



**Draft response to  
Local Government Acts Taskforce *Preliminary Ideas Paper October 2012***

<b>Date</b>	<b>December 2012</b>
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**Opening:**

The Local Government Association of NSW and the Shires Association of NSW (the Associations) are the peak bodies for NSW Local Government.

Together, the Local Government Association and the Shires Association represent all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

The mission of the Associations is to be credible, professional organisations representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW. In pursuit of this mission, the Associations represent the views of councils to NSW and Australian Governments; provide industrial relations and specialist services to councils; and promote Local Government to the community.

As the peak bodies for NSW Local Government, the Associations have a deep and abiding interest in the *Local Government Act 1993* and the regulation and guidelines that flow from it. In contrast the Associations have seldom been called on to comment on the *City of Sydney Act 1988* and will be guided by the City of Sydney on this legislation.

The Associations thank the Local Government Acts Taskforce (the Taskforce) for the opportunity to respond to their *Preliminary Ideas Paper October 2012*.

We are heartened by the observation conveyed to Associations representatives at the meeting of 6 September 2012 that the Taskforce was unanimous, after their first meeting that morning, to remove as much prescription as possible.

**Executive Summary:**

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 & 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 had been raised i) in recent gatherings such as Destination 2036 and Associations conferences and ii) in other work of the Associations and the sector.

The Associations believe the intent and the overall structure of the *Local Government Act 1993* remain valid. We see no compelling reasons to scrap the Act and start afresh with a blank canvass.

However, the Associations believe 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.

**Purpose:**

The Associations understand that the Taskforce will consider the provisions of the *Local Government Act 1993* and the *City of Sydney Act 1988*, and their practical operation so as to:

- Ensure that the legislation and statutory framework meet the current and future needs of the community, Local Government, and the Local Government sector.
- Strengthen and streamline the legislation to enable Local Government to deliver services and infrastructure efficiently, effectively and in a timely manner.
- Ensure that the legislation is progressive, easily understood and provides a comprehensive framework, while avoiding unnecessary red tape.
- Recognise the diversity of Local Government in NSW.
- Provide greater clarity on the role and responsibility of Local Government.
- Adopt the decisions of the Government in relation to the recommendations of the Independent Local Government Review Panel.
- Make recommendations to the Minister for Local Government for legislative changes considered necessary and appropriate for a new Local Government Act.
- Identify and recommend to the Minister for Local Government, at any time during the review process, any legislative changes that need to be implemented prior to the completion of the review.

In carrying out its work, we recognise that the Taskforce will:

- Engage and consult with the wider NSW community and with Local Government stakeholders (including the Local Government and Shires Associations of NSW, Local Government Managers Australia (NSW), local councils, village committees, county councils, regional organisations of councils, business, community, industrial and employee associations, relevant professional bodies, and government agencies) about the operation of the legislation.
- Identify key principles to underpin Local Government legislation in NSW. In developing these principles the Taskforce will consider legislation and its application in other jurisdictions both in Australia and overseas.
- Take account of the work, findings and government decisions, in relation to the NSW Planning System Review, the Destination 2036 Action Plan and the NSW State Plan “NSW 2021 – A Plan to make NSW number one”.
- Conduct its work in a manner that recognises the terms of reference and approach being taken by the Independent Local Government Review Panel.

The Associations appreciate that the Taskforce will provide its final report to the Minister for Local Government by September 2013.

**i. What top 5 Principles should underpin the content of the new Local Government Act?**

The Associations believe the Act should be guided by the following points:

- Seek to give clear expression of the purpose, status, models and functions of 21<sup>st</sup> century Local Government;
- Seek to maximise council autonomy;
- Equip councils to be the leaders, identity & place makers, and service providers their communities want them to be; and
- Avoid unnecessary prescription and/or regulation of councils and the communities they serve.

**Clarity in expressing purpose, legal status, models, functions and taxing power needed for 21<sup>st</sup> century Local Government**

**Recognition as an integral sphere of government**

In opening it is critical to make comment on Local Government's role and purpose as the third sphere of government in the Australian federated system.

The Associations support a system of Local Government in which councils are responsible for governing all matters that affect local communities and that are most appropriately dealt with at a local level.

Facilitating local choices and making decisions on the shape of the locality and local services through a system of Local Government has a number of key advantages. Local Government has the ability to utilise local knowledge and most appropriately identify and manage local variations in needs, preferences and costs of services. Local Government, being the sphere of government closest to the communities, is best placed to actively engage the public in the decision making process. Furthermore, democratically elected Local Government has the political mandate to make local choices that an alternative administrative body would not have.

The notion of making local choices at the local level is captured in the principle of subsidiarity, according to which the lowest possible level of government should deliver public functions, except where higher levels of government can undertake these functions more effectively.

For example, in federal systems, the National Government should be constrained to matters that are best dealt with nationally, such as defence, foreign policy, social security, labour markets, or trade and corporate regulation. State governments, dependent on their size, tackle issues with a state-wide or major regional benefit, such as state highways, public transport, police, prisons, courts, major hospitals and education facilities. Local Government should deal with service functions that impact local communities, like local infrastructure such as local roads, water supply and sewerage service provision, recreational facilities, parks, and local services such as local human services, health, culture and education, and waste management. Local Government should also deal with local regulatory regimes including local land use planning and approvals.

