

**Submission to Local Government Acts  
Taskforce regarding Stage II Discussion Paper  
*"A New Local Government Act for NSW"*  
July 2013**

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## Opening

Local Government NSW (LGNSW) is the peak body for councils in NSW.

LGNSW represents all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW.

LGNSW represents the views of councils to NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

LGNSW welcomes the opportunity to make a submission to Local Government Acts Taskforce (the Taskforce) Stage II Discussion Paper entitled "*A New Local Government Act for NSW*" (the Paper) in relation to the *Local Government Act 1993* (the Act).

It is acknowledged the Paper is designed to provoke thought and discussion on how the legislation and regulatory regime can be best designed to provide an optimum framework for long term sustainable Local Government in NSW.

It is noted that the Taskforce received many submissions from NSW councils and the themes of these submissions have been used to inform the Taskforce's approach to the new legislation. Councils generally agreed that the new legislation should be enabling and should allow councils to have autonomy within a broader system, working strategically and in partnership with other councils and State Government.

LGNSW notes that the Paper clearly sets out the new direction for the legislation, and that the main features are proposed to be:

- an emphasis on the legislation being enabling, rather than overly prescriptive (focussed on the 'why' rather than the 'how')
- a more streamlined, logical and flexible Act with the 'how' moved out of the Act and into regulations, codes and guidelines
- the use of Integrated Planning and Reporting (IPR) as a 'central plank' of the legislation
- the clear placement of Local Government as part of a broader system of government, encouraging cooperation and recognising that autonomy is necessary for Local Government to meet the needs of communities

## Initial Comments

LGNSW agrees with the overall approach of the Paper. It is consistent with what LGNSW's predecessors and councils have argued is needed as the overarching approach. It meets many of the principles we have advocated.

In the first round of consultations, LGNSW's predecessors made the following points about what was needed in a revised or new Local Government Act:

In planning for a new or revised Local Government Act there is the need to focus strongly on:

- recapturing the idea of enabling legislation,
- more autonomy for councils,
- less regulation of councils and the communities they serve, and

- equipping councils to be the leaders, identity and place makers, and service providers their communities want them to be.

In planning for a new Act the Taskforce shouldn't start with a blank sheet of paper, but rather concentrate on the issues relating to the *Local Government Act 1993* that have been raised i) in recent gatherings such as Destination 2036 and Associations' conferences and ii) in other work of the Associations and the sector.

LGNSW believes the intent and the overall structure of the *Local Government Act 1993* remain valid. According to LGNSW there is no compelling reason to scrap the Act and start afresh with a blank canvass.

However, the Association believes that the legislation needs a major edit to assist it remain contemporary. In this context, it is critical to recognise and address that the compliance burdens created by *Local Government Act 1993* fall more heavily on smaller councils than larger ones.

There are however, points of divergence which will be clear as this discussion progresses. For example, unlike the Taskforce, it is LGNSW's view that there is compelling evidence for councils to return to their previous status as 'bodies corporate'. There is no longer a need to remove councils from the federal industrial relations jurisdiction and as such the 'bodies corporate' status of councils should be restored. Restoration of the bodies corporate status will also remove the dichotomy that exists whereby under section 220(1) of the Act councils operate with the legal capacity and powers of an individual however, section 220(4) of the Act provides that when it comes to a law of the State, councils operate with the legal capacity and powers of a corporation.

### **1.3 Approach and Principles for the Development of the New Act**

The Taskforce proposes:

- (i) a flexible, principles based legislative framework, avoiding excessive prescription, written in plain language and in a logical form. The new Act should be confined to setting out the principles of how councils are established and operate. When further detail or explanation is required as to how these principles are to be achieved then regulations, codes and guidelines will be used where appropriate.
- (ii) a more consistent approach be taken to the use and naming of the regulatory and other instruments, noting that there is inconsistent use of mandatory and discretionary codes, section 23A guidelines, practice notes, discretionary guidelines and the like.

Comment:

LGNSW agrees that the new Act should be flexible, avoid excessive prescription and be written in plain language and a logical form.

However, there is concern that avoiding prescription in the new Act and merely shifting it to subordinate legislation or other instruments will not make a significant difference. Importantly, subordinate legislation and other instruments should not be prescriptive either.

LGNSW seeks genuine extinguishment of prescription in order to gain appropriate flexibility from the new Act.

It is agreed that the current use of mandatory and discretionary codes, guidelines and practice notes is inconsistent and can be confusing. Councils have long struggled to understand when

a guideline or similar must be followed or merely needs to be taken into consideration.

LGNSW supports the approach taken by the Taskforce, providing real and meaningful consultation takes place with Local Government in the development of the revised subordinate legislation and guidelines. In this context there also needs to be a legislative or other guarantee that subsequent reviews of the revised subordinate legislation and guidelines should be consulted on in detail with LGNSW as the peak body for the sector.

### 3.1.1 Purposes of the Local Government Act

The Taskforce proposes the following draft Purposes of the Act:

“The purpose of this Act is to provide

- (1) a legal framework for the NSW system of local government in accordance with section 51 of the *Constitution Act 1902 (NSW)*
- (2) the nature and extent of the responsibilities and powers of local government
- (3) a system of local government that is accountable, effective, efficient and sustainable.”

Comment:

LGNSW supports the purposes of the Act as outlined in the Taskforce Discussion Paper provided a number of improvements are made.

The Taskforce’s suggested draft Purposes of the Act are close to what LGNSW’s predecessors sought in early dialogue and the formal submission. However, it is important to recognise that there are other descriptors that need to be captured in this brief section.

LGNSW strongly recommends that this proposed section of the Act be amended so that it recognises that Local Government is an autonomous elected sphere of government and not an agency of the State.

