



Briefing 09/50 October 2009

# Local authorities' power to trade

This is a briefing paper on local authorities' power to trade following the end of categorisation under Comprehensive Performance Assessment and is provided to local authority chief executives, council leaders and APSE contacts in England and to Scotland, Wales and Northern Ireland for information.

## Key issues

This briefing explains the changes to trading powers and the need to amend those powers following the move to comprehensive area assessment from comprehensive performance assessment.

The CPA framework categorised those authorities who had the power to trade based on their performance assessment. The new powers will extend the power to trade to all local authorities.

## 1. Introduction

Local authorities have historically had fairly broad powers to 'trade' with other public bodies for example using powers within *The Local Authorities (Goods and Services) Act 1970* which governs the way in which local authorities are allowed to 'trade' with other public bodies. There is also a power for the Secretary of State to designate by order that any person(s) exercising functions of a public nature shall be a public body for the purposes of the Act.

In addition Section 95 of the *Local Government Act 2003* ("the 2003 Act") authorises the Secretary of State, by order, to permit Best Value authorities to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions. This is commonly known as the power to trade. The power to trade is only able to be exercised through a local authority company (within the meaning of Part 5 of the *Local Government and Housing Act 1984*). Trading under the power needs to be directed towards the achievement of Best Value in the related function. This means that local authorities cannot set up trading arms unrelated to core services or functions. Government thinking behind the new power was to fulfill a promise that the highest performing authorities would be given greater freedoms and

flexibilities. In line with the Governments' performance objectives the power to trade was limited to those authorities that attained a certain level of performance namely those authorities who have been categorised by order under the previous inspection regime as "excellent", "good" or "fair" under the CPA framework. However it is important to note that such restrictions did not apply to the charging provisions under Section 93 of the 2003 Act.

In addition Section 3 of the *Local Government Act 1999* places a duty of Best Value on local authorities and other public bodies. This requires them to secure continuous improvement in the way in which they exercise their functions, having regard to a combination of economy, efficiency and effectiveness. Trading under the 2003 Act powers needs to contribute towards Best Value in the related function.

The trading power permits local authorities to act in an entrepreneurial manner and engage in commercial activities. However in recognising the potential risks in undertaking such activities, especially to local taxpayer's, safeguards were put into place to ensure that trading is undertaken with an appropriate level of consideration by a local authority. The trading power permits local authorities to trade in function related activities only (i.e. authorities need to have the power to engage in an activity before they can trade in it) so the power to trade does not confer a general power to trade but a power that is governed by a criteria designed to protect the numerous interests and stakeholders.

## **2. Revision to the inspection framework and CPA categorisation**

The power to trade provided under the Local Government Act 2003 is currently available to excellent, good, fair, or 1 to 4 star local authorities. In 2006 the responses to the consultation on how to handle the trading powers under CPA received broad support to extend the power further to all local authorities, regardless of categorisation.

Following the introduction of changes to the CPA framework and moves toward CAA the former categorisations permitting trading to those authorities who met the existing criteria were allowed to continue on an interim basis. However it was proposed in a *Freedoms & Flexibilities Consultation* in May 2009 to extend the power to trade commercially to all local authorities. The responses also reflect the calls made in the *Lyons Inquiry into Local Government* that the power should be extended to all local authorities.

## **3. Consultation responses and the regulatory impact assessment**

Most respondents to the May 2009 consultation, including APSE, supported the moves towards extending the trading power to all local authorities. This reflects the general view that the power to trade would be used sensibly and often as a default power to existing legislative powers. As part of the consultation process on extending the power to trade to all local authorities some concerns were raised that some local authority companies would have a captive market or that they use their local authority status to win business, or leverage a competitive advantage over other providers. However the impact assessment specifically considered the legal safeguards that are in place

including the requirements to comply with competition law and the state aid principles, procurement regulations and rules of free movement of goods and non discrimination. The 2004 Order, for example, requires an authority to recover the costs of any services provided to the company.

#### **4. Trading activity**

In September 2006 the communities and local government department (CLG) commissioned a baseline evaluation of the use, awareness, and emerging impact of freedoms and flexibilities in local government from the Institute of Local Government Studies at Birmingham University (INLOGOV). The report published as *Evaluation of Freedoms and Flexibilities in Local Government: Baseline Study* (CLG, September 2006) found that there has been between 20 and 30 per cent of respondents reported that their authorities were taking up trading and charging powers with 3 per cent of authorities saying they had made significant use of the power and 18 per cent of authorities said they had made some use of it. 56 per cent said they had made no use at all of the power. The most commonly traded local authority services are:-

- Grounds maintenance
- Building cleaning/maintenance
- Highways maintenance
- Vehicle maintenance.

