



Transport for NSW
Cities and Active Transport Division

Via electronic submission: <https://www.haveyoursay.nsw.gov.au/community-improvement-districts>

To whom it may concern,

Thank you for the opportunity to provide feedback on the Draft Community Improvement Districts (CID) Bill 2023 (the Bill) and accompanying Guide. The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

The Commission has been engaging with Transport for NSW (TfNSW) since the early stages of the policy proposal and has raised a series of concerns relating to the CID policy and potential ways it could create undue hardships on small businesses.

Further to these concerns, the Commission stresses the importance of cautious and transparent policy development and assessments in this area given the potential for vested interests to shape or prioritise the development of this and/or related Bills. It is vital that such proposals are subject to rigorous and independent assessments given the impact on future property transactions, development opportunities and property valuations. It is imperative that bills of this type be developed in a manner that protects against the potential for external organisations to influence for the purposes of supporting current or future business ventures in a manner that compromises the public interest.

This submission outlines questions and scenarios which highlight areas where the CID policy and proposed Bill warrants further examination. The areas of concern include, but are not limited to:

- The minimum voting thresholds and procedures required to establish a CID.
- The basis for any levies to be determined, including robust protections for CID constituents.
- Provisions relating to whether lessors can pass on levies to lessees and any implications for outgoing under a lease.
- Treatment of businesses of a class that do not benefit from the activities of the CID.
- Financial hardship that may be imposed on a landowner or business that is subject to proposed levies.
- Exemptions or other protections for small businesses due to their size and/or ability to pay.
- Accountability controls and measures to ensure the proper administration of CIDs.
- Review mechanisms to confirm the benefits of any specific CID proposal outweighs any costs, noting the potential for CIDs to appear attractive on superficial grounds in the absence of rigorous assessment.
- Appropriate governance arrangements so CIDs are properly administered with assurance processes to ensure the expected benefits of CID proposals outweigh costs (and with distributional considerations to ensure the costs and benefits are not unfairly concentrated to a narrow group of CID constituents).

Issue 1: Public CID proposal ballots

How will the policy address the potential risk of coercion, harassment or reputational damage in non-secret CID voting procedures, ensuring the fair representation of small business owners' positions with regards to a CID proposal?

The Commission holds concerns that conducting a public ballot may result in negative consequences for CID constituents. Some voters may feel they will suffer social or reputational consequences for protecting their legitimate interests by voting either for or against a CID proposal, and at worst it may encourage harassment or even coercion by vested interests or larger property owners or developers. Even if voting arrangements were accompanied by strict rules and requirements, commercial arrangements can be complex, and some voters may feel reluctant to report or complain in the event they are subjected to egregious conduct. These issues can be more complex than in other settings, such as strata title arrangements, as there can be complex interdependencies and power imbalances between local businesses.

For these reasons, **CID proposals should be subjected to a secret ballot.**

Issue 2: CID voting majority

How does the policy ensure CID voting arrangements do not disadvantage small businesses, with CIDs established only where there is decisive and broad support from the small business community?

The non-essential nature of services delivered through a CID means that decisive and broad support should be a pre-condition for them to be funded through compulsory levies.

It is crucial that any CID voting arrangements protect the legitimate interests of minority groups whose interests will not be taken into account by CID proponents. The Bill proposes that a CID ballot could be successful, even in circumstances where there is significant opposition. For example, under the Bill it is possible for a CID to be successful and require compulsory levies even in circumstances where close to a majority of constituents oppose (50 per cent of votes minus one).

A related issue is that it is unclear whether a ballot would require a minimum turnout. Without a minimum voter turnout, it is possible for a CID to be established with only a small minority of businesses supporting the proposal. For this reason, a successful ballot should be required to demonstrate a sufficiently high percentage of support among those eligible to vote, and not just those who actually voted. Given essential services are provisioned for by government, the Commission maintains **this level of support should represent at least 80 per cent of eligible CID constituents.**¹

A further concern arises where CID proposals do not equitably distribute benefits across CID constituents, such as where businesses are expected to subsidise the cost of services for which they have no means of benefiting. Further policy development is required to establish checks and balances to protect against the tyranny of the majority. The adoption of a 'no disadvantage test' should be included in assessments of all CID proposals.

