National Competition Policy

Guidelines for conducting reviews on anti-competitive provisions in local laws

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Acknowledgement of Country

The Department of Local Government, Water and Volunteers respectfully acknowledges the Traditional Custodians of Country. We recognise the ongoing spiritual and cultural connection Aboriginal Peoples and Torres Strait Islander Peoples have with land, water, sea and sky. We pay our deep respects to their Elders past and present, support future leaders and acknowledge First Nations People's right to self-determination.

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1. Introduction

In April 1995, all Australian governments committed to the National Competition Policy to establish a national approach to achieve greater economic efficiency and to improve the overall competitiveness of the Australian economy.

One of the key principles of the National Competition Policy was a commitment that all governments, including local governments, would not make laws that restricted competition unless it could be demonstrated that:

- the benefits of the restriction to the community as a whole outweighed the costs, and
- the objectives of the law could only be achieved by restricting competition.

To give effect to this principle, governments agreed to review all laws that restrict competition.

Under the agreement, the Queensland Government requires local governments to review anti-competitive provisions in any proposed local laws before the laws are adopted.

These guidelines set out the criteria for identifying possible anti-competitive provisions in local laws and establish the process for conducting reviews of those provisions. Local governments are required to comply with these guidelines when making local laws and failing to do so may result in the local law being of no effect.

These consolidated guidelines replace the separate identification and review guidelines published by the Department in 1997.

2. Relevant legislative provisions

Local laws are laws made by a local government and include:

- interim local laws
- subordinate local laws
- local laws that incorporate model local laws.

(Section 27 of the City of Brisbane Act 2010 and section 26 of the Local Government Act 2009)

An anti-competitive provision in local laws (anti-competitive provision) means a provision that a regulation identifies as creating barriers to—

(a) entry to a market; or

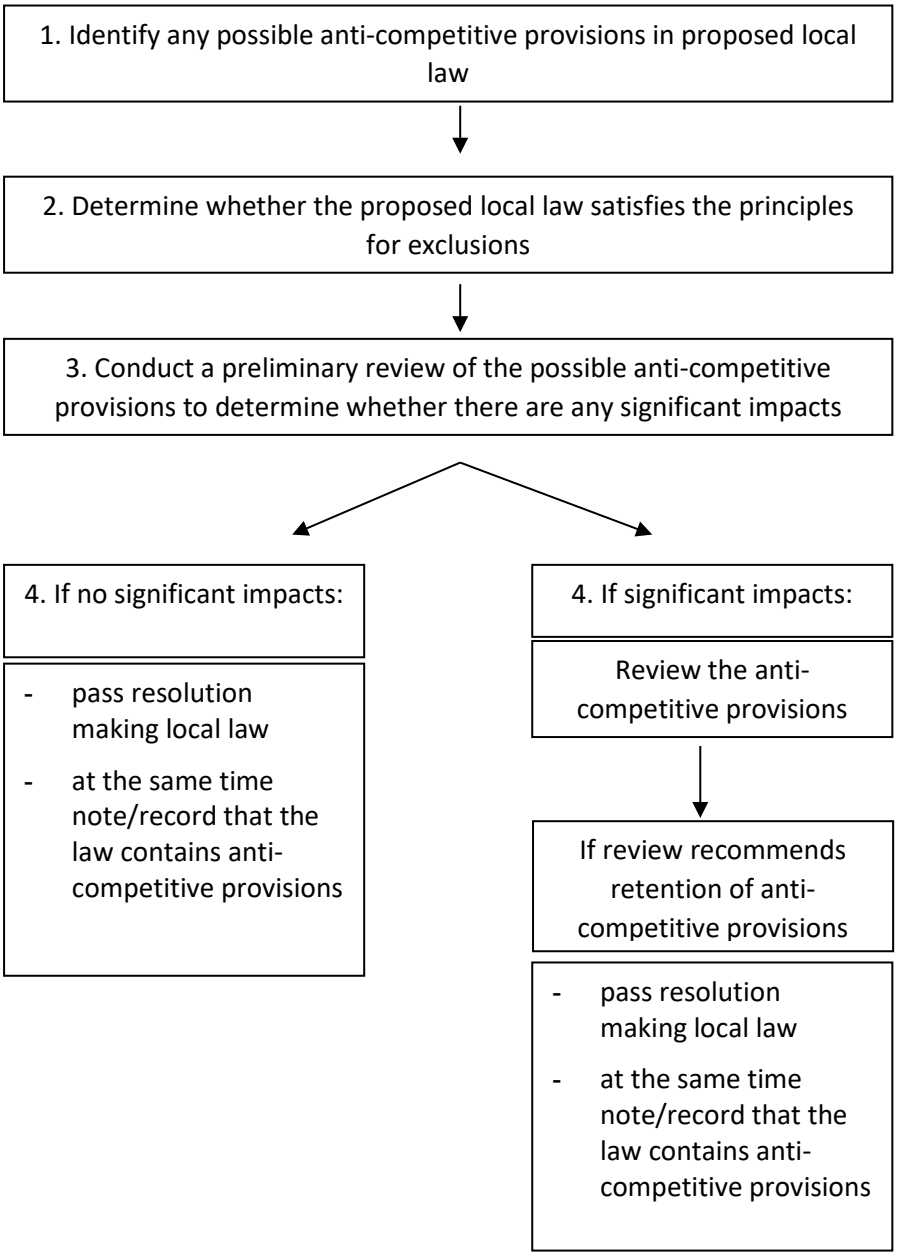
(b) competition within a market.

