Municipal Trading: to charge or not?

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Summary

- Introduction and History
- Pre-2003
- Trading and Charging Powers
- Powers in Local Government Act 2003
- Some Practical Implications

Introduction and History

- Victorians ran all public services
- Sufficient income generated
- General and business rates
- Christmas trees for councillors
- Local Government changes in 1970s and 1980s

Section 1 - Local Authorities (Goods & Services) Act 1970

(1) a local authority and any public body may enter into an agreement for -

a) the purchase and supply of any goods or materials;

b) the provision of any administrative, professional or technical services;

c) the use of any vehicle, plant or apparatus and staff;

d) the carrying out of works of maintenance of land or buildings;

Section 111 – Local Government Act 1972

- Without prejudice to any other powers a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

- A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with existing legislation.

Introduction and History cont'd

- Introduction of CCT
- Cross boundary tendering
- Competitive edge
- Need to generate income during periods of financial stringency
- Audit Commission Report

Pre-2003 Trading Powers

- Accepted view up to recent changes:
  - 1970 Act permitted trading for profit with public sector bodies
  - staff could be employed
  - *Yorkshire Purchasing Organisation* case
  - exercise sound business sense
  - incidental power under Section 111 to dispose of surplus capacity

Pre-2003 Charging Powers

- Specific statutory power to charge required
- Section 111 permits a charge where “it facilitates or is conducive or incidental to performance of a function”
- *McCarthy and Stone –v- Richmond upon Thames*
- Pre-planning advice within Section 111 but levying a charge was not until 2003 Act

Section 150 - Local Government and Housing Act 1989

(1) The Secretary of State may make regulations providing that a charge may be imposed in respect of anything -

- which is done by any relevant authority or by an relevant authority of a prescribed description;
- which is prescribed or falls within a prescribed description;
- in respect of which there is no power or duty to impose a charge apart from the regulations; and
- which is not done in the course of exercising an <u>excepted</u> function.

Section 19 - Local Government (Miscellaneous Provisions) Act 1976

(1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit including -

- indoor and outdoor facilities of all kinds;
- premises for the use of clubs or societies;
- staff, including instructors, in any such facilities;
- such facilities in connection with any other recreational facilities as the authority considers it appropriate to provide.

and to provide facilities, include powers to provide buildings, equipment, supplies and assistance of any kind.

(2) A local authority may make any facilities provided by it available for use with or without charge as it thinks fit.

Pre-2003 Charging Powers cont'd

- Section 150 power infrequently used
- "Excepted" functions relate to statutory areas such as education
- Charging is severely curtailed other than for discretionary services

Background to 2003 Act Powers

- Abolition of CCT
- Introduction of Best Value
- March 2001 Consultation Paper
  - new framework of trading to achieve Best Value
  - single unified statutory framework
  - detailed proposals subsequently withdrawn

Background to 2003 Act Powers cont'd

- White Paper – Strong Local Leadership – Quality Public Services
- Greater freedom to trade
- Trading in any service in which they are strong performers
- High performing councils will have greater freedom to trade
- Safeguards for taxpayers
- Power to charge for discretionary services

Local Government Act 2000

Section 2 - Promotion of well-being

(1) Every local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects -

a) the promotion or improvement of the economic well-being of their area;

b) the promotion or improvement of the social well-being of their area; and

c) the promotion or improvement of the environmental well-being of their area

Local Government Act 2000 cont'd

(4) The well-being power includes power for a local authority to –

a) incur expenditure;
b) give financial assistance to any person;
c) enter into arrangements or agreements with any person;
d) co-operate with, or facilities or co-ordinate the activities of, any person;
e) exercise on behalf of any person any functions of that person, and
f) provide staff, goods, services or accommodation to any person.

Local Government Act 2000 cont'd

Section 3 – Limits on power to promote well-being

(1) The well-being power does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).

(2) The power under section 2(1) does not enable a local authority to raise money (whether by precepts, borrowing or otherwise).

Local Government Act 2000 cont'd

- Well-being power subject to additional requirements
  - local authority must have regard to their community strategy
  - Secretary of State can by order prevent local authorities from exercising the power
  - local authorities must have regard to any guidance

Section 93 - Local Government Act 2003

(1) a best value authority may charge a person for providing a service to him if -

a) the authority is authorised, but not required, by an enactment to provide the service to him, and

b) he has agreed to its provision.

Section 93 - Local Government Act 2003 cont'd

(2) Subsection (1) does not apply if the authority –

- has power apart from this section to charge for the provision of the service, or
- is expressly prohibited from charging for the provision of the service.

(3) The power under subsection (1) is subject to a duty to secure that, taking one financial year with another, the income from charges under that subsection does not exceed the costs of provision.

Section 95 – Local Government Act 2003

(1) The Secretary of State may by order -

a) authorise 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, and

b) make provision about the persons in relation to whom authority under paragraph (a) is exercisable.

(2) No order under this section may authorise a best value authority –

a) to do in relation to a person anything which it is required to do in relation to him under its ordinary functions, or

b) to do in relation to a person anything which it is authorised, apart from this section, to do in relation to him or a commercial purpose.

Section 95 cont'd

(3) An order under this section may be made in relation to –

a) all best value authorities, particular best value authorities or particular descriptions of best value authority;

b) all things authorised to be done for the purpose of carrying on a particular function, particular things authorised to be done for that purpose or particular descriptions of things authorised to be so done.

(4) Power conferred by an order under this section shall only be exercisable through a company within the meaning of Part V of the Local Government and Housing Act 1989.

Powers in the 2003 Act

- Well-being powers authorise various activities but issue about charging

- Charging powers
  - duty to ensure income does not exceed cost
  - power to provide service including well-being
  - recipient must have agreed provision and charge

Powers in the 2003 Act cont'd

- Charging powers
  - applies both in England and Wales
  - does not apply to statutory services
  - does not override any existing legislation
  - power to charge for discretionary service

Powers in the 2003 Act cont'd

- Trading powers
  - powers to trade commercially
  - no effect on existing legislation i.e. 1970 Act
  - no trading in statutory service
  - secondary legislation
  - CPA assessment

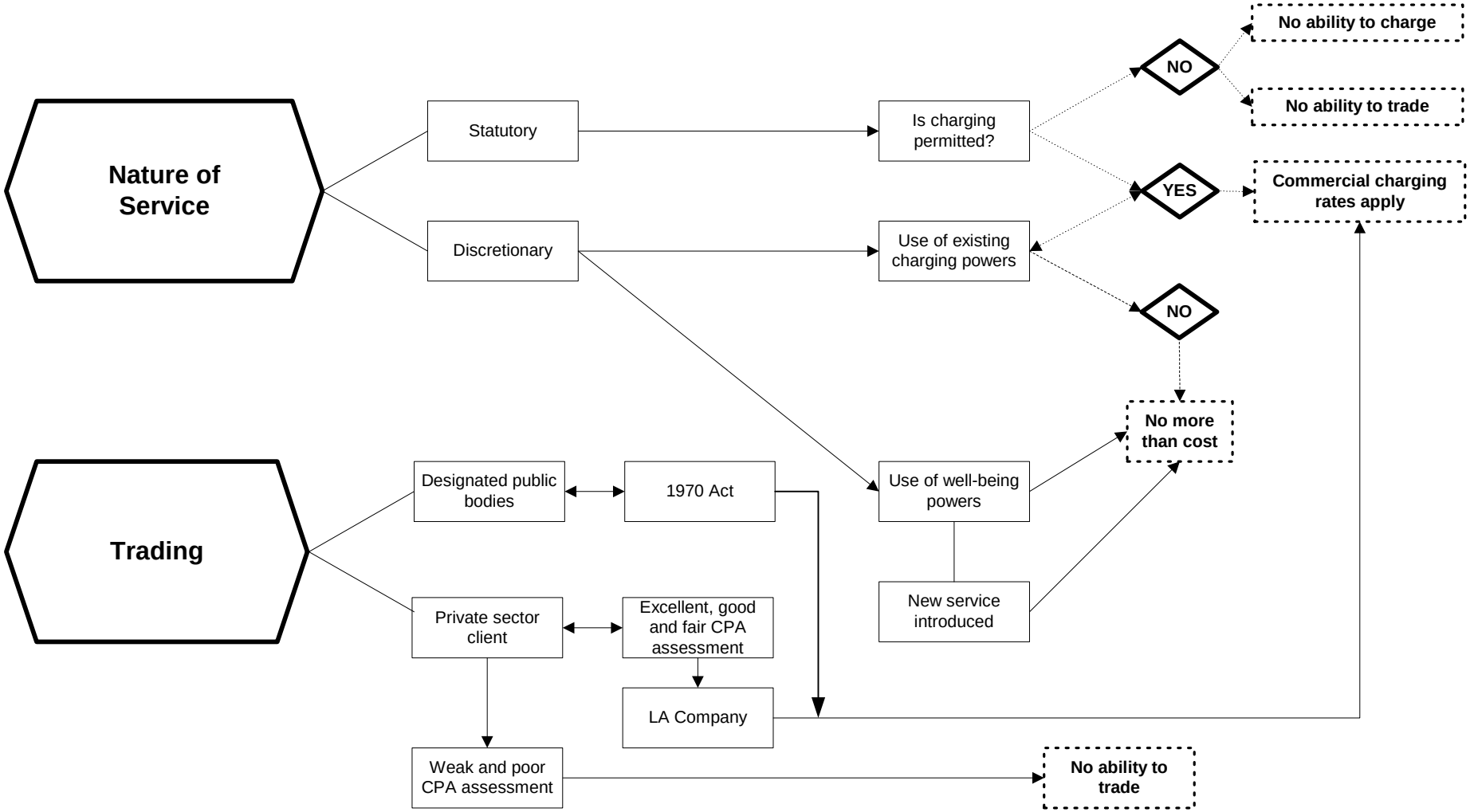
Powers in the 2003 Act cont'd

- Trading powers
  - commercial trading can only be done through corporate vehicle such as company or industrial and provident society
  - making business case and business planning
  - local authority as sole shareholder?
  - local authority nominees on board?
  - staff transfer under TUPE

Powers in the 2003 Act cont'd

- Trading powers
  - regulated under Part V of the Local Government and Housing Act 1989
  - introduction of level playing with private sector e.g. tax, no state aid or EU competition
  - no financial limit
  - reserve powers to intervene
  - exit strategy

Municipal Trading



Practical Implications

- Local Authorities (Goods and Services) Act 1970 still applies
- Designate “public bodies” through CLG on externalisations
- Charging for discretionary services on “non-profit” basis (not trading?) available to all authorities
- CPA score will dictate other commercial trading activities
- Well-being powers to create and support joint venture vehicle or partnership with other local authorities

Practical Implications cont'd

- New trading powers in 2003 Act to permit strong local authority interest
- Guidance issued by CLG in July 2004
- No change in full externalisations which overcome "trading" issues
- Opportunity to experiment with new "community interest companies"
- The future for municipal trading is brighter