However the relatively small sample size of this research means that the results should be treated with caution and the narrow definition specifically to the new powers under the 2003 Act may also not reflect the use of other powers to engage in activity such as the Civic Restaurants Act 1946. APSE has trained numerous local authorities on the use of both trading and charging powers. Whilst the trading company route is one that many may consider the charging provisions under Section 93 of the 2003 Act provide a simple solution to utilizing capacity and generating income without the requirement to set up a trading company. APSE's own survey work in this area suggest that the charging power is a first route to testing the suitability and income generating potential of additional activity without the cost and complexity of a trading company route. A trading route can always be considered should levels of charging activity grow and warrant (through either service development needs or legal necessity) the formation of a Section 95 trading company.

As found within both the CLG commissioned research carried out by INLOGOV and APSE's own surveys and training in the area many authorities have also successfully traded or charged for work including:-

- Facilities management and small building works
- Temporary staff
- Transport services (for example in vehicle adaptations and MOT testing)
- Property consultancy services
- Waste management and recycling
- Grounds and highways maintenance
- Catering services
- Environmental services

As a result of the trading consultation and ministerial support to extend the trading power a new trading order has now been laid before Parliament to extend the power to all local authorities regardless of categorisation.

#### **4. A new trading order**

The terms of the new Trading Order will continue to place safeguards on the use of the power. For example, by requiring an authority to prepare and approve a business case before trading. This requirement ensures that authorities manage risks effectively. However, local authorities will need to continue to base firmly any proposed trading activity on the need to secure value for money for the taxpayer and to have regard to relevant good practice.

The new trading order ***Statutory Instruments 2009 No. 2393 Local Government, England The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009*** was made on the 2 September 2009 laid before Parliament on the 8 September 2009 and came into force on the 1 October 2009.

An extract of the order is as follows:

The Secretary of State<sup>(1)</sup>, in exercise of the powers conferred by sections 95, 96 and 123 of the Local Government Act 2003<sup>(2)</sup> makes the following Order

#### **Citation, commencement and application**

**1.**—(1) This Order may be cited as the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 and shall come into force on 1st October 2009.

(2) This Order applies to the following best value authorities in England<sup>(3)</sup>—

(a) a local authority;

(b) a fire and rescue authority constituted by—

(i) a scheme under section 2 of the Fire and Rescue Services Act 2004<sup>(4)</sup> (power to create combined fire and rescue authorities), or

(ii) a scheme to which section 4 of that Act applies (combined authorities under the Fire Services Act 1947);

(c) a metropolitan county fire and rescue authority; and

(d) the London Fire and Emergency Planning Authority.

#### **Power to trade in function-related activities**

**2.**—(1) Subject to paragraphs (2) and (3), a best value authority is authorised to do for a commercial purpose anything which it is authorised to do for the purpose of carrying on any of its ordinary functions.

(2) Before exercising the power conferred by paragraph (1), the authority shall—

(a) prepare a business case in support of the proposed exercise of that power; and

(b) approve that business case.

(3) A best value authority shall recover the costs of any accommodation, goods, services, staff or any other thing that it supplies to a company in pursuance of

any agreement or arrangement to facilitate the exercise of the power conferred by paragraph (1).

(4) In this article, “business case” means a comprehensive statement as to—

- (a) the objectives of the business,
- (b) the investment and other resources required to achieve those objectives,
- (c) any risks the business might face and how significant these risks are, and
- (d) the expected financial results of the business, together with any other relevant outcomes that the business is expected to achieve.

### **Revocation of regulations**

**3.**—(1) The Regulations listed in paragraph (2) are revoked.

(2) The Regulations are—

- (a) the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004(**5**);
- (b) the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) Order 2004(**6**);
- (c) the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment No. 2) Order 2004(**7**);
- (d) the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) Order 2006(**8**);
- (e) the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment) Order 2007(**9**);
- (f) the Local Government (Best Value Authorities) (Power to Trade) (England) (Amendment No. 2) Order 2007(**10**).