There are a number of elements required to enable Local Government to fulfil this role, the most important of which are:

- Recognition of Local Government’s purpose and/or role in the relevant constitutional instruments specifying it as the sphere of government dealing with local matters and generally assigning corresponding revenue raising powers;
- A mechanism to allocate specific functions between Local Government and other spheres of government to avoid wasteful duplication of service provision and confused responsibilities resulting in a lack of transparency and accountability to constituents and to prevent an erosion in the effectiveness of Local Government’s revenue framework; and
- A revenue framework that:
  - Provides the flexibility to deal with varying local needs and preferences as well as the varying cost of performing functions and delivering services and infrastructure;
  - Provides the capacity and flexibility to respond to emerging challenges;
  - Provides for transparency and accountability in local governance;
  - Balances the varying revenue raising capacity of different Local Government areas; and
  - Enhances the financial sustainability of Local Government.

Further, before we leave the matter of relations between spheres of government, it is important to recognise that in the eyes of many the relationship of councils with the NSW Government is broken. While councils have responsibility for whole-of-government local planning through Community Strategic Planning (known colloquially as IP&R) and are required to consult with the NSW Government in the process, there is no reciprocal obligation in any NSW legislation for NSW Government participation to support successful implementation. All this means councils’ plans are not adequately aligned with NSW Government, departments and agencies’ regional and state planning and in turn their plans do not necessarily embrace council plans. Some form of obligation of the NSW Government to engage with, respond to and contribute to local Community Strategic Planning is critical.

**The Associations advocate that the new or revised Act needs to include new sections that:**

1. recognise, value and respect Local Government’s purpose and/or role as an integral part a federal system of government and specifying it as the sphere of government dealing with local matters;
2. create reciprocal pathways for the NSW Government to engage with Local Government on any changes to legislation, regulation, programs or funding with this Act and any other NSW legislation; and
3. create reciprocity on State plans and their regional components and on Community Strategic Plans

**Legal Status**

In the lead up to and during the 2011 State Government Election campaign, the Associations outlined a number of election priorities<sup>1</sup> that included a request that the concept of a ‘body politic’ be removed from the *Local Government Act (NSW) 1993*.

On 22 November 2008, section 220 of the *Local Government Act (NSW) 1993* was amended changing the legal status of NSW councils from “bodies corporate” to a “...body politic of the State with perpetual succession and the legal capacity and powers of an individual, both in and outside the state”.

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<sup>1</sup> Local Government and Shires Associations of New South Wales, *New South Wales Election Priorities 2011*, 4 February 2011.

The objective of the 2008 amendment was to remove councils from the federal industrial relations jurisdiction so that they remained part of the NSW State industrial relations system. In late 2009, the Australian Government and the NSW State Government implemented a suite of legislative changes that facilitated the transfer of NSW private sector industrial relations to the Federal industrial relations system. As part of these changes, the then Minister for Industrial Relations, the Hon. John Robertson MLC, declared all NSW councils not to be national system employers, so that they remained part of the NSW industrial relations system.

As a consequence, the legal status of councils and county council can now be restored to bodies corporate without impacting upon whether councils or county councils belong to the State or Federal industrial relations system.

The Associations continue to be concerned about the potential ‘unintended consequences’ that may arise through the removal of councils’ status as bodies corporate. There are several known examples of where such removal created legal and/or practical problems for councils. We acknowledge that in many of these examples the problem(s) were overcome through further legislative change, changes to State/Federal government policy and/or Ministerial intervention. These ‘band-aid solutions’ fail to address the underlying issue that councils are no longer a separate legal entity under federal and international law. The bodies corporate status should be restored to councils to provide certainty and to remove the potential for unintended consequences in the future.

**The Associations advocate that the new or revised Act include the amendment of sections 220, 221, 388 and 389 as follows:**

**220 Bodies Corporate**

*A council is a body corporate.*

**221 What is a council’s corporate name?**

- (1) The *corporate* name of a council of an area other than a city is the “Council of X” or the “X Council”, X being the name of the council’s area.
- (2) The *corporate* name of a council of a city is the “Council of the City of X” or the “X City Council”, X being the name of the city.

...

**388 Bodies Corporate**

A proclamation establishing a county council operates to constitute the county council as a *body corporate under this Act*.

**389 What is a county council’s corporate name?**

The *corporate* name of a county council is to be “X County Council”, where “X” is the name specified by the proclamation.

**Models**

The Associations believe there is a need for the models of Local Government contained in the Act to be expressed in a way that reflects contemporary and emerging thinking on models. While the Associations appreciate that the Taskforce’s thinking on this issue will be driven by the findings of the Independent Local Government Review Panel, we need to flag now that the constructs and language of the new Act should enable creating different models for i) metropolitan councils, ii) regional councils and iii) rural councils.

The Associations recognise that the models in the *Local Government Act 1993* are to an extent both flexible and saleable. However those models have their limitations.

The discussion about whether there is the need for further models has shifted in the course of the past five years with greater interest being shown in new or different models.

