Local Government Act 1995 (WA) Review

Phase Two

Civic Legal Submission

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[redacted]

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Contents

Agile

Beneficial enterprise

Discussion

Local governments are presently empowered to provide services for a fee. They cannot currently form independent corporations to provide these services.

The State Government is contemplating introducing 'beneficial enterprises' to permit local governments with a business plan and other eligibility criteria to provide local government services or facilities with a commercial orientation, such as gyms, pools, parking, childcare, sports complexes, caravan parks and regional airports, through private companies.

The proposal provides that:

1. the local government must 'consult widely' before doing so;
2. the local government must have a controlling share in the business; and
3. the business be subject to existing company law.

While beneficial enterprises are likely to attract badly needed investment from the private sector, including in regional areas, our view is that beneficial enterprises are likely to lead to recurring controversy.

These controversies will arise out of the fact that:

1. the enterprise will be directed at generating profits that represent an acceptable rate of return on its investment, whereas the local government's priority will remain the good government of its district;
2. beneficial enterprises will likely be more sensitive to loss-making or unprofitable services than a local government, particularly in light of the strict laws surrounding corporate insolvency;
3. the involvement of the private sector increases the chances of perceived or actual corruption by the involvement of private money in local government business; and
4. ultimately, a local government could outsource certain community services to a beneficial enterprise but find that the provision of those services achieves a financial performance that is worse than originally hoped for. That in turn might result in the winding up of the beneficial enterprise. The local government would then be in no position to recover the asset (such as a swimming pool complex) and would need to compete in the market to recover or re-establish the asset on behalf of the community. This situation would be exacerbated if the private partners in the beneficial enterprise sought to

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acquire the asset and applied for development approval to remove the complex and replace it with high density residential buildings.

The following issues would need to be addressed before a beneficial enterprise regime could be effectively introduced:

1. how the local government will be accountable, or have the beneficial enterprise accountable to it, for decisions made to reduce or end local services (if at all);
2. at what stage in the lifetime of a struggling beneficial enterprise should the local government resist providing top-up funding as a shareholder and what regulations or guidelines can be drafted for this purpose;
3. whether any limits can be placed on the ability of the other investors, or the public at large, to acquire the assets of a failed beneficial enterprise, such as the local pool building, for 'peppercorn' consideration;
4. what limits can be placed on the communication and consultation between the local government and other shareholders in the beneficial enterprise to retain the current arm's-length treatment of private business by elected members and officers; and
5. whether the beneficial enterprise should be managed to have a lower appetite for risk than other private sector entities, to minimise the likelihood of failure of the beneficial enterprise and loss of the invested assets.

Beneficial enterprises pose a number of risks and potentially unintended consequences that might not be obvious in the short term and might only become so in the long term and the State Government should tread cautiously in this area.

Any amendment to the legislation should avoid the perception that its only purpose is to open a commercial market for services, with partial ownership by local governments being a secondary consideration.

Proposal

If the Act is amended to introduce beneficial enterprises, those amendments should be drafted in such a way as to make benefiting the community its primary goal. Furthermore, there should be strong mechanisms of accountability with regard to the local government's decisions that surround the creation, investment into and continued operation of such enterprises.

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Rates, fees and charges

Rates exemptions

Discussion

The local government sector is presently unable to recover rates from charitable organisations. Local governments must grant rates concessions to those organisations or may be forced to do so by the State Administrative Tribunal (**the SAT**) if it declines to do so.

The law on this issue is not as certain as it should be. It is not set out in the Act nor is it specified in some other legislation. Accordingly, new cases, or new facts, can warrant real reservations in not granting rates concessions. Local governments have to bear the risk when opposing a claim by the claimant organisation before the SAT to defend their decisions not to grant exemptions. Notably, the SAT is not bound by the rules of evidence and the burden on the claimant organisation is relatively low, when compared to the court system.