This section could also be more specific in terms of accountability and say “accountable to its community (or constituents)”.

The provision could also be more specific, e.g.: “...performs functions and provides services effectively and efficiently” and could clarify what is meant by “sustainable”.

In section 2 on responsibilities and powers a reference to revenue raising powers should be included (this theme is continued under the sections on roles and principles); e.g. “... the nature and extent of the responsibilities, powers and corresponding funding and revenue raising powers, including taxation powers, of Local Government.

As to drafting, LGNSW believes that it may be more logical if the third point was to come before the second point.

### 3.1.2 Role and Principles of Local Government

The Taskforce proposes the inclusion of a new Role of Local Government and a set of Principles for Local Government that will replace the charter in the new Act as follows:

#### “Role of Local Government

The role of local government is to lead local communities to achieve social, economic and environmental wellbeing through:

- i) utilising integrated strategic planning
- ii) working in partnership with the community, other councils, State and Commonwealth governments to achieve outcomes based on community priority as established through Integrated Planning and Reporting
- iii) providing and procuring effective, efficient and economic infrastructure, services and regulation
- iv) exercising democratic local leadership and inclusive decision-making

### **Principles of Local Government**

Principles to be observed by local government are to:

- i) provide community-based representative democracy with open, unbiased and accountable government
- ii) engage with and respond to the needs and interests of individuals and diverse community groups
- iii) facilitate sustainable, responsible management, development, protection and conservation of the natural and built environment;
- iv) diligently address risk and long-term sustainability;
- v) achieve and maintain best practice public governance and administration, and to act fairly, responsibly, ethically, and in the public interest; and
- vi) optimise technology, and foster innovation and flexibility.”

Comment:

LGNSW believes that the Taskforce’s recommendations on roles and principles are moving in the right direction but require more work.

Before turning to specific comments on ‘role’ and ‘principles’ LGNSW needs to challenge some of the Taskforce’s commentary. The Paper notes that the IPR framework “enables councils to reposition themselves from the role of ‘service provider’ to a more ‘facilitating’ or ‘place shaping’ role”. The LGNSW Board does not believe a shift away from service provision is necessary or desirable especially in regional and rural areas. LGNSW’s view about the various roles of service provision, facilitation and place making being simultaneous needs to be preferred (see below).

Generally LGNSW agrees that it is important to include the role and principles of Local Government in a prominent and early part of the New Act and to keep these listed separately.

We acknowledge that the Taskforce’s suggested draft Role and Principles of Local Government echo the sentiment of what LGNSW’s predecessors sought in early dialogue and the formal submission, but not the actual wording. In the submission the following points were made about the Charter: The placement of the principles together in one section has helped citizens, councillors and staff understand the breadth of Local Government responsibilities. It has helped all stakeholders appreciate the unique challenges councils have in being i) leaders, ii) identity makers, iii) place makers, and iv) service providers simultaneously. However, there is room for refreshing and refining section 8.

In this context, we note there are some points that have been missed that were in the previous Charter and had long been supported by the Local Government sector and LGNSW’s predecessors. Social Justice needs to be re-included in the role and principles of Local Government. Equity, rights, access and participation are the cornerstones of social justice and should be included in the Local Government Act’s role and principles given the IP&R framework is recommended to take a central strategic framework. The Taskforce has somewhat curiously recommended Social Justice be included in the Community Engagement

section. LGNSW recommends that social justice principles be applied in a broader context of achieving social, economic and environmental wellbeing of communities, not just underpinning community consultation.

Similarly, ecologically sustainable development (ESD) needs to be re-included in the role and principles of Local Government. While retaining a point on the environment, the new 'Principles' remove any reference to ESD. This may be in parallel to a similar move in the Planning White Paper and represent a wider trend. The Principles also remove the concept of 'enhancement', limiting it to 'management, development, protection and conservation'. These two omissions are worth further exploration by the Taskforce.

Furthermore there are some other points raised in the submission that need pursuing again. In the "role" section the following points should be included:

- the provision on democratic leadership should be the first dot point and include the term "democratic representation of its community". That is the most important role of Local Government and integrated strategic planning is but one tool to fulfil this role and should follow on from it;
- In (iii), delete the term "economic" as it sounds like the provision is merely about "economic infrastructure" as distinct from social or environmental infrastructure. The terms "effective" and "efficient" sufficiently capture what seems to be envisaged by "economic"; and
- dealing with the revenue raising issues by adding it as a separate subsection: "...utilising revenue raising powers and funding from other spheres of government flexibly and autonomously in correspondence with its responsibilities" (i.e. revenue powers match expenditure functions which is essential for achieving financial sustainability). It would be worthwhile mentioning that rates are taxes for general government expenditure and not charges for particular service. That would then make general taxation principles applicable (as pointed out in LGNSW's initial submission, page 8).

In the "principles" section the following points need to be addressed:

- Under point (i), the wording should read "provide wholly elected community based representative democracy"; and
- LGNSW suggest adding the subsidiarity principle. The notion of making local choices at the local level is captured in the principle of subsidiarity, according to which the lowest possible sphere of government should deliver public functions, except where higher spheres of government can undertake these functions more effectively. This principle should be recognised by other spheres of government.

### 3.2.1 Integrated Planning and Reporting

The Taskforce proposes that:

- (i) IPR be elevated to form a central 'plank' of the new Act as the primary strategic tool to enable councils to fulfil their leadership role and deliver infrastructure, services and regulation based on community priorities identified by working in partnership with the community, other councils and the State Government.
- (ii) other provisions of the Act be drafted so as to better support IPR including accountability to the community, financial sustainability and partnership with the State and others to deliver community outcomes.
- (iii) where possible relevant provisions from other sections of the Act be incorporated into IPR to reduce duplication. For example, capital planning and expenditure approval provisions could be moved to the IPR resourcing strategy provisions; and community consultation processes should reflect IPR community engagement principles and need not be repeated throughout the Act.