For example, in the course of the Associations' *Modernising Local Government* project, while there was agreement there should be different models available, there was also a noticeable undercurrent about the existing model being more than adequate with the hybrid form put in place by the *Local Government Act 1993* largely serving communities well over the subsequent years. The model of councillors focusing on strategic tasks rather than involving themselves in operational matters, and at the same time allowing them to act as conduits of community concern on service levels, seems to approximate the right balance.

More recently at *Destination 2036* representatives recognised the need to reshape the structure, governance and financing arrangements, functions and capacity of the sector to better enable councils to serve their communities in a challenging and rapidly changing environment. There was broad consensus among representatives that change and reform is needed within the Local Government sector to meet changing community needs.

There was universal recognition that a variety of operating models for Local Government are needed that can be applied in the differing circumstances of rural, regional and the greater metropolitan area councils, because one size does not fit all.

There is a difficulty with *Local Government Act 1993* model as it relates to general purpose councils in large geographic areas with low populations. The compliance burden the Act places on small and very small council operations is too heavy. It is almost as if the compliance regime was designed for a large, if not very large councils, and is ill-fitting for small rural councils. In compliance terms alone there needs to be a new regime for smaller councils.

There is also a view gathering support that councils in low population areas may be able - with appropriate central government resources - to manage a blended Local and central government service role to the advantage of all spheres of government and the local communities. This bears further analysis.

At the other end of spectrum, and especially with the prospect of some metropolitan councils becoming considerably larger over the next decade, there is an emerging interest in a less corporate and more parliamentary model. For very large councils there may need to be an option that involves something like:

- the popular election of the mayor at large;
- the election of a significantly larger number of councillors on the basis of wards; and
- the appointment by the mayor of an executive committee from the councillors.

**The Associations advocate that the new or revised Act include:**

- a section which enables creating different models for i) metropolitan councils, ii) regional councils and iii) rural councils.

### **Taxing Power**

The Associations suggest it may be prudent at either a high level in this ‘opening chapter’ covering purpose etc., or later at the opening of Chapter 15 dealing with finances, to deal with the very nature of rates.

Comrie et al (2011) analysed Local Government rating legislation in all Australian jurisdictions. They noted that only in South Australia does the Local Government legislation make clear that council rates are a tax.

This at least provides some guidance for councils in setting rates. It is clear, for example, that the South Australian Parliament intended that rates not be interpreted or applied as a form of utility charge. This clarity counters the perception of ‘rates as utility charge’ are often held by those ratepayers who object to property values influencing the relative amount payable by individual ratepayers.

No jurisdictions specifically require councils to have regard to taxation principles in determining their rating structures. NSW stipulates that the imposition of rates should be fair and Victoria emphasises the importance of stability in the level of the rates burden.

Comrie et al (2011, p.1) suggested that *‘Appropriate and explicit regard to clearly articulated principles would lead to better policy decision making and improved community acceptance of Rating outcomes’*.

Therefore if the new or revised Act was explicit that council rates are a tax, this would allow councils confidence to draw more heavily on their property tax base where this was warranted.

### **The Associations advocate that the new or revised Act include new sections that:**

- articulate that rates are a tax and covers high levels principles on rating as part of the financing regime that underpins Community Strategic Planning etc., either in an opening chapter on purpose etc., or later in the chapter 15 dealing with finances.

### **How it is written**

Finally it is worth observing that how the new or revised Act is written can contribute to it being – and being seen as – ‘enabling’. There is an argument for reversing the present practice – it is currently often written in the negative which does not facilitate trust, openness and transparency.



**ii. What is currently working well in the Local Government Act and why. Should it be retained in the new Act?**

To comment on what is working well in an Act as large and multipurpose as the *Local Government Act 1993* is difficult to do without sounding trite or sweeping.

With that caveat in mind, the Associations can say, with reasonable support from councils, that the parts of the Act that work well, have largely stood the test of time, and should be retained in a refined or refreshed form are as follows:

- Chapter 3 – the Charter;
- Chapter 4 – Community influence especially Part 1;
- Chapter 5 – Council’s functions;
- Chapter 6 – Service functions especially Part 1;
- Chapter 7 – Regulatory functions;
- Chapter 8 – Ancillary functions;
- Chapter 9 – Establishment;
- Chapter 11 – Staffing;
- Chapter 12 – Operations;
- Chapter 13 – Accountability especially Part 2, Part 3;
- Chapter 15 – Finances;
- Chapter 16 – Offences; and
- Chapter 17 – Enforcement.

The Associations will offer brief comments on any changes that may be needed in respect of these Chapters or their constituent parts.

**Chapter 3 – the Charter**

While when it was introduced the contents of the Charter were sometimes derided as pious aspirations at their best, these appear have served communities well in the way they bring together and hold in balance diverse principles that are central to Local Government. The placement of the principles together in one section has helped citizens, councillors and staff understand the breadth 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.

Firstly, the dot point dealing with children needs revisiting. This is the dot point that reads: ‘to promote and to provide and plan for the needs of children’. The Associations have long advocated the importance of planning for - and where-ever practical with - children and making appropriate facilities, services and programs available to them. We will continue to do that.

However, this dot point highlights a question about why other population groups should not be covered in the Charter. It leads logically to a point about to giving expression to a principle on responding to unique demography of the area. We recommend thought be given to this in refreshing section 8.