The current regime favours a claimant organisation even when the organisation may use considerable local resources for its activities and the location of the charity within the area is only a matter of circumstance. Local governments therefore effectively subsidise such organisations for no clear policy reason relevant to the district.

The Act does not currently define the term “charitable” and the SAT must rely on the Preamble to the *Statute of Charitable Uses 1601 (Imp) (43 Eliz I, c 4)*. Local government officers are not generally trained lawyers. They should not have to interpret a rates exemption provision on the basis of an investigation into the status of 17th Century law in England and Australian judicial decisions since then, to see if it applies to their local government.

Currently the threshold for achieving rate exemption for charities is relatively low in Western Australia. The current approach does not appear to place any significant burden on claimants to establish that the property is used on a costs-recovery-only basis.

As a local government has no power to affect the charitable status of an organisation, the ratepayers of the district effectively subsidise the operations of that organisation. However, that organisation may operate to benefit a wider community. While charity is by its nature for the public good, a question worth asking is whether it is a public good (available to the entire population of Western Australia) or whether it is one that is for the local good (available to the community of the particular district).

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Local governments should have the power to decide which organisations meet the (charitable or other social) needs of the local public. It should also have the power to decline to give rates exemptions to organisations that would fit the legal definition of charities which have the purpose of benefiting the wider public.

South Australia's *Local Government Act 1999* (SA) ss.160-165 has a series of clear tests for the purpose to be fulfilled and specific examples of the services to be offered for a rates rebate to be available.

There are many items in the list of non-rateable land in s6.26 of the *Local Government Act 1995* (WA). The list of non-rateable land ignores the question as to whether the use of such land benefits the ratepayers of the relevant district.

State or Federal governments are the more appropriate level of government for extending favourable treatment to charities. It should be left to the relevant local government to decide whether to support a charity within its district by way of rebates or grants.

Proposal

The legislation should be amended by reducing the number of organisations listed in s6.26 of the Act. Any funding or concessions to offset the impact on those organisations should be resolved either as a State matter or through a discretionary local government process.

It is not the purpose of such an amendment to remove favourable governmental treatment from such worthy organisations but to shift the costs burden represented by such organisations to the appropriate level of government. Local governments are not the appropriate level of government to bear those costs by default.

The *Local Government Act 1999* (SA) is a model to consider when amending the *Local Government Act 1995* (WA).

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Smart

Administrative efficiencies – local laws

More consistency between local laws

Discussion

The proposal to achieve consistency between local laws risks appearing to be an attempt to institute State control over local discretions as to what constitutes the good government of a district.

Every local government governs a district that has particular needs. It should therefore retain a reasonable degree of local autonomy to cater for those particular needs. By way of example, the City of Perth faces assorted challenges on the issue of street parking and accordingly has an interest in instituting strict restrictions on such parking. On the other hand, many country shires do not require intensive parking management. A one-size-fits-all approach dealing with this local issue is likely to short-change the City of Perth on parking (or fine revenue) or force disproportionate responses in country shires.

In another context, it may be the case that uniformity of local laws would suit businesses that operate outlets in a number of districts. However, it does not necessarily serve every local government well if they are forced to adopt uniform rules that are primarily for the convenience of such multi-district businesses and only secondarily for the benefit of its residents and ratepayers.

While it can be convenient for such businesses to have to deal with a local law that is consistent with that of every other district, such uniformity detracts from the recognition of the particular needs and nature of each district. Local governments, as a sector, operate for the benefit of their district, not for the commercial convenience of multi-district business interests, although there may well be occasions when the two sets of interests will not diverge from or conflict with each other.

A general proposal to force more consistency between local laws also sends the message to the community that parliament devalues the idea of local governments as relatively independent entities constituting the third tier of government in this country. The proposal would result in a *de facto* regime in which the State ends up effectively legislating what should be legislated by local governments.