(City of Brisbane Act 2010 and the Local Government Act 2009)

Relevant legislative definitions are included in the Appendix.

3. Review process

The process for undertaking a review of anti-competitive provisions in a local law is set out below. The following process must be undertaken when making local laws, subordinate local laws and model local laws.



The steps in the process are detailed below.

Step 1 – Identification of anti-competitive provisions

As defined in the City of Brisbane Act 2010 and the Local Government Act 2009, there are two types of anti-competitive provisions, those which:

1) create barriers to entering the market, or
2) restrict competition in the market.

Barriers to entering the market

This type of anti-competitive provision in a local law involves either prohibiting particular business activities or placing obligations on the operators of business activities.

Examples of this type of anti-competitive provision include:

- requiring businesses to obtain an approval from the local government before operating
- placing restrictions on the conduct of the business such as hours of operation, where the business may operate, or the types of goods and services that can be sold
- requiring businesses to comply with standards of operation
- requiring the operators of businesses to hold particular qualifications.

Restricting competition in the market

This type of anti-competitive provision in a local law involves giving some benefit or imposing some hindrance on particular business operators.

Examples of this type of anti-competitive provision include:

- prohibiting itinerate vendors from setting up within a specified distance from existing businesses
- requiring business operators to reside locally
- limiting the number of licenses issued by the local government
- excluding local government businesses from the operation of the local law.

Step 2 – Determination of exclusions

In some cases, a local law that is considered necessary has some unintended impacts on businesses that inadvertently create barriers to entering the market or restrict competition. Depending on the nature of the local law, in some cases, the local government may not be required to conduct a review of any anti-competitive provisions.

The particular types of local laws excluded from the review of anti-competitive provisions are:

1) local laws regulating the behaviour of individuals
2) local laws dealing solely with internal administrative procedures of a local government
3) local laws intended as legitimate measures to combat the spread of pests and disease
4) local laws to ensure accepted public health and safety standards are met
5) repealing local laws

Examples of excluded local laws include:

- A local law that prohibits the bringing of dogs into a public mall to protect the health and safety of customers is exempt from a review of the anti-competitive provisions that may be creating barriers to any businesses that rely on dogs being brought into the mall
- A local law requiring an administrative approval to reserve a community hall for a wedding is exempt from a review of the anti-competitive provisions that may be creating barriers to commercial wedding planners from using the hall.

Step 3 – Conduct preliminary assessment

If an anti-competitive provision has been identified and not excluded (under steps 1 and 2 above), the local government must undertake an assessment of the anti-competitive provisions to determine whether significant impacts will exist if the provisions are adopted.

In determining whether significant impacts will exist, the local government must consider the following factors:

1) the probability of impacts occurring
2) the size and characteristics of the affected businesses
3) the intensity of the potential impact on affected businesses
4) whether particular businesses will incur a disproportionate impact
5) the duration of the impact (for example ongoing or “one-off”)

Examples of potential significant impacts include:

- Where a local law will impact on a relatively significant number of businesses
- Where a local law will impose significant restrictions on business operating in the local government’s area
- Where businesses will be required to pay a substantial yearly license fee to operate
- Where one type of business will be regulated to a lesser degree than other businesses providing the same or similar products.