Secondly, it may be worth examining whether there is a need for a new dot point giving expression to taking into account local environmental and social determinants of health given the influence Local Government has on these.

Thirdly, it is necessary to revisit the language style of the extensive list of dot points in section 8. In particular dot points 1 and 5 are just too convoluted and definitely need rewording. The opportunity could be taken to bring all the dot points into a similar style.

Finally, it may be useful to group the principles set out in the Charter according to whether they primarily cover i) governance, ii) social, iii) economic or iv) environmental matters. This would give the listing greater internal coherence and greater legibility.

#### **Chapter 4 – Community influence**

Generally Chapter 4 appears to have served councils and communities well in the way it clearly articulates how the community can influence what a council does.

Chapter 4 Part 1 relating to ‘open meetings’ remains appropriate with the possible exception of the need to refine sections 10A & 10B (relating to closure of parts of meetings to public).

In relation to sections 10A & 10B councils still report there is a difficulty being as entrepreneurial as they should be in their business undertakings when they have to work through what are open community governance structures. The Associations suggest that the view needs exploration through a small stand-alone research project to establish which features of the open governance provisions can be demonstrated to be problematic for business undertakings.

There may be some advantage in bringing forward the other sections relating to meeting procedure from Chapter 12 Part 1 & 2 for ease of access for the general public. This may be seen to provide even greater openness to council proceedings.

It would also be useful in this chapter to highlight (or point to) the other major points of community influence that are contained in Chapter 13 Part 2 on strategic planning and covering the Community strategic plan, the Resourcing strategy, the Delivery program, the and Operational plan.

#### **Chapter 5 – Council’s functions**

Generally Chapter 5 appears to have served councils well in the way it helps stakeholders understand the variety of functions that councils are empowered to enact – with these explained as service (non-regulatory) functions (Chapter 6), regulatory functions (Chapter 7), ancillary (those functions that assist the carrying out of a council’s service and regulatory functions Chapter 8), administrative functions (Chapters 11, 12 and 13), revenue functions (Chapter 15), and enforcement functions (Chapters 16 and 17).

#### **Chapter 6 – Service functions**

Chapter 6 Part 1 has assisted councils and communities to understand that a council may provide goods, services and facilities, and carry out activities, appropriate to the needs of the local community and the wider public. The notes make it clear these functions are conferred in broad terms and emphasise the list of examples is not exhaustive. It is also makes it clear a council may have other service functions under other Acts e.g. functions relating to the provision and management of roads under the *Roads Act 1993*.

Chapter 6 Part 2 relating to the classification and reclassification and management of public land has strengths and weaknesses.

The purpose of the classification regime is to identify clearly that land which should be kept for use by the public (community - land such as a public park) and that land which need not (operational - land held as a temporary asset or as an investment, land which facilitates the carrying out by a council of its functions or land which may not be open to the general public, such as a works depot). The major consequence of classification is that it determines the ease or difficulty with which land may be alienated by sale, leasing or transfer. Community land must not be sold (except in very limited circumstances). Community land must not be leased or licensed for more than 21 years.

This regime protects community assets on the one hand and protects councils by preventing inappropriate sales for short term gain on the other. To this extent Chapter 6 Part 2 needs to be retained.

The major exception is section 32 (2) which seems to be overly restrictive. There are other circumstances where reclassification may be appropriate. For example, as part of a land swap for a superior parcel of land for community land use or as part of a broader property asset portfolio management proposal

However, it can be argued that the protection of land from sale needs to more explicit and not buried as it is two thirds of the way into Chapter 6 Part 2 Division 2 (Use and management of community land). Section 45 on the dealings a council can have in community land which specifies that a council has no power to sell, exchange or otherwise dispose of community land etc., should be moved to the head of Chapter 6 Part 2 Division 2.

More generally, Chapter 6 Part 2 Division 2 on community land needs a thorough revision as it has become mired in technicalities relating to plans of management that reduce councils' autonomy and flexibility. The sections on Plans of Management from 36 to 36N appear to be unnecessarily onerous and prescriptive. The requirements should be scalable.

Chapter 6 Part 3 imposes some restraints and qualifications on the exercise of the service functions and warrant re-examination.

Chapter 6 Part 3 Division 1 on tendering needs refining. Many councils have argued that the threshold is too low and that other provisions are too prescriptive. The tendering threshold is not cognisant of council and project size. The tendering timelines still depend on publication in print media; electronic publication does not satisfy the legislated requirements. The threshold and procedures should be examined by comparison to leading practice in other jurisdictions.

The Associations comments on Chapter 6 Part 3 Division 2 covering water supply etc., are covered later in our consolidated section on Local water utilities.

### **Chapter 7 - Regulatory Functions**

Chapter 7 Regulatory Functions Part 1 (Approvals) , Part 2 (Orders) and Part 3 (Local Policies on Approvals and Orders) have generally served councils well in the way they helps stakeholders understand the variety of tools it has for approving, controlling or stopping a range of local activities. It is an important area of which the practical administration of local land use, occupation and ownership relies. However, there is considerable room to refine and modernise these parts. In refining and modernising attention to detail and functionality of change is required to ensure regulatory functions are improved and not unintentionally diminished with dealing with public health & safety and community expectation and

harmony. There will be the need for extensive consultation with Local Government policy makers and regulatory practitioners.