¹ For example, if there are 100 eligible voters then at least 80 would need to vote in support, even if up to 20 decided not to vote.

To illustrate the Commission's concerns, consider a scenario where the boundaries of a CID have been established within a commercial area bisected by a river with impeded access and only occasional bridge crossings between the northern and southern riverbank. The majority of local attractions and retail businesses are located along the northern riverbank. Conversely, the southern riverbank forms part of the commercial area but typically accommodates industrial businesses such as mechanics, panel beaters, smash repairers and warehouses.

Businesses located along the northern riverbank get together to propose a CID to improve the local retail trading environment. The CID would invest in initiatives predominantly located in the northern riverbank given this is where the majority of local attractions and retail businesses are located. However, the businesses located along the northern riverbank decide to define the boundaries of the CID as the commercial area comprising both the northern and southern riverbanks.

A CID proposal ballot is conducted, and the results are:

- 75 per cent of eligible voters located on the northern riverbank, 25 per cent are located on the southern riverbank.
- All businesses located on the southern riverbank vote against the CID as they would not benefit from its initiatives.
- Just over two-thirds of voters located in the northern riverbank support the CID as they would benefit from its initiatives.
- The rateable value of land owned by those voting in support of the CID narrowly exceeds those voting against.
- The ballot narrowly passes.

In this circumstance, businesses of the type typically located on the southern riverbank would rightfully feel the CID does not serve their interests and that the CID serves to cross-subsidise initiatives that should be funded in their entirety by businesses located on the northern riverbank.

The Commission notes this issue can be generalised to a range of attributes in addition to geography. This includes but is not limited to business type, industry, customer base, size and service delivery model.

Issue 3: All business types covered

In the event a CID is passed, how would businesses who do not benefit be protected?

Voting arrangements should provide strong protections to prevent minority interests being taken advantage of by those of the majority. However, even with voting arrangements that require decisive and broad support there will remain business types which stand to gain little, if anything at all, from a CID proposal.

For example, activation activities may only benefit businesses which rely on foot traffic. It would not be reasonable for an accountant operating from office space to be expected to contribute a levy for a street festival intended to drive foot traffic to local cafes, restaurants, clubs, and retail stores from which they derive no benefit.

It is essential for the interests of these businesses to be protected, including by **formally exempting them from compulsory levies that may be associated with the CID.**

Issue 4: Protections for small businesses

How will the policy implement protections for small businesses considering their size and/or ability to pay CID levies, and ensure their interests are represented in decision-making processes?

Larger and more sophisticated entities will have inherent advantages in proposing and participating in the establishment and administration of a CID. This is because they may possess the financial and technical resources required to do so, while small business operators are typically time-poor and lack the economies of scale to meaningfully engage.

The Bill does not establish any protections for small businesses and there is no additional policy detail setting out how their interests will be protected through accompanying regulations. In this regard, it is not possible to express a view on the merits of the Bill without visibility over the remaining policy detail which is yet to be determined.

It is plausible to conceive of scenarios where a CID entity is established with significant representation from commercial developers and large retail chains which do not provide sufficient representation and meaningful consideration of small business interests. For example, when making expenditure decisions and setting levies it is possible that the CID entity will not have sufficient regard for the financial burden posed by levies, even if smaller businesses benefit from CID initiatives. Some vulnerable small businesses will have difficulty meeting additional costs, including both direct and indirect costs. There may be insufficient consideration of their interests without adequate oversight and protections.

While there may be provisions for levy exemptions for properties under a certain rateable value, it is unclear what protections will exist to ensure small businesses can and will have a say in decision-making processes. These protections should consider that owner-operators of small businesses do not have the time to participate in meetings themselves and often do not have staff who can represent their interests.

The Commission's view is that it should be best practice for CID proposals to consider whether **exemptions or discounted levies should apply to smaller businesses**. In this regard, progressive rates and thresholds should apply to the value of rateable land. This approach has been adopted for most other business taxes including payroll tax (where small business employers are exempt), land tax (where it only applies to land holdings above a certain value), stamp duty (where progressive rates apply), and company tax (where smaller companies pay a lower rate).