- (iv) the IPR provisions be simplified to increase flexibility for council to deliver IPR in a way that is locally appropriate.

Comment:

LGNSW agrees that it is logical for Integrated Planning and Reporting to become a central plank of the new Act but not *the* central plank of the new Act. However, it needs to be remembered that as useful as IPR is, there still comes a point where the elected must govern and should not become mired in participatory processes. Political leadership is part of the balance that must be struck.

It is essential that the majority of provisions on Integrated Planning and Reporting in the existing Act are brought forward intact into the new Act given the long and inclusive manner in which the Act was developed.

The provisions covering the Community Strategic Plan, the Resourcing Strategy, the Delivery Program and the Operational Plan offer councils reasonable flexibility and must be retained in their present form.

For example, it is of critical importance to councils and their communities that the Community Strategic Plan maintains the following elements:

1. That it is developed and endorsed by the council
2. That it identifies the main priorities and aspirations for the future of the area covering a period of at least 10 years
3. That it establishes strategic objectives and strategies for achieving those objectives
4. That it addresses civic leadership, social, environmental and economic issues in an integrated manner
5. That it is based on social justice principles of equity, access, participation and rights
6. That it is adequately informed by relevant information relating to the four sets of issues
7. That it is developed having regard to the State Government's State Plan and other relevant State and Regional Plans of the State Government, and
8. That it is developed through a robust Community Engagement Strategy

While it is difficult to anticipate the final report of the Independent Local Government Review Panel and the Government's reaction to it, the Taskforce may need to anticipate a new model of regional co-operation flowing from the Panel's idea of a new look 'county council' and ensure that such new entities meet appropriate Integrated Planning and Reporting obligations.

It may also be appropriate to add a provision clarifying the role of mayors and councillors in the strategic planning process; i.e. making service level decisions. In this context the Taskforce could canvass the following points:

- Strategic planning is an essentially political task – it is about making choices for the future of the community, and ultimately the community looks to its elected representatives to make those decisions and holds them accountable.
- The collective role of elected members is to develop (author) and monitor the implementation of the strategic plan and the delivery program required to advance that strategy, and to frame and review the council's long term financial plan, strategic asset management plan and expenditure policies. In this process elected members lead and liaise with communities through a consultation and engagement process about the choices for their future.
- In particular, the role of the mayor should be expanded to embrace leadership in:
  - Community consultation and accountability



- Securing the commitment of councillors to the preparation of draft strategic plans and delivery programs and promoting them to councillors, the community and other stakeholders
- Promoting consistent and concerted implementation of adopted plans and policies
- Ensuring responsible financial management
- Reporting to the community as the council's spokesperson
- Leading and overseeing the councillors in the discharge of their responsibilities.
- The general manager should facilitate the leadership role of the mayor and elected members. This entails:
  - Leading and coordinating the organisation's resources to facilitate preparation by council of the strategic plan and delivery program
  - Leading and coordinating the organisation's efforts to deliver.

### 3.2.2 Community Consultation and Engagement

The Taskforce proposes the following set of principles to guide councils regarding how consultation and engagement might occur:

- commitment to ensuring fairness in the distribution of resources (equity); rights are recognised and promoted (rights); people have fairer access to the economic resources and services essential to meet their basic needs and to improve their quality of life (access); and people have better opportunities to get involved (participation)
- ensuring that persons who may be affected by, or have an interest in, a decision or matter should be provided with access to relevant information concerning the purpose of the consultation and the scope of the decision(s) to be taken
- ensuring that interested persons have adequate time and reasonable opportunity to present their views to the council in an appropriate manner and format
- ensuring that the views presented to the council will be given due consideration
- ensuring that council, in exercising its discretion as to how consultation will proceed in any particular circumstance, has regard to the reasonable expectations of the community, the nature and significance of the decision or matter, and the costs and benefits of the consultation process
- arranging for special consultative procedures in particular instances.

Comment:

For the most part the process proposed by the Taskforce for community consultation and engagement is clearly articulated and will give the community and interested persons relevant information, adequate time and opportunity to present their views.

However LGNSW requires clarification on some issues before LGNSW may offer support on these principles.

It appears that the principles of social justice do not belong in this section. As discussed previously, it would be more appropriate that they should be moved to the Role and Principles of Local Government and the provisions relating to the Community Strategic Plan.

There are also threshold questions that the Association would like to see addressed. The idea of community influence has been significantly elevated as a major point in strategic planning covering the Community Strategic Plan, the Resourcing Strategy, the Delivery Program and the Operational Plan. The threshold question is whether this needs to stand alone or should be part of the approach to IPR. LGNSW believes it should be an integral part of the IPR system and not a stand-alone section.

Another question surrounds the interaction of the new Local Government Act and the new land use planning act. One of the probable outcomes of the Planning White Paper is the development of a Community Participation Charter, which will require councils to develop Community Participation Plans. In the context of the Planning White Paper the Minister for Planning and Infrastructure has indicated that if councils already possess a Community Engagement Strategy that includes all relevant details then a separate Community Participation Plan will not be necessary. All councils have developed a Community Engagement Strategy for local IPR processes. It will need to be clarified whether these Community Engagement /Participation documents will be able to align and be used interchangeably as there should only be one overarching Community Engagement Strategy to avoid duplication and confusion.