These parts in their current form appear to keep live earlier legislation. They require accurate and in depth assessment with a view of removing unnecessary functions that i) remain from the superseded *Local Government Act, 1919* or ii) have been otherwise shifted to prescriptive and specific appropriate legislation namely:

- *Environmental Planning and Assessment Act, 1979*
- *Food Act, 2003*
- *Public Health Act, 2011*
- *Companion Animals Act, 1993*
- *Protection of the Environment Operations Act, 1997*
- *Liquor Act, 2007*
- *Contaminated Land Management Act, 1997*
- and others

**Part 1 - Approvals**

Clarity on connectivity between “Section 68 approvals” and that of other legislation as listed above is required. Consideration should to be given to the relationship between Part 1 “approvals” and Part 3 “council policy” and to provide a strong and clear connection explaining the relationship to ensure appropriate use and functionality.

Councils across NSW use a variety of language in practice, when issuing “approvals” relevant to this section (e.g. permits, licenses and registration). Consideration is required on whether the wording needs changing required to reflect its use in practice or modernising in other ways.

Approvals within the current form, are an area with the potential for significant and in some circumstances unnecessary ‘red tape’. This in turn diminishes the powers and functionality of the regulator and can appear to lack transparency or be unclear to the community on what is required.

Approvals, Licenses and Registration could be improved to create better consistency and interpretation of this area across the state whilst still having local significance. Councils may be mismanaging approvals due to confusion as to the relationship between local policy and legislation.

The Associations comments on Chapter 7 Regulatory Functions Part 1 as they relate to water supply etc., are covered later in our consolidated section on Local water utilities.

**Part 2 - Orders**

The s124 Table of Orders is used daily by Local Government throughout NSW. This table is an important tool in the regulatory functions of council with which industry is familiar, which the community understands and the legal system can manage. The basic framework of the table is well structured and highly utilised in administering land ownership, occupation and use. The titles of each column work well, are written in plain English and are straight forward to follow for the regulator, community member and legal practitioner.

Order No.	Column 1. To do What?	Column 2. In What Circumstance?	Column 3. To whom?

The number of 'Orders' presently ranging up to 30 should be reviewed taking into account actual frequency of use and necessity particularly where more modern recent legislation has been developed. A review may result in the volume of orders currently available being reduced from the current 30 available for use.

The content of each order also requires review to better reflect current needs and omit areas called upon in other more appropriate legislation (i.e. Order no. 5).

Division 2 and Division 3 function well in principle but require review to ensure functionality and appropriate and correct use in practice.

### **Part 3 - Adoption of Local Policies Concerning Approvals and Orders**

This portion offers Council an opportunity to provide prescriptive requirements in addition to legislation, although not over and above legislation, as to the use and process for approvals and Orders.

Consideration as to the necessity of local policies should be given and whether local policies could be removed altogether. Deliberation as to whether prescriptive yet flexible legislation could ensure better administration of regulation rather than many policies which all have the same goal. A review should include all current policies with a view to their practicality, maintenance requirements, ease of functionality and appropriateness for society.

### **Chapter 8 – Ancillary functions**

Chapter 8 Part 1 on acquisition of land appears appropriate.

However, Chapter 8 Part 2 relating to entry onto land and other powers has some anomalies. For example, s193 regarding notice of entry and s200 regarding residential exclusion, would seem to obstruct and frustrate the purpose of entry.

### **Chapter 9 – Establishment**

Chapter 9 Part 1 regarding areas is relatively straight forward in terms of the machinery involved and probably needs to be retained.

Chapter 9 Part 2 regarding councils appears to have served councils and communities passably in the way it sets out clearly the constitution and related matters for councils (Division 1), mayoral roles and related matters (Division 2), councillor roles and related matters (Division 3), Local Government Remuneration Tribunal (Division 4), Councillor fees, expenses and facilities (Division 5) and Administrators (Division 6).

However, there remain a number of changes that are required for this chapter to work into the future.

### **Legal status of councils**

As argued earlier in this submission the Associations advocate that the legal status of councils and county councils covered in section 220 can and should now be restored to 'bodies corporate'. As outlined this can be done without impacting upon whether councils or county councils belong to the State or Federal industrial relations system.

### **Mayor & Councillor fees**

There is room for further work on section 248 relating to fixing and paying annual fees for councillors. Councils have raised concerns about the attendance patterns of some councillors.

There is an emerging view that an incentive for councillors to regularly attend meetings of council can be accomplished by a portion of councillor fees being tied to attendance at council meetings. As a result the 2012 Local Government Association Conference resolved that the Local Government Association lobby the State Government to address deliberate sustained councillor non-attendance as part of the development of a new *Local Government Act* (resolution 51 sponsored by Holroyd).

There is room for further work on section 249 covering mayoral annual fees. The issue revolves around remuneration while the Mayor is unable to undertake their civic duties for any reason. Currently the Deputy Mayor, if there is one, could be paid the Mayoral allowance while acting as Mayor but this payment would come out of the Mayor's allowance and therefore depriving the Mayor of their Mayoral allowance for that period. This in effect may penalise a Mayor where the circumstances of their absence are beyond their control. This is seen as anomalous compared to an employee acting in the role of their manager while the manager is away and the payment for the staff member acting in that role. The Associations believe that the same courtesy should be extended to councillors performing the duties of the Mayor.