Signed by authority of the Secretary of State for Communities and Local Government

*Ian Austin*

Parliamentary Under Secretary of State  
Department for Communities and Local Government

2nd September 2009

#### EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order, made under the power in sections 95 and 96 of the Local Government Act 2003 (“the Act”), provides that all best value local authorities in England, and fire and rescue authorities in England, are authorised to trade in any of their ordinary functions subject to certain conditions.

Regulation 2 sets out those conditions, which require the prior preparation and approval of a business case, and the recovery of any costs incurred by the authority in anything it supplies, including accommodation, goods, services or staff, to a company through which the trading power is exercised. Under section 95(4) of the Act, the power to trade must be exercised through a company.

The Order revokes the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2004 (“the 2004 Order”) and all Orders that amended the 2004 Order. Prior to its revocation, the 2004 Order authorised only those English

local authorities which had achieved a certain level of categorisation and named fire and rescue authorities in England to trade. The named fire and rescue authorities were only allowed to trade in specified services.

The powers under sections 95 and 96 of the Local Government Act 2003.(c.26) are exercisable by the appropriate person being the Secretary of State, in relation to England, by virtue of section 124 of that Act. The statutory instrument brings to a conclusion speculation over the uncertain situation created by the introduction of CAA and should help assure councils who wish to go down a trading company route that they have the powers to do so.

### **APSE comment**

APSE is a strong advocate for local authority trading and charging powers and the clarity provided by the new trading order is to be welcomed. However APSE would also express a word of caution. Trading companies are not a panacea. Whilst for many within local authorities the trading company route might provide an excellent and innovative route, towards a more entrepreneurial approach to service delivery, it is important to consider other avenues before entering into a trading company. Local authorities can generate income and reduce the burden of costs, such as central establishment charges, and maximise the use of resources through a charging route.

Unlike the trading powers the charging powers available under Section 93 of the 2003 Act provide a highly flexible and responsive criteria to deliver services on a charged for basis to other bodies without the need to formally establish a trading company. Whilst charging powers can be relatively easily established and put into place by identification of the work to be provided, establishing that you have the right to do that work and simply charging for it, the trading company operation requires considerable effort and risk. For example, like any company operation a trading company will require the identification of business plans, assets, company articles, staff transfers and pension arrangements and of course a healthy order book of work to complete to keep the company going. Moreover there is no automatic right for a trading company to be awarded work from the local authority as there needs to be compliance with procurement rules. On the other hand the relative simplicity and flexibility of utilising charging powers, particularly at a time of recession and efficiency savings, could provide a very interesting and quickly achievable route to better cost efficiency and provide much needed local services, particularly to other public sector bodies.

In addition work with other public bodies or where specific trading powers exist in legislation, as previously identified, can be undertaken directly by local authorities' existing service providers without the need to establish an arms length trading company.

The new measures, extending the power to trade, to all local authorities, is nevertheless welcome. The previous restrictions were unnecessary in APSE's view as safeguards were already in place to prevent the abuse of the trading power. Indeed the expansion of trading activity can have a very positive impact on the local economy, not only by maximising economy activity within the public sector but in supporting the local economy. APSE's recent research on 'Creating resilient local economies' found that for

every £1 spent locally by the public sector there is a £1.64 return to the local economy. In this context therefore trading and charging activity should be welcomed as a means to recycle and increase the impact of public sector activity and spending within the local economy at a time of economic downturn. It should also be considered as a viable alternative to cost cutting measures as a means to instead generate additional income, whilst providing much needed services. Charging policies could in fact be geared towards supporting those who have suffered both socially and economically as a result of the recession.

Therefore these under-used powers to both charge and trade should be explored at a local level, to ascertain whether or not they could be of use to provide local services within the local economy. In doing so it may help to develop provision for local use, income generation and specialist services, through a trusted public sector source. For example domestic cleaning services to older people who remain in their own homes, vehicle adaptations to the charity sector, gardening or car parking services to an NHS trust. The possibilities are many and other councils have used these powers to create a positive local impact. More examples of local authority trading and charging activity will shortly be available on the APSE website trading and charging portal at [www.apse.org.uk](http://www.apse.org.uk). For training needs contact Jan on [jmazzone@apse.org.uk](mailto:jmazzone@apse.org.uk) or for support in developing a charging or trading plan contact Andy Mudd on [amudd@apse.org.uk](mailto:amudd@apse.org.uk)

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