### 3.2.3 Technology

The Taskforce proposes that:

- (i) as a general principle the Act should support the optimal and innovative use of technology by councils to promote efficiency and enhance accessibility for the benefit of constituents.
- (ii) the Act allow each council to determine the most appropriate use of technology taking into account the principles for local government and community engagement through the IPR framework discussed above.

Comment:

LGNSW supports the Taskforce approach to technology in so far as it encourages councils to use up to date technologies and allows councils to determine what is appropriate locally.

### 3.3.1 Elections

The Taskforce proposes:

- (i) use of postal voting at all council elections as a means of increasing efficiency and voter participation and reducing council election costs.
- (ii) the following possible improvements to electoral provisions:
  - the most appropriate voting system – exhaustive preferential; optional preferential; proportional, or first past the post
  - the option of utilising electronic voting in the future
  - mechanisms for removing the need for by-elections, when a vacancy occurs either in the first year following an ordinary election or up to 18 months prior to an ordinary election
  - half term elections for councillors, similar to Senate elections
  - the ward system being abolished
  - improving the adequacy of and access to candidate information prior to elections
  - the enrolment process and maintenance of the non-residential roll, particularly in the City of Sydney

Comment:

LGNSW opposes mandatory postal voting but would support councils being given the option of postal voting if their communities decide that it would be in their best interest.

LGNSW advocates that elections should be conducted under the preferential system where one or two positions are to be filled but where more than two positions are to be filled then the election should be held on the proportional system and that there be a uniform voting system for all three levels of government.

While the Taskforce has proposed the use of electronic voting in the future, LGNSW opposes the introduction of mandatory electronic voting as this is a matter that should be left to the discretion of each council taking into consideration their particular local circumstances.

In regard to by-elections LGNSW supports the removal of the need for by-elections in certain circumstances. LGNSW would support dispensing with the need for a by-election when a vacancy occurs in the first 12 months after an ordinary election or within 12 months of an upcoming ordinary election in the circumstance that the person that polled the next highest number of votes after the retiring councillor should be allowed to fill the vacancy. Only in the circumstance that there were no further candidates able to fill the position should a by-election be held.

LGNSW would need to be provided with a case of real benefits before supporting the half term election of councillors as in the first instance it would necessitate the election of half the councillors for either a longer period or shorter period than is currently permitted by the Act. LGNSW believes that this would be impractical and would necessitate the need for further elections and the costs involved.

LGNSW does not support the abolition of wards. Wards allow a council to have areas of similar populations each represented by local councillors and the absence of wards could result in an uneven level of representation across a local government area. LGNSW supports councils having the choice of a ward system and also the number of councillors per ward. LGNSW stresses that there should be flexibility in relation to Ward population requirements particularly for an interim period if boundary changes occur.

LGNSW supports improving access to and the adequacy of candidate information prior to elections so as to provide greater assistance to the public when making electoral decisions. If the Taskforce is interested in legislating about processes for getting information to prospective candidates, LGNSW suggests that the approach taken in the lead-up to the last election is counter-productive. The level of prescriptive information was seen as doing more to dissuade than persuade candidates to stand. The electoral 'dos and don'ts' need to be balanced with information from serving councillors about the value of and rewards in performing the civic task of local governance.

### **3.3.2 Meetings**

The Taskforce proposes:

(i) the provisions relating to council meetings be:

- reviewed, modernised and any unnecessary prescription and red tape removed,
- designed to facilitate councils utilising current and emerging technologies in the conduct of meetings and facilitating public access; and
- consolidated into a generic mandatory Code of Meeting Practice that may if necessary be supplemented to meet local requirements, provided the amendments are not inconsistent with the provisions of the Act and standard Code of Meeting Practice.

Comment:

LGNSW supports the Taskforce proposals as to the modernisation of meeting procedures and the removal of any unnecessary prescription and red tape. This could be achieved by way of a review and update of the Meetings Practice Note 16 that is currently published by the Division of Local Government.

LGNSW also supports the use by councils of current and emerging technologies in the conduct of meetings and facilitating public access to meetings on condition that this does not become mandatory and that councils are able to take into consideration their own local circumstances when deciding how to provide public participation in meetings.

### 3.3.3 Appointment and Management of Staff

The Taskforce proposes:

- (i) the strategic responsibilities of the council be clearly separated from the operational responsibilities of the general manager in determining the council's structure and be aligned with IPR by:
  - the general manager being responsible for determining the organisation structure and for recruiting appropriately qualified staff necessary to fulfil each role within the structure
  - the council being responsible for determining those services and priorities required and to provide the resources necessary to achieve the Council's Delivery Program, and
  - the general manager being responsible for the employment of all staff and there be no requirement for the general manager to consult with the council in relation to appointment and dismissal of senior staff.
- (ii) all positions meeting the criteria as a senior staff position be treated as such, appointed under the prescribed standard contract for senior staff, identified as a senior staff position within the organisation structure, and the remuneration be reported in the council's annual report.
- (iii) in line with the principle of reducing prescription:
  - each council to determine how it deals with regulatory responsibilities that fall outside of the Local Government Act, rather than prescribe the appointment of a Public Officer, and
  - the EEO provisions be incorporated with the IPR processes and procedures
- (iv) the current prescription in the Act relating to the advertising of staff positions and staff appointments be transferred to regulation or to the relevant industrial award.

Comment:

The approach to the Appointment and Management of Staff proposed by the Taskforce is not supported by LGNSW.

The matters that have been raised have been of great contention for councils since the introduction of the 1993 Act. The delineation of the roles of the mayor and councillors and General Managers must be clear and unambiguous.