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Proposal

We propose that the State Government consult with local governments to first identify if there are any particular local laws that could be applied uniformly throughout Western Australia without detracting from the needs of individual local governments. The State Government should then consider whether to seek amendments to the Act to achieve uniformity with respect only to those local laws. The development of all other local laws should be left to the discretion of local governments based on a non-mandated model local law.

Certification of local laws

Discussion

We have encountered cases where our local government clients had a local law that they wished to enforce against a person they believed to be contravening a provision of the law, but the law did not in fact contemplate that contravention. This can occur where a provision is drafted to deal with a particular mischief, but the drafting accidentally excludes some of the ways in which the mischief can occur.

We believe that such problems have arisen because of the practice in the sector whereby non-lawyer officers or external consultants undertake the drafting of local laws. Sometimes, those officers or consultants copy all of, or large sections from the local law of another local government. State and Federal legislation is treated much more carefully and is inextricably linked to the receipt of advice and drafting input from lawyers.

The examples we have encountered cannot be disclosed without breaching the relevant local governments' legal professional privilege. However, a hypothetical scenario about wood storage can be used (assuming that it was a valid exercise of local government power), as set out below

In our example, the fictional Shire of Woodson is being inundated with termites and the main culprits appear to be residents who store wood near their property boundaries which become infested by termites. The Shire decides that it must draft a local law dealing with wood storage. It prepares a local law including the following provisions:

> ***Object***
>
> *1.2 The object of this Local Law is:*
>
> *(a) to ensure the responsible management and control of wood storage and termite pests in Woodson; and*

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(b) to provide for responsible options for lower risk wood storage to prevent the transmission of pests between properties or into the surrounding environment.

[…]

Interpretation

1.3 In this Local Law:

(a) "Shed" means any house, shed, hut, outbuilding or other permanent residential structure used as or capable of being used for the storage of wood;

Wood Storage

2.1 No person shall store wood in a Shed unless:

(a) the Shed has undergone a domestic termite pest treatment by a Fumigator within the last three years;

(b) the wood is stored on a tarpaulin no less than 30cm wider than the width of the woodpile; and

(c) the Shed is no less than 3m from the nearest boundary of the property.

Assuming the fictional Shire of Woodson in this scenario had appropriately defined Fumigator, the Shire may face the following issues when applying this law:

1. the law only contemplates storage within structures and does nothing to prevent storage on the ground;

2. the law also does not prevent residents from storing wood in a tent or in a trailer or any other portable structure;

3. as subparagraph 1.3(a) reads "*other permanent residential structure*", it is arguable that the terms "*shed*" and "*hut*" are intended to be included because they are considered to be permanent residential structures, yet most sheds or huts as they are ordinarily known would not fall within that definition; and

4. if "*domestic termite pest treatment*" is not defined, then many residents may find ways to 'cut corners' for the treatment intended.

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We have seen local governments face similar types of interpretation issues when legal advice was not obtained prior to the passage of the local law and was instead drafted by an officer or external consultant who was not a legal practitioner. The result is an increased risk of problems in interpretation and enforcement and the costs associated with getting legal advice to interpret the local law as well as the costs of enforcement (or abandonment of enforcement).

It would be worthwhile taking precautions to ensure that the certification process be given substance by requiring the local government to obtain advice from the lawyer prior to certification of the local law.

The value of such advice would lie in addressing questions such as whether the local law covers the mischief the local government is attempting to address and that it is not inconsistent with, or rendered unnecessary, by any written laws.

It would be of great benefit to local governments and their legal advisers if the Department of Local Government Sport and Cultural Industries (**the Department**) published a set of non-mandatory model local laws which could be considered by those parties when drafting or updating their local laws. Then, when certifying the particular local law, the legal practitioner would be able to make reference to the particular model local law and state that he or she has taken that model into consideration.

Proposal

New legislation should introduce the requirement that local laws be the subject of review and advice by a legal practitioner prior to submission to the Joint Standing Committee on Legislation. Further, the legal practitioner must certify that he or she has furnished the local government with advice directed to the mischief sought to be addressed by the local government and/or considered the model local law published by the Department.