Governance arrangements should also be established to **specifically protect the interests of small businesses**, particularly when setting the value of any levies and making decisions that affect their interests. As mentioned earlier in this submission the application or inclusion of a 'no disadvantage test' could be introduced and administered by an independent authority.

Issue 5: Tenants and landlords

How will the policy navigate leasing issues, particularly where the interests of tenants and landlords are not aligned?

A landlord may be held legally liable for a CID levy, however in many circumstances the cost will ultimately be incurred by the tenant either as a contracted outgoing under a lease or through rent adjustments.

A CID proposal may have different costs and benefits for both landlords and tenants. Some CID proposals may benefit landlords directly, particularly if they are targeted to yield longer term dividends. For example, precinct upgrades may improve the long-term value of assets but could be associated with short run costs such as construction disruption. Additionally, the burden of upfront levies required to pay for the upgrades (even if they are not legally liable) may fall on tenants who have no right of tenure to benefit from the longer-term benefits of a CID.

Complexities may also arise in circumstances where a landlord becomes liable for a levy after a lease has been signed. Under Section 12A of the *Retail Leases Act 1994*, tenants are not required to pay undisclosed outgoings with landlords ordinarily liable for any new costs that were disclosed as part of the lease. However, this protection does not apply to an outgoing in the nature of a tax, rate or levy that is imposed by or under an Act after the lessor's disclosure statement is given. While the Commission does not offer a legal opinion on how this may apply to a compulsory levy associated with a CID, this issue should be clarified.

A related concern arises if the entity responsible for paying compulsory levies (either directly as the liable entity or indirectly through outgoings or rent adjustments) is different to the entity that is able to vote for or against the CID. The entity that ultimately pays the levy, whether this is the landlord or the tenant, should be the only entity entitled to vote.

Voting rights should align with financial liability, transferring to tenants when they bear the direct or indirect cost of proposed levies.

Issue 6: CID governance arrangements

What accountability controls and quality measures will be in place to ensure the proper administration of a CID?

The Commission notes that in the UK, the Regeneration Committee of the Greater London Authority is tasked with monitoring and reviewing the Mayor's regeneration functions and spending decisions, including the roles of Business Improvement Districts (BIDs).² At the time of the review in 2016, half of London's boroughs did not have a BID. Key reasons included:

- Financial mismanagement, disputes over the handling of levy income and lack of transparency.
- The lack of need, including instances where businesses have opted not to form a BID, preferring an alternative structure instead.³ In other instances, businesses have voted not to renew a BID.⁴
- The financial burden the levy represents on local businesses, exacerbated by economic downturn, thus threatening their viability - International case studies suggest there is not universal support for established BIDs.⁵
- The resistance of local governments, emphasising the responsibilities of elected officials in public spaces.

CIDs are likely to lack the economies of scale to be robustly managed to deliver value for money on behalf of CID constituents. Given the risk of vested interests and mismanagement leading to poor

² Greater London Authority - Regeneration Committee (2016). Business Improvement Districts The role of BIDs in London's regeneration, p. 17. https://www.london.gov.uk/sites/default/files/final_bids_report_0.pdf

³ Department for Communities and Local Government (2015). Review of Business Improvement Districts Consultation (UK). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418008/BIDs_Consultation_Document.pdf

⁴ Example of a BID in Wales. <https://www.business-live.co.uk/economic-development/business-improvement-district-welsh-town-16974926>

⁵ See Against Bid <https://www.againstbid.org/> or NO BID ROC <https://www.nobidroc.com/>

outcomes for the public, **it is essential to have a robust suite of controls and governance mechanisms in place.**

Conclusion

The Commission's views remain that stakeholders, including small businesses, should be provided with an opportunity to comment on specific policy details, particularly in relation to voting arrangements for small businesses and strategies to protect small business interests.

It would be preferable to delay further consideration of the CID policy framework until insights from the pilot program can be embedded into policy design and further policy development can occur. The Commission does not support progressing draft legislation until there is a much clearer view of the key features, protections and governance arrangements associated with the revised CID policy with feedback sought from small business stakeholders.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett, at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

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