On 3.3.3 (i), LGNSW recognises that that the General Manager must play an integral role in the determination of a council's organisation structure. However, if the General Manager is to be responsible for determining the organisation structure, LGNSW advocates that the structure should still be determined in consultation with council. As the elected officials have a statutory obligation to provide the community with effective, efficient infrastructure and services, LGNSW advocate that councillors should be provided with opportunity to understand the legal, economic and other resourcing consequences of the services. For example: child care services are covered by regulations specifying staffing numbers, the consequences of which must be considered by a council in determining the nature and form of services to be provided and therefore the organisation structure and resources required to support it. The view of LGNSW is consistent with the view expressed by the Independent Local Government Review Panel (the Panel) which was that "*Councils have a legitimate interest in how staff resources*

*are allocated and hence the council should retain its current power to approve the organisation structure on the advice of the General Manager...”<sup>1</sup>.*

Further, there are certain issues raised in LGNSW’s Preliminary Ideas Paper that have not been addressed, such as the nature of contracts for locum General Managers and other proposed changes to temporary appointment provisions of the Act. LGNSW proposes that to overcome the administrative difficulties that are associated with the Act’s existing temporary appointment provisions, the Act could be varied in terms that are consistent with the provisions of section 28 of the *Public Sector Employment and Management Act 2002 (NSW)*.

Similarly, LGNSW reiterates its position that section 340 of the *Local Government Act 1993* should be varied to eliminate any uncertainty that has arisen in relation to its application. In this regard, LGNSW submit that there is merit in adopting a provision that is worded to be consistent with section 72 of the *Public Sector Employment & Management Act 2002 (NSW)*.

In relation to Taskforce Proposal 3.3.3(ii) it needs to be highlighted that with the exception of the position of General Manager, LGNSW does not support that positions which satisfy the skills descriptors prescribed by the Local Government (State) Award’s Executive Band should be automatically considered senior staff for the purposes of the Act. Nor does LGNSW support that employees whose rates of pay under councils’ salary systems exceed SES 1 should be automatically considered senior staff for the purposes of the Act.

In relation to Taskforce Proposal 3.3.3(iii), LGNSW supports the retention of the role of Public Officer EEO being incorporated into Integrated Planning Reporting.

Turning to Taskforce Proposal 3.3.3(iv), it is LGNSW’s position that the advertising and staff appointments remain in the Act, rather than be transferred. The relevant industrial award is not an appropriate instrument to prescribe recruitment practices, the award outlines the terms and conditions of the employment relationship and does not have application to pre-employment recruitment and selection processes. In any event the *Local Government (State) Award 2010* does not have universal application across the entire industry and would not for example cover the employment of senior staff employees.

LGNSW supports the removal of the requirement to advertise senior staff positions twice in a daily newspaper. The requirement that positions be advertised in a manner sufficient to enable suitably qualified persons to apply for the position should be retained.

LGNSW notes that the Taskforce has not addressed the Act’s provisions relating to Part 6, Arrangements for councils staff affected by the constitution, amalgamation or alteration of council areas. LGNSW is of the view that the “*employment protection provisions*” are in part too restrictive and hinder change. LGNSW argues that section 345D which provides for the unlimited preservation of transferred employees’ entitlements and conditions is counterproductive to the role and principles proposed by the Taskforce, in particular the facilitation of sustainable, responsible management.

Further LGNSW is of the view that attention must be paid to section 218CA which provides the maintenance of staff numbers in rural centres. These obligations on rural councils are too prescriptive, do not reflect rural centres’ changing circumstances and do not support the role of Local Government in sustaining economic wellbeing and the provision of services.

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<sup>1</sup> Independent Local Government Review Panel, *Future Directions for NSW Local Government: Twenty Essential Steps*, April 2013, p32.

On the basis of the preceding points, the staffing provisions in the Taskforce's Discussion Paper cannot be supported in general terms.

### **3.3.4 Formation and Involvement in Corporations and Other Entities**

The Taskforce proposes to defer further consideration of this component of the legislation until the work of the Independent Panel is completed. The Panel did not make any preliminary comments in relation to formation of corporation in local government.

Comment:

The Taskforce have focused strongly on the use of Regional Organisations of Councils when discussing this Section but it should be noted that there are other models available for resource sharing and regional co-operation among councils.

In particular, there is the use of the alliance models put forward by LGNSW for council owned and operated water utilities.

This is an issue which will require further discussion and development.

### **3.3.7 Pecuniary Interest**

The Taskforce proposes that:

- (i) the pecuniary interest provisions be reviewed to ensure they are rewritten in plain language, easily understood and any unnecessary red tape removed.
- (ii) consideration be given to utilising available technology to assist with the submission and maintenance of pecuniary interest disclosures and to facilitate appropriate access to this information.

Comment:

LGNSW agrees that the pecuniary interest provisions should be written in plain language, easily understood and with any unnecessary red tape removed. It is important to recognise that pecuniary interests are also dealt with in the Model Code of Conduct which provides guidance for council officers on the matter and that the Model Code has been reviewed on a number of occasions recently.

Equally the idea of using technology to assist with the submission and maintenance of pecuniary interest disclosures and to facilitate appropriate access to this information is well worth exploring although there is some apprehension if this would include publishing personal information on the internet.

The pecuniary interest provisions need to focus on the obligations of individual civic office holders as there can be damage to the reputation of the whole of council where those obligations are not met.

On this basis the Taskforces proposals on pecuniary interest can be supported, on the basis that any review of these provisions takes into consideration the Model Code of Conduct.

### 3.3.8 Delegations

The Taskforce proposes that the provisions in the Act relating to delegations be reviewed to ensure they are streamlined; written in plain language; and are reflective of the roles and responsibilities of the council and the General Manager to facilitate the efficient, effective and accountable operation of local government.