Interventions

Tendering requirements

Discussion

Criminalising breaches of administrative procedures will cause CEOs and other officers of local governments to seek legal advice on procurement processes routinely. This would be for the purpose of self-protection as well as for compliance. This will increase the administrative burden and cost to the local government of procurement processes.

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In the private sector, directors are exposed to personal liability through offences under corporation law. That is one set of checks to ensure that the personal profit motives that drive such parties to enrich themselves at the expense of shareholders and creditors are given play within a set of norms considered by parliament to be acceptable.

In the local government sector however, CEO breaches of tendering regulations that we are aware of appear to be the result of misguided attempts to be efficient or dynamic or else compliant with priorities placed upon them by their councils. We are aware of some recent cases of breaches of the tendering regulations, including the high-profile cases of the Shire of Halls Creek and the Shire of Exmouth. In those two cases, the errant CEOs appear to have been motivated to breach the tendering regulations in order to cause their local governments to act expeditiously. There appears to be no evidence that they acted with the dishonest intention of enriching themselves or a third party.

Accordingly, the mischief that was common to the two cases is arguably that of having CEOs and other officers prioritising efficiency over compliance with the regulations. That is hardly a basis for criminalising such breaches.

It might be argued that it is necessary for such breaches of compliance and administrative process to be criminalised because they involve major assets of a local government. However, using such reasoning, one could extend criminalisation to a failure to create a proper asset management plan, or the failure to attend to improvements in the procedures of the local government despite non-conformance reports from its external auditor.

If a CEO or other officer were to breach the tendering regulations as part of a scheme to enrich themselves or a third party, then they could be subject to the processes of the criminal law for stealing or acting corruptly as a public officer.

The objectives of the tendering regulations are transparency, value for money and fairness of process. These are the kinds of objectives that permeate local governments in all their other spheres of activity. Public officers are already governed by a body of laws that impose obligations to act reasonably, in good faith and within power.

If breaches of the tendering regulations are criminalised, that would create a precedent for criminalising other breaches of compliance. Criminalisation in the way suggested is neither necessary nor desirable to ensure better administration.

The State Government should also not discourage people from a career in local government. It should not criminalise an area where the mischief is already addressed under the current regime. The sector is already under continuous

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scrutiny by the Office of the Auditor-General, the Department, the Public Sector Commission and the Corruption and Crime Commission, and the authorities who police criminal law.

Proposal

We propose that the Act not be amended to criminalise breaches of the tendering regulations.

Municipal monitors

Discussion

The reasoning behind the proposal to create municipal monitors is not presently clear. As identified in the Detailed Discussion Paper on Interventions, the State already has the power to appoint a commissioner in certain circumstances. It is not clear how the circumstances in which a municipal monitor would be appointed differ from those relating to appointment of a commissioner.

Although the powers of a municipal monitor are specified, these powers are broad in nature (or vaguely drawn). It also appears that the proposed office of a municipal monitor is intended to have more powers than the Victorian model, which provides for an advisory function to the local government and a reporting function to the State Government. It therefore appears that, in effect, the State is proposing a *de facto* broadening of the circumstances in which the equivalent of a commissioner can be appointed.

The proposal is also to appoint either an administration or council-based person (a municipal monitor versus an appointed person).

It can be imagined that the State wishes to have greater discretion to assist local governments which are substantially dysfunctional but have not yet passed the threshold to becoming completely dysfunctional, and that the office of municipal monitor is the device for providing assistance at a stage earlier than complete dysfunction.

If that is indeed the concept, then there is some merit in it, provided the legislation makes it clear not only what the powers of such a monitor are but also what circumstances would trigger appointment.

One advantage of a regime of municipal monitors is that local governments will know that there are narrower limits to their acting in a dysfunctional way. However, balanced against the need for such monitors is the impending change to the Act making training mandatory for councillors and intending councillors. Often, it is the lack of training that leads to dysfunctional councils (although we acknowledge that

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the exceptional situation can arise where the dysfunctional council arises out of a reckless disregard for the norms of local government rather than a lack of training). If the mandatory training regime is effective, there will be fewer instances of dysfunction, in which case there would seem to be no need for municipal monitors.

One disadvantage of the introduction of municipal monitors is that it opens up the possibility that such monitors get appointed for political, rather than compliance reasons. Any proposal to legislate the office of municipal monitors, or to adjust the powers of commissioners, should be treated cautiously and should not be in a form that grants greater powers than the Victorian model.

Proposal

If an amendment is to be made to the Act, it should contain provisions that ensure that appointments cannot be political appointments. The amendment should provide that municipal monitors be appointed on the basis of their independence as well as experience in working in or advising the sector. The amendment should specify what the powers of a municipal monitor are and what circumstances would trigger an appointment.

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Inclusive

Community engagement – IPR

More inclusive planning decision-making

Discussion

The State Government proposes a more inclusive process of town planning and related decision-making. In our review of planning processes at a major metropolitan local government, we saw first-hand the core of the challenge that is faced by local governments when it comes to community consultation in that process: local governments and, most particularly the Joint Development Assessment Panels (**the JDAP),** are only required to have 'due regard' to the provisions of local development plans, local planning schemes and so on.

Communities are already somewhat extensively consulted in creating planning frameworks as well as at the application stage for many developments. Community dissatisfaction is typically the result of poor implementation of consultation processes, not the lack of them. However, the current law provides that local governments and the JDAPs are only required to have 'due regard' to those provisions. Local governments and the JDAPs are not bound by the outcome of consultations under those provisions.

Our experience reveals that the system of the JDAPs tends to increase the feeling of local alienation, as the decision-making power resides in a panel external to the local government. Further, planning decisions that are not viewed favourably by the developer are appealable and decisions on appeal have tended to favour the proponent and not the community consulted.

Any expansion of community consultation processes is likely to feel illusory without reform of the decision-making process itself. Further consultation without reform of the regime under which planning decisions are currently made is likely to cause more, rather than less, consternation at the local level.

Many planning issues cannot be resolved by consultation alone. Consideration should be given to having more local decision-making power on planning issues or more binding local planning frameworks.

Proposal

Any reform in this area should involve amendments to both the *Local Government Act 1995* (WA) as well as the *Planning and Development Act 2005* (WA).

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Elections

Election funding and disclosure

Discussion

The Discussion Paper suggests that private campaign financing through election donations ‘contributes to a more informed and engaged voter base’. However, we do not consider this to be the only possible outcome.

Many election campaigns can be mistaken or misleading about central issues in debate. Higher campaign financing thresholds are likely to increase the risk that incorrect information is distributed more widely. Further, it will add to the risk that private interests hold greater sway over council decision-making processes. Higher campaign expenditure can have the effect of excluding community-minded and qualified candidates who have less access to private funding.

The State's proposal to make the election gifts disclosure rules less onerous may have a negative impact on transparency.

According to the Discussion Paper, a candidate is currently required to disclose any gifts received after nomination within 3 days of receiving the gift. The State Government proposes that this period be extended to 10 days and would not cover gifts received after the election. It would mean that a candidate could avoid declaring gifts until a substantial time after the election. This proposal would therefore result in lower transparency in election donations.

Election gifts registers do not currently have to be displayed on the internet. The electoral gifts registers are one of the least accessible forms of public document that are mandated to be public-facing. As such, it is difficult to see if council members are possibly influenced in their decision-making by notional obligations to donors. The State’s proposal to put election gifts registers on the website therefore promotes transparency. However, a requirement that it be uploaded only within 10 days of disclosure reduces transparency in the period leading up to an election.

Proposal

We propose that there be no amendment to the Act in regard to the timing of election funding disclosures.

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