Step 4 – Outcome of preliminary assessment

The actions to be undertaken by the local government following the preliminary assessment depend on whether there is considered to be significant impacts in relation to the anti-competitive provisions.

No Significant Impacts are identified

Where a local government determines there are no significant impacts from the anti-competitive provisions, the local government is not required to undertake any further review of the anti-competitive provisions but must notify the community of the existence of the anti-competitive provision when making the local law.

Significant Impacts are identified

Where a local government determines there are significant impacts from the anti-competitive provisions, the local government is required to review the anti-competitive provisions in line with the principles outlined below.

4. Conduct of reviews

The purpose of the review of the anti-competitive provisions is to demonstrate that:

- the benefits of the restriction to the community as a whole outweigh the costs, and
- the objectives of the law could only be achieved by restricting competition.

The review process must comply with the following principles:

1) Meaningful consultation with relevant businesses about the anti-competitive provisions
2) Examination of the reasonable alternatives to the anti-competitive provisions
3) A cost benefit analysis that involves calculating the value of the impacts, both positive and negative, of the anti-competitive provisions including:
    (i) the local governments costs in implementing and enforcing the provisions
    (ii) the costs of compliance for business
    (iii) comparison of the total costs for each of the reasonable alternatives
    (iv) the benefits to the community from the anti-competitive provisions
4) Determining whether on balance, the anti-competitive provisions should be retained in the proposed local law in the overall public interest.

Should the review find that the anticompetitive provisions should be retained, notification must occur, as outlined below.

5. Notification of anti-competitive provisions

If the local government passes a resolution under section 29(2) of the Local Government Act 2009 or section 30(2) of the City of Brisbane Act 2010 to make a local law that contains anti-competitive provisions that are not excluded under the guidelines, then the local government must note in the minutes of the meetings that the law contains anti-competitive provisions in addition to the other requirements in the Acts.

For example,

"Council notes that Local Law No.1 (Administration) 2013 contains anti-competitive provisions."

This requirement is in addition to the requirement for the notice to be published on the local government's website, stating that the law contains anti-competitive provisions.

Appendix

Relevant legislative definitions

For Brisbane City Council

Section 41 of the City of Brisbane Act 2010 provides:

41 Anti-competitive provisions

(1) The council must not make a local law that contains an anti-competitive provision unless the council has complied with the procedures prescribed under a regulation for the review of anti-competitive provisions.
(2) A local law, to the extent that it is contrary to this section, has no effect.
(3) This section does not apply to an interim local law.

Section 12 of the City of Brisbane Regulation 2012 provides:

12 Anti-competitive provisions and review procedures

(1) For the Act, schedule, definition anti-competitive provision, a provision is identified as creating a barrier to entry to a market or competition within a market if a local government, applying the competition policy guidelines, identifies the provision as creating a barrier of the relevant type.
(2) For section 41(1) of the Act, the prescribed procedures are the procedures under the competition policy guidelines.
(3) The competition policy guidelines is the document called 'National Competition Policy Guidelines for conducting reviews of anti-competitive provisions in local laws', version 1, made by the department.

For all other local governments

Section 38 of the Local Government Act 2009 provides:

38 Anti-competitive provisions

(1) A local government must not make a local law that contains an anti-competitive provision unless the local government has complied with the procedures prescribed under a regulation for the review of anti-competitive provisions.
(2) A local law, to the extent that it is contrary to this section, has no effect.
(3) This section does not apply to an interim local law.

Section 15 of the Local Government Regulation 2012 provides:

15 Anti-competitive provisions and review procedures

(1) For the Act, schedule 4, definition anti-competitive provision, a provision is identified as creating a barrier to entry to a market or competition within a market if a local government, applying the competition policy guidelines, identifies the provision as creating a barrier of the relevant type.

(2) For section 38(1) of the Act, the prescribed procedures are the procedures under the competition policy guidelines.

(3) The competition policy guidelines is the document called 'National Competition Policy Guidelines for conducting reviews of anti-competitive provisions in local laws', version 1, made by the department.