Comment:

LGNSW agrees that the delegation provisions in the Act should be streamlined, written in plain English language and reflect the roles and responsibilities of the council and the General Manager as eventually settled and detailed.

The review of the delegations should only take place once the role and responsibilities are set out in the draft Act as they may be considerably different to how they are provided for in the current Act.

The issue of delegation of powers to council officials under other Acts also needs to be looked at as there can be confusion on how this can occur in practical situations.

Taking into consideration the abovementioned matters LGNSW would support the Taskforce proposals.

### 3.3.9 Financial Governance

The Taskforce proposes:

- (i) there be greater scope for a focus on principles and the definition of financial systems/minimum standards within a new legislative framework and for assimilation with the mechanisms of IPR in line with frameworks proposed for other parts of the legislation.
- (ii) there be a rebalancing of the regulatory focus of the legislative framework towards systems and risk management rather than process prescription.
- (iii) to await the Independent Panel work on many of the issues associated with fiscal responsibility including; rating issues; asset and financial planning; rates and charges; management of expenditure; and audit practices before recommending legislative positions on these matters.

Comment:

LGNSW is supportive of subsection (i) as far as it proposes a more mature systems approach; i.e. making sure adequate systems are in place to manage risks rather than requiring compliance with prescriptive financial processes and achieving regulator set results. However, it is unclear what that would entail in detail as the body of the report is very limited in terms of describing what would actually change.

Another important consideration relating to financial governance for councils is that there is a pressing need to comprehensively review the appropriateness of existing rate exemptions. The *Local Government Act (NSW) 1993*, mainly in sections 555 and 556, provides for a wide range of rate exemptions most of which were carried over from the *Local Government Act (NSW) 1919* and many of which are archaic and no longer appropriate.

Many exemptions serve to provide financial benefits to numerous religious organisations, benevolent institutions, private schools and some government business enterprises that are no longer justified in terms of principles of optimal taxation, particularly principles of equity and

efficiency. The distinction between charitable and social activity and commercial activity has progressively blurred over time, with community orientated enterprises increasingly engaging in more commercially focused activity.

For example, rate exemptions act as an incentive to enterprises within the retirement/aged care industry to operate under the banner of a charitable institution. This distorts land use away from what would prevail in the absence of rate exemptions and creates higher demand for places in retirement/aged care facilities operated by exempt institutions, as opposed to non-exempt private operators, simply due to lower costs. Another example is the growth of non-core educational activity within the exempt grounds of private schools.

Also, many exemptions do not meet the equity test. Often it is no longer appropriate for local ratepayers to subsidise activities of exempt institutions where institutions act commercially, benefit from council services, and have capacity to pay (e.g. private schools, state owned corporations such as the Forestry Corporation of NSW).

These inappropriate rate exemptions serve to restrict the revenue base of councils and place an unfair financial burden on rate payers. Accordingly, LGNSW has been calling for review and reform of rate exemption provisions for over a decade. LGNSW has commenced research on this subject and would present this research to a comprehensive review of rate exemptions.

On this basis the Taskforces proposals on financial governance set out in points (i) and (ii) would generally be supported, with the caveat that the detail be negotiated with the Local Government sector.

### **3.3.10 Procurement**

The Taskforce proposes:

- (i) the adoption of a more principles-based enabling approach to procurement combined with a medium level of regulation designed to ensure support of the principles of value for money, efficiency and effectiveness, probity and equity, and effective competition.
- (ii) in relation to the current tendering threshold of \$150,000 rather than the legislation setting a dollar value threshold a more flexible principles-based approach be taken to councils setting the threshold based on risk assessment of the proposed procurement.
- (iii) the delegations section of the Act be reviewed to facilitate councils entering into collaborative procurement arrangements such as via ROCs and allowing councils to delegate procurement to general managers with a 'report back' mechanism.
- (iv) any regulation of council procurement support councils utilising available technologies that can assist with efficient, effective and economic procurement processes that are accessible to all relevant stakeholders and are fair, open and transparent.

Comment:

LGNSW agrees that a more principled approach to tendering should be engaged. The principles will need to be clearly designed and defined to allow for a flexible approach to tendering so that a council can take into consideration their own particular circumstances when deciding whether to go to tender. This may lead to a more mature decision making process for council.

The Taskforce have put forward principles of "value for money, efficiency and effectiveness, probity and equity and effective competition".



LGNSW understands that these are the principles that councils currently consider before entering into any contract for the provision of goods or services as this is best practice and allows for the tender evaluation process to be open and robust.

LGNSW is of the opinion that it is important that a principle based system includes a stringent probity audit process and that guidance be provided to councils on this process such as is found in the Queensland Government publication *Use of Probity Auditors and Advisors in Procurement*.

In a principles based system it could be argued that the tendering threshold of \$150,000 may be redundant or that setting a threshold of \$250,000 is more appropriate as it is in line with the State Government tendering procedures. LGNSW is unaware of any historical basis for the setting of the threshold and it provides no scope for taking into consideration a council's individual circumstances. LGNSW sees merit in the removal or lifting of the tendering threshold in a principles based system of tendering on condition that any system introduced is not more costly or onerous on councils.

Section 55 (3)(i) of the Act currently contains certain provisions that take into consideration a councils individual circumstances. These provisions of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers must be retained in any principle based system.

In addition to a principles based tendering system it may be appropriate that if a threshold were to be retained that a much higher threshold be introduced for contracts that are deemed to be major or significant.

The advertising of tenders also needs further consideration. Advertising is one of the greatest costs to councils and the use of modern electronic communications should be available for a council when calling for tenders.