Finally in the general area of fees for councillors, there is also a more general issue that may interest the Taskforce. One particular weakness with the current Act is the issue of councillor fees and taxation which can be a barrier for many people when deciding whether to stand for civic office. Many people on government benefits that have the time and knowledge to stand for civic office find that it is financially unviable for them to do so because of the risk that they may lose some or all of their government benefit due to the taxation treatment of civic remuneration.

### **Return to democracy after dismissals**

The Associations believe there is the need for changes to aid and speed the return to democracy after dismissals. These changes would involve refinements to sections 256 and 257 which include i) the period of administration not exceeding 2 years, and ii) a model of administration which addresses the reasons for which the councillors were dismissed with two administrators focusing on different tasks - this may involve one administrator to focus primarily on the business of running council's functions and one administrator to focus on working as a change agent to change either a) the governance or councillor practices that contributed to the dismissal or b) the organisational or staff cultural issues that contributed to the dismissal.

### **Chapter 11 – Staffing**

Chapter 11 regarding staffing appears to have served councils and communities reasonably in the way it details the determination & re-determination of structure (Part 1), appointment & functions of general manager & matters relating to other senior staff (Part 2) and appointment & functions of the public officer (Part 3), and other staff provisions staff (Part 5).

Nonetheless there are improvements that should be made in a new or revised Act.

### **Functions of the general manager**

In its current form the legislation recognises that the general manager is responsible for "...the efficient and effective operation of the council's organisation..."<sup>2</sup>; "...the day-to-day management of the council"<sup>3</sup>; along with the appointment and dismissal of staff.

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<sup>2</sup> Section 335(1)

<sup>3</sup> Section 335(2)

To facilitate the range of functions outlined in section 335, the Associations are of the view that it is also imperative that the legislation reflect that the general manager is also responsible for the making of employment policies. There is a direct nexus or correlation between the day-to-day management of council and the employment policies adopted at a council. The Associations suggest that section 335(2) be amended accordingly.

#### **Nature of contracts for locum general managers**

The existing provisions of the *Local Government Act 1993* require a general manager to be employed under a performance-based contract. The model contract cannot have a term less than 12 months or more than 5 years. As such councils experience some interesting challenges when they seek to engage locum general managers.

The Associations propose an amendment to section 338(2) with the insertion of a new section 338(2a) to provide:

338 Nature of contracts for senior staff

(1) ....

(2) *Subject to the exception outlined in sub-section 2a*, the term of a contract must not be less than 12 months or more than 5 years (including any option for renewal). A term that is less than 12 months is taken to be for 12 months and a term for more than 5 years is taken to be limited to 5 years.

(2a) *The term of a contract can be for less than 12 months if the contract pertains to the employment of a locum general manager or a temporary senior staff employee.*

#### **The judicial functions of the Industrial Relations Commission of NSW do not apply to senior staff employees**

The Associations understand that section 340(4) of the Act operates to prevent the making of not only awards, agreements, contract determinations or effectively any order that could be made by the Industrial Relations Commission of NSW, including the Commission in Court Session, and as such the entirety of the jurisdiction of the Commission has been excluded by section 340. However, in *Vincenzo Paparo v Moree Plains Shire Council* [2005] NSWIRComm 4, (14 January 2005), his Honour Justice Haylen held that section 340 of the *Local Government Act 1993* (NSW) was designed to exclude only industrial arbitration and not matters arising under the “Unfair Contracts” provisions (Chapter 2 Part 9) of the *Industrial Relations Act 1996* (NSW)<sup>4</sup>.

The Associations submit that a variation to section 340 in the following terms is required to eliminate any uncertainty arising out of the 2005 Paparo decision:

340 *Jurisdiction of the Industrial Relations Commission of New South Wales and the Industrial Court of New South Wales excluded*

(1) In this section, a reference to the employment of the general manager or another senior staff *employee* is a reference to:

(a) The appointment of, or failure to appoint, a person to the vacant position of general manager or to another vacant senior staff position, or

(b) the removal, retirement, termination of employment or other cessation of office of the general manager or another senior staff *employee*, or

(c) the remuneration or conditions of employment of the general manager or another senior staff *employee*.

(2) The employment of the general manager or another senior staff *employee*, or any matter, question, or dispute relating to any such employment, is not:

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<sup>4</sup> *Vincenzo Paparo v Moree Plains Shire Council* [2005] NSWIRComm 4, (14 January 2005) at p74 and 75.

- (a) *an industrial matter for the purposes of the Industrial Relations Act 1996;*  
and  
(b) *a matter arising under Chapter 2 Part 9 – Unfair Contracts of the Industrial Relations Act 1996.*
- (3) ....
- (4) No award, agreement, contract determination, *judicial determination* or order made or taken to have been made or continued in force under *any part of the Industrial Relations Act 1996*, whether made before or after the commencement of this section, has effect in relation to the employment of senior staff *employees*.
- (5) ....

