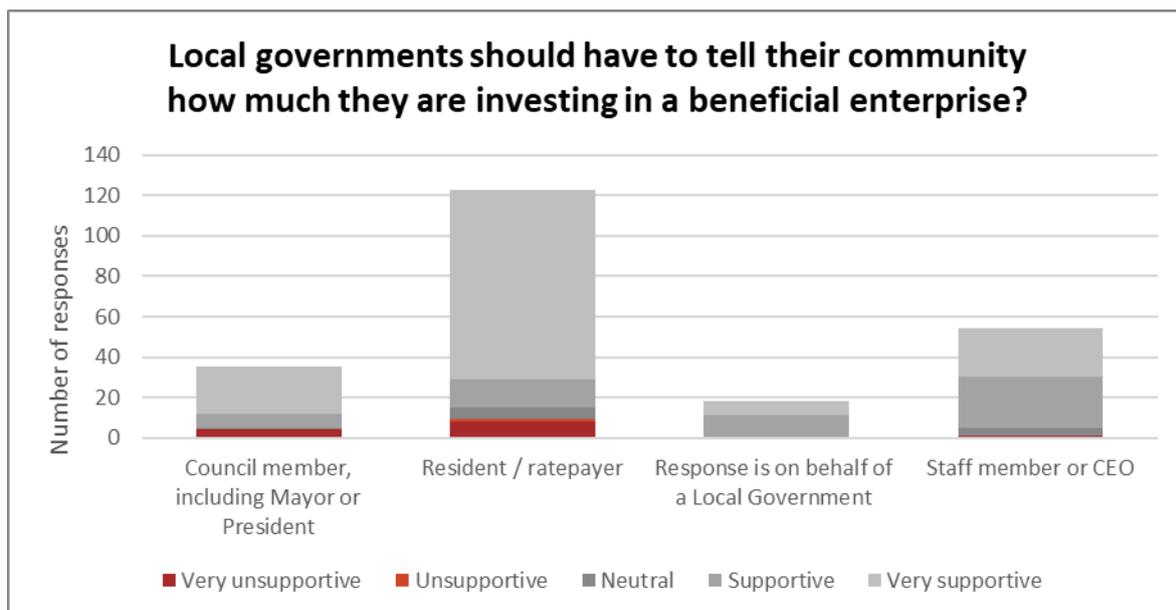
Viewpoints were mixed on maintaining local government pay rates and conditions for beneficial enterprise employees. Most responses on behalf of local government (78 per cent or 18 local governments) and local government staff (46 per cent) did not support this concept. Residents were split on this issue with 38 per cent supporting this concept and 38 per cent being unsupportive. 40 per cent of council members were supportive in maintaining local government employment conditions but 37 per cent were unsupportive.

## Community involvement

### *Informing the community*

### Surveys and written submissions

Most survey respondents (88 per cent) were supportive of a requirement for local governments to inform their community about how they were investing in a beneficial enterprise. All local government survey responses supported the notion of local government informing the community.



## *Community decisions on who can establish a beneficial enterprise*

### **Surveys and written submissions**

Viewpoints on the ability of communities to be able to determine if their local government could establish a beneficial enterprise were divided between the public and responses from local government. 80 per cent of members of the public who responded to the question were supportive of the community determining if their local government could establish a beneficial enterprise.

In contrast, 67 per cent of survey responses lodged on behalf of a local government did not support a community veto. Individual council members were more likely to support community involvement with 54 per cent supportive. Local government staff who completed survey responses were split on the matter.

### *Public meetings*

While companies are required to have annual general meetings for their shareholders, there is no requirement for a beneficial enterprise to have a general meeting for members of the public to attend.

Similarly, State Government trading enterprises, for example Water Corporation, are not required to hold public meetings although they are held to account indirectly through the Parliament via the Minister responsible.

If beneficial enterprises were permitted, it may be argued that it is reasonable to expect a beneficial enterprise to hold public meetings and bear the associated costs incurred with hosting a public meeting. This could be in addition to the requirement to hold an annual general meeting of shareholders, which the local government(s) will be able to attend and hold the beneficial enterprise to account on behalf of the community as the major shareholder.

### **Surveys and written submissions**

Respondents were asked whether local government beneficial enterprises should be required to hold public meetings. Members of the public (81 per cent) and council members (66 per cent) were most likely to support a requirement for beneficial enterprises to hold public meetings. 48 per cent of local government staff and 44 per cent of local government responses did not support the suggested requirement.

### **Guaranteeing debt**

Another issue that was considered is whether a local government should be able to guarantee the debts of a beneficial enterprise.

The ability to guarantee debts raises some issues:

- Commercial finance will be able to be raised at a cheaper rate (leading to a possible competitive neutrality issue);

- The appropriateness of using public money for that purpose; and
- Whether a current local government should be able to place an unknown, contingent liability upon unknown rate payers at an unknown time in the future.

Not allowing a local government to provide a guarantee may limit the ability of a local government to provide public services, such as aged care.

### **Surveys and written submissions**

57 per cent of respondents did not support local governments being required to be guarantors of debt. This included 61 per cent of residents, 48 per cent of council members and 46 per cent of staff members not supporting this concept.

41 per cent of survey respondents that were 'very supportive' of the general concept of beneficial enterprises supported local governments being required to guarantee the debt of beneficial enterprise it established.

## **Lending money**

### *Local governments*

#### **Surveys and written submissions**

The issue of whether a local government should be able to lend money to a beneficial enterprise was also considered.

85 per cent of residents did not support the concept. On the other hand, responses on behalf of local government (83 per cent) and local government staff (56 per cent) were most likely to support the concept.

### *Western Australian Treasury Corporation*

#### **Surveys and written submissions**

Most respondents including council members (58 per cent), responses on behalf of a local government (89 per cent) and staff members (70 per cent) supported the Western Australian Treasury Corporation (WATC) being able to lend money to local government beneficial enterprises. 62 per cent of residents did not support this concept. One local government stated that they were 'very unsupportive' of the concept.

### *Commercial lenders*

#### **Surveys and written submissions**

Respondents were asked whether commercial lenders should be able to lend money to a local government beneficial enterprise. 57 per cent of responses from members of the public were 'very unsupportive' of the concept as were the responses from 30 per cent of council members. Local government survey responses were overwhelmingly positive (88 per cent).

## **Approval from the Minister**

Ministerial approval for the establishment of a beneficial enterprise would address whether processes set out in legislation or policy had been correctly followed. The State Government would not assess the commercial viability of a business proposal, the level of risk to the community or whether appropriate controls are in place under the proposed model.

### **Surveys and written submissions**

More than two-thirds of respondents (67 per cent) supported requiring the establishment of beneficial enterprises to be approved by the Minister. Support for this concept was highest among members of the public (80 per cent), although 51 per cent of council members and 62 per cent of local government staff also supported Ministerial approval. The concept was generally not supported by local governments with only 24 per cent supporting the concept and 47 per cent unsupportive.

## **Approval from Treasurer**

### **Surveys and written submissions**

Less support across all groups existed for requiring Treasurer approval. Nevertheless, support was still high with 62 per cent of members of the public 'very supportive' of the concept.

## **Auditing of beneficial enterprises**

Reforms in 2018 resulted in the Office of the Auditor General (OAG) becoming responsible for local government audits. Respondents were asked if the Auditor General should also be responsible for auditing beneficial enterprises.

### **Surveys and written submissions**

Strong support existed among members of the public (78 per cent), local government staff (66 per cent) and council members (66 per cent) for extending the Auditor General's powers. Half of local governments who responded to the surveys also supported OAG audits.

## **Summary**

An analysis of feedback received through the consultation workshops and submissions has identified the following key themes:

- Residents were the group most opposed to local governments having the ability to form beneficial enterprises.
- Residents also supported limitations being placed on local governments creating beneficial enterprises.
- The most frequent responses regarding the functions that a local government beneficial enterprise should undertake included waste management, leisure centres and aged or child-care facilities. The most common response, however, was that local governments should not be permitted to form a company.

- Viewpoints were mixed on maintaining local government pay rates and conditions for beneficial enterprise employees.
- Most survey respondents were supportive of a requirement for local governments to inform their community about how they were investing in a beneficial enterprise.
- There was support for beneficial enterprises to be approved by the Minister for Local Government.
- There was strong support from respondents for beneficial enterprises to be audited by the Auditor General.

### **Where to from here**

Feedback and suggestions received during the consultation period will be used to inform the new Local Government Act.

Using the feedback and comments received, consideration will be given to the ability of local governments to form beneficial enterprises.