The use of Regional Organisation of Councils (ROCs) needs further exploration. ROCs are not currently included in the prescribed organisations for tendering purposes for the Regulations.

One further positive step forward may be to make use of Prescribed Entities Contract as mandated to councils on a similar system as used by State Agencies.

LGNSW sees merit in the ability of a council to delegate certain decision making functions to the General Manager in certain circumstances. This could be tied to the General Managers role of the day to day running of the council.

LGNSW believes that a more thorough assessment of the tendering processes be undertaken and that consideration be given to the approaches undertaken in other States.

### **3.3.11 Capital Expenditure Framework**

The Taskforce proposes:

- (i) that a capital expenditure and monitoring framework be developed to enable the appropriate management of risk by councils. This framework should be tailored to risk levels, including significance of the project (including materiality and whole of life costs) and not based on arbitrary monetary thresholds or procurement vehicles.

Comment:

LGNSW agrees that there needs to be a capital expenditure framework although are of the view that it should be integrated into the IPR process because creating a separate capital expenditure framework outside IPR may be a duplication of process.

### **3.3.12 Public Private Partnerships**

The Taskforce proposes that PPP projects continue to be subject to regulation and aspects that could be streamlined or simplified be identified and mechanisms for ensuring PPPs be considered for inclusion in the IPR framework.

Comment:

LGNSW has been generally supportive of the Public Private Partnership provisions in the current Act as they appear to provide the necessary guidance and safeguards when a council is proposing to enter into a relatively high risk public private venture.

### **3.3.13 Acquisition of Land**

The Taskforce proposes:

- (i) no change at this time to the acquisition of land provisions as they remain essential to council's continued service and infrastructure delivery, are generally working well and there are no strong reasons to support change.
- (ii) council plans for the acquisition of land be linked with the IPR processes, and in particular the expressed opinion of the community in the community strategic plan on the need for additional public land or the sale of public land, be included in Delivery Program provisions.

Comment:

LGNSW believes that it is appropriate that there be no change to the land acquisition provisions as they remain essential to councils continued service and infrastructure delivery and that they are currently working well. Linking plans for the acquisition of land to the IPR process is logical.

### **3.3.14 Public Land**

The Taskforce proposes:

- (i) the current processes for council land management, being complex and inconsistent with the Crown Lands regime, be simplified and complementary.
- (ii) the Local Government Act:
  - require councils to strategically manage council-owned public land as assets through the IPR framework
  - balance reasonable protections for public land use and disposal where the land is identified as having significant value or importance
  - end the classification regime of public land as either community or operational land and instead, require the council resolution at the time of acquiring or purchasing land to specify the proposed use or uses
  - provide that a proposed change in the use or disposal of public land, including consultation mechanisms, should be dealt with through the council's asset management planning and delivery program
  - retain the requirement for a public hearing to be held by an independent person where it is proposed to change the use or dispose of public land identified as having

significant value or importance. The results should be reported to and considered by the council before a decision is made and proposals should be addressed through council's community engagement strategy

- recognise the LEP zoning processes and restrictions applying to council owned public land
- review the prescribed uses to which public land may be applied to accommodate other uses appropriate to the current and future needs of the community
- cease the need for separate plans of management for public land to be prepared and maintained, and in lieu, utilise the asset management planning and delivery program
- cease the need for a separate report to be obtained from the Department of Planning and Infrastructure where proposed leases and licences of public land are referred to the Minister for Local Government for consideration.

Comment:

Public Land Management is an emotive issue that generates significant community interest. It is vital that councils are provided with a framework to effectively, efficiently and transparently manage their depots, community buildings, parks and reserves and other areas of public land.

The current provisions in Chapter 6 Part 2 relating to the classification and reclassification and management of public land have both strengths and weaknesses. The regime has positive aspects protecting both community assets and councils; however it has become mired in technicalities relating to Plans of Management that reduce councils' autonomy and flexibility. It should be retained subject to a thorough revision.

Taking this into account, LGNSW strongly supports the Taskforce proposal to strategically manage council owned public land assets through the IPR framework. This will focus attention on the management of natural assets, including the relevant costs associated with the management, protection, enhancement and replacement of the asset.

LGNSW would generally support a review of the prescribed uses of public land and the removal of the classification of land as either community or operational as long as it does not reduce the level of protection of land currently identified as community.

However there are a number of issues that need to be dealt with if land is not to be categorised as community or operational at the time it comes under the control of council. Specifically where council is purchasing land for future strategic purposes and may not have a specific purpose for the land at that time. Councils may be appropriating the land so as to be proactive and providing for the future needs of their community.

The Taskforce has proposed that the prescribed uses of land may be broadened but the Association finds that this is counterintuitive and goes against the principles of streamlining the Act. However, it may be appropriate that there be a category of use for the current and future needs of the community that may overcome some of the mentioned issues.

### ***Biobanking on Public Land***

LGNSW requests that the Taskforce explore proposals to alter public land management to enable biobanking.

Biobanking is a market-based scheme that provides a streamlined biodiversity assessment process for development, a rigorous offsetting scheme, and most importantly in this context, an opportunity for landowners to generate income by managing land for conservation.

Biobanking enables 'biodiversity credits' to be generated by landowners (public and private) who commit to enhance and protect biodiversity values on their land through a biobanking agreement. These credits can then be sold to developers (looking to offset impacts of development) or those seeking to invest in conservation (such as philanthropic organisations and government). This generates funds for the ongoing management of the site.

### ***Opportunities for Local Government***

Increasing community expectations on the level and extent of management of public land is placing constant pressure on the financial resources of councils. Biobanking provides an opportunity for councils to source additional funds from non-traditional sources to meet these responsibilities. However, at present there are a number of legislative and policy issues that need to be resolved to make the most of this opportunity.

### ***Constraints to Local Government***

LGNSW has identified a conflict between the present Biobanking scheme and the *Local Government Act 1993*. This conflict specifically relates to the restrictions on long term leases, licences and/or other estates on community land in Sections 46 and 47 of the Act. A biobanking agreement could be considered to be an 'estate' for the purpose of these sections of the Act. Therefore, as an "estate", a biobanking agreement can only be granted for community land if:

- the relevant Plan of Management expressly authorises biobanking agreements on the land (s46(1)(b));
- the biobanking agreement is for a purpose consistent with the core objectives for the categorisation of the community land as described in sections 36E to 36N (s46),
- the biobanking agreement is approved by the Minister for Local Government (if a person makes an objection); and
- the requirements of s47 in relation to public exhibition and consideration of submissions have been complied with.

While councils understand their obligations in regard to open and transparent governance of public land, these current legislative provisions are impediments to councils' involvement and implementation of biobanking.

### ***Existing conservation obligations (Additionality)***

Where a land manager has an existing legal obligation to conserve or protect the biodiversity on a site, the allocation of biobanking credits may be discounted (reduced) according to the conservation measures required to be carried out by that existing obligation. This is called 'additionality'. For councils, this means that the provisions in Division 2 of the Act will affect the number and/or type of credits allocated to biobank sites on public land.

Unfortunately, this 'additionality' has the potential to deliver perverse outcomes inconsistent with best practice land management and conservation. Most importantly is the different treatment of community and operational land that creates disincentives for councils to classify land as 'community', and the perverse incentive for poor planning where it is easier to calculate additionality (and therefore reduce credit eligibility) from good quality Plans of Management than from poor quality ones.

LGNSW recommends that the Taskforce explore this in more detail with the NSW Office of Environment and Heritage.

## **3.3.15 Approvals, Orders and Enforcement**

The Taskforce proposes:

- (i) regulatory provisions be reviewed to ensure that the Act provides guidance on regulatory principles but contains flexibility and less prescription in their implementation, with statutory minimum standards or thresholds the council must meet, and councils discretionary 'on-the-ground' functions.
- (ii) within this framework, the prescriptive processes of approvals and orders be streamlined and, subject to risk assessment, be placed into regulations where possible, allowing the Act to focus on high priority areas and principles.
- (iii) certain approvals be repealed or transferred to other legislation, such as the installation of manufactured homes and the operation of caravan parks and camping grounds. Installation of domestic oil and solid fuel heating appliances should be transferred to the Environmental Planning and Assessment Act; approvals for filming activities on public land be deleted or transferred to other legislation; approvals for amusement devices be transferred to health and safety legislation; and approvals for engaging in activities on public roads be transferred to roads and transport legislation.
- (iv) given that maximum penalties have not increased since 1993, penalties for offences in the Act and Regulation be reviewed to ensure they are proportionate to the seriousness and nature of the offence, and act as a deterrent to re-offending.
- (v) to have regard to the findings and recommendations of the reports by IPART as they affect local government that are due mid-2013.

The Taskforce invites comments as to whether there are currently activities requiring approval that are low-risk or redundant and therefore can be removed from the legislation.

Comment:

LGNSW supports these Taskforce proposals.

The current process of controlling certain activities by the issuing of Orders and Approvals is time consuming, overly complex and not cost effective. There is scope for these provisions to be thoroughly re-examined rather than just moving them from one control regime to another.

As the standards for Approvals are found in the Regulations, these will also need to be examined carefully as the process of examination is undertaken.

LGNSW is firmly of the opinion that there should be provision in the Act that allows for full cost recovery for any regulatory function that is undertaken by a council. Moreover, the Act needs to be modified so that penalties for non-compliance are seen as genuine punishment.

#### **4.1 City of Sydney Act**

The Taskforce proposes that a separate Act for the City of Sydney be retained (pending the report and recommendations of the Independent Panel) noting that the Council is also subject to the provisions of the Local Government Act.

Comment:

LGNSW will not be making comment on the *City of Sydney Act* as this is the City's area of expertise.

## Other issues

Finally LGNSW wishes to raise what we consider unfinished business regarding the recent Local Government Amendment (Early Intervention) Bill.

As the Taskforce may be aware LGNSW worked hard to make improvements to the Bill. The amendments relating to accountability, notice on performance improvement orders and suspensions and others represent an improvement on the original Bill.

However we are firmly of the view that there are some deficiencies and the Acts Review provides an opportunity to correct those deficiencies.

LGNSW is of the view that a Suspension Order should not be issued unless a valid Performance Improvement Order has been issued and not been complied with by the council.

LGNSW believes that there should be clear criteria in the legislation to limit the reasons the Minister can use to take action against a council to improve its performance.

The Bill contains no definition of what constitutes the "proper functioning of the council" for the purposes of Suspension Orders. LGNSW believes that if a Suspension Order can be issued without a Performance Improvement Order being previously issued and not complied with, then such a definition is necessary in the legislation.

The "proper functioning of council" will not be occurring where:

- a council is unable to form a quorum over an extended period of time,
- a council is not complying with its legislative responsibilities, relevant standards or guidelines,
- a major risk is being undertaken and the proper risk assessment and audit functions have not been complied with, or
- council business is being disrupted and council is failing to exercise its functions

There may be other circumstances that need to be prescribed by Regulation.

LGNSW is also concerned that where a Performance Improvement Order is issued that requires the performance of an individual or group of councillor be improved that the whole of council should not be suspended where the performance of the individual or group of councillors has not improved to the required standard.