### **Advertising of staff positions**

As it is currently worded section 348(3) details a number of exceptions that exempt a council from advertising new or vacant positions. The Associations propose the deletion of section 348(3) and the insertion of the existing exceptions into a new section 351 that will detail the circumstances where both sections 348 and 349 do not apply.

### **Temporary appointments**

Currently section 351 provides that if a position within the organisation structure of a council is vacant or the holder of such a position is suspended from duty, sick or absent then the general manager may appoint a person to the position temporarily. A person appointed to a position temporarily may not, according to the Act, continue in that position for more than 12 months or 24 months if the substantive holder of the position is on parental leave.

It is the Associations' position that the existing legislative provision has caused administrative difficulties for general managers, human resources managers and project managers with the Associations appearing on behalf of a number of councils in disputes relating to temporary appointments.

The Associations propose that the administrative difficulties associated with the existing legislative provision can be overcome by varying the Act in a manner consistent with section 28 of the *Public Sector Employment and Management Act 2002* (NSW). The Associations advocate the insertion of a new section 350 which would provide as follows:

#### *350 Temporary Appointments*

- (1) *If a position (including a senior staff position) within the organisation structure of the council is vacant or the holder of such a position is suspended from duty, sick or absent:*
- (a) *the council, in the case of the general manager's position, or*  
(b) *the general manager, in the case of any other position, may appoint a person to the position temporarily.*
- (2) *The maximum term for which an employee may be temporarily appointed is for a period of 3 years.*

### **Appointments to which sections 348 and 349 do not apply**

The Associations propose the drafting of an amended section 351 which would provide that the obligations to advertise positions and to appoint on merit do not apply in circumstances where:

- an employee is demoted; or
- an employee is laterally transferred; or
- a senior staff employee is re-appointed under a new contract; or



- an employee is appointed in a manner consistent with the temporary appointment provisions of the proposed section 350 for a term that does not exceed three years.

The proposed amendment to section 351 is intended to enhance the drafting of the legislation and to minimise confusion. It is proposed that the legislation will be drafted in a way that outlines exceptions to sections 348 and 349 and accounts for the temporary appointment provisions of section 350.

The Associations propose a new section 351 in the following terms:

**350** *Appointments to which sections 348 and 349 do not apply*

*Sections 348 and 349 do not apply to:*

- (a) *An appointment that is by way of a demotion; or*
- (b) *An appointment that is by way of a lateral transfer, unless the council decides that sections 348 and 349 are to apply to the appointment; or*
- (c) *The re-appointment of a general manager or senior staff employee under a new contract; or*
- (d) *An appointment that is made consistent with the temporary appointment provisions of section 350 for a term that does not exceed three years.*

### **Preservation of entitlements of staff members**

The Associations recognise that in an environment where the Independent Local Government Review Panel is considering the possibility of amalgamations, there is merit in the legislation providing for the preservation of employee entitlements. The provision of employment protection provisions assists in facilitating an environment of positive change for an industry that may have to deal with amalgamations, boundary changes or transfers.

The Associations, however, are of the view that the unlimited preservation of employees' terms and conditions is counterproductive to any potential change. As such the Associations propose that section 354D of the Act be amended in a manner consistent with the no forced redundancy provisions of section 354F to provide that the entitlements of employees are preserved for 3 years after the transfer. It is proposed that section 354D be amended as follows:

**354D** Preservation of entitlements of staff members

(1) If a staff transfer occurs, the employment of:

(a) a transferred staff member, and

(b) In the case of a boundary alteration:

i. a remaining staff member of the transferor council, and

ii. an existing staff member of the transferee council,

other than a senior member, continues on the same terms and conditions that applied to the staff member immediately before the transfer day *and cannot be altered, without the employee's agreement, for 3 years after the transfer day.*

....

### **Maintenance of staff numbers in rural centres**

The Review of the Act provides an opportunity for the legislation to be afforded changes of a pragmatic nature. It is the view of the Associations that it would be more pragmatic if the provisions of section 218CA were contained within Part 6 of Chapter 11 of the Act.

Notwithstanding, the above observation, the Associations are concerned about the obligation placed upon councils to maintain staff numbers at rural centres with a population of 5000 people or fewer. The concerns of the Associations are centred on the fact that the obligation

to maintain staff numbers is for an unlimited time (unlike the no-forced redundancy provisions of section 354F or the proposed amendment to section 354D). In any event the figure of 5000 people appears to be an arbitrary figure and inexplicably the legislation does not contemplate the possibility of readjusting staff numbers as population figures fall below 5000 people.

## **Chapter 12 – Operations**

Chapter 12 relating to ‘operations’ has both strengths and weaknesses.

The following Parts have generally worked well and should be retained in a refined form:

- Part 1 – General;
- Part 2 – Decisions Making Division 2 – Other Council Meeting Provisions
- Part 3 – Delegation of Functions;
- Part 4 – Insurance; and
- Part 5 – County Councils.

In relation to Chapter 12, Part 1 covering general operations there is room for refinement on section 355 and the practices that flow from it. There can be confusion over the makeup of section 355 committees. This can be an issue where a council requires a member of staff to be on a committee to oversee a particular function of the committee. Guidance on the role responsibilities and membership of section 355 committees should be provided.

There is an important refinement that needs to be made in respect of Part 2 – Decisions Making Division 2 – Other Council Meeting Provisions. There is need enable formal meetings of councils to take place, using electronic media such as teleconferences, videoconferences and the like, where Councillors cannot attend in person due to the immediate impact and aftermath of disasters. This point arose from the complications in holding meetings caused by widespread flooding in recent years. But it could well apply to other disasters. It was highlighted at the 2012 Shires Association Annual Conference which resolved that the Minister for Local Government gives consideration to amending the *Local Government Act* to allow formal meetings of Council to take place where Councillors cannot attend in disaster declared Shires to be conducted using suitable electronic media (resolution 31 sponsored by Narrabri and B Division).

## **Tendering for council groups**

In respect to Chapter 12 Part 3 on ‘delegations’ the issue of delegating tendering processes to groups warrants attention. The Associations believe it is time to streamline how council groups such as Regional Organisation of Councils (ROCs), strategic alliances, groupings of councils or joint ventures conduct their business and improve the tendering decision making process.

This has been given voice recently by the Local Government Association Conference:

That section 377(1) of the *Local Government Act 1993* – General power of the council to delegate – be amended to allow councils to delegate to Regional Organisation of Councils (ROCs), strategic alliances, groupings of councils or joint ventures, the power and authority to allow them to accept tenders on behalf of member councils.

This can be simply achieved by the following amendment to the clause:

377 (1) A council may, by resolution, delegate to the general manager or any other person or body (not including another employee of the council) any of the functions of the council, other than the following:

The acceptance of tenders which are required under this Act to be invited by the council, INSERT THE WORDS

..... except where by individual resolution, a Council may delegate to a Regional Organisation of Council (ROC's), strategic alliance, grouping of Councils or joint venture the authority to undertake and accept or reject tenders on behalf of member councils.

Such an action may not take place unless the majority of members have passed such a motion and is binding only to those councils which elect to be part of the tender process. (Local Government Association Conference 2012 resolution 36 sponsored by Penrith)

In respect to Chapter 12 Part 6 Division 1 and 2 relating to Public Private Partnerships the Associations can only offer a preliminary comment. The Associations were consulted at the time of its introduction and generally supported the provisions. It appears to be appropriate in providing necessary guidance and safeguards when they are proposing to venture into relatively high risk ventures such as PPPs. This is a relatively new section that does not appear to have been widely used to date so the Associations have no feedback from councils on its performance.

### **Chapter 13 – Accountability**

Generally Chapter 13 Part 2 relating to accountability appears to have served councils and communities well, and increasingly so since the move to strategic planning embodied in Part 2 covering the Community strategic plan, the Resourcing strategy, the Delivery program, the Operational plan and associated planning and reporting guidelines.

There remains a concern that while the sections covering the Community strategic plan, the Resourcing strategy, the Delivery program, and the Operational plan offer councils reasonable flexibility the section enabling the creation of planning and reporting guidelines could be used to limit council flexibility and autonomy in the future. This danger warrants careful assessment as this review progresses.

Generally Chapter 13 Part 3 relating to financial management has served councils and communities well. Division 1 relating to 'funds' is appropriate and no apparent changes are required. The inclusion in chapter of the separation of water and sewerage fund from general fund, makes it clear that cross transfers are not allowed. Division 2 on accounting, financial reports & audit, does not present any major concerns.

Generally Chapter 13 Part 4 relating to 'annual reports' is acceptable to the extent that it reflects and complements strategic planning embodied in Chapter 13 Part 2. There is no need to change Act although guidelines could be improved to provide for better presentation & communication standards and to ensure that the requirements are scalable and do not impose too great a reporting burden on smaller, modestly resourced councils. In contrast it is clear that s428A on State of the environment reports is a strangely circular duplication of s428 and should be removed.

### **Chapter 15 – Finances**

Generally Chapter 15 Parts 1 (Overview), 3 (Ordinary Rates), 4 (Making Rates & Charges), 5 (Levying Rates & charges), 7 (Payment of Rates & Charges), 8 (Concessions) and 10 (Fees), have served councils and their communities reasonably but there is room for both greater clarity and more succinct expression of principle. The Associations have dealt with Chapter 15 Part 2 later in this submission recommending its repeal.

The Associations suggest the following points would be of value:

- Introduce separate part on rates as taxation (as discussed earlier in this submission);
- 'Rating' and 'charging' (including annual charges) should be separated and dealt with in different parts (e.g. take sections 501 – 504 out of Part 1;
- untangle Parts 4, 7, 8 and put any revenue raising limits into separate parts for different revenue types;
- Introduce separate part on charging both annual (fixed) and user charges for utility functions (water and sewerage, waste); and
- Introduce separate part on any other charging and fees (highlighting cost recovery principles)

### **Exemptions**

Chapter 15 Parts Part 6 requires significant work. Councils and their communities are poorly served by the exemptions that have multiplied as a result of the following sections (and their predecessors in the previous Act):

- Section 555 What land is exempt from all rates?
- Section 556 What land is exempt from all rates, other than water supply special rates and sewerage special rates?
- Section 557 What land is exempt from water supply special rates and sewerage special rates?
- Section 558 What land and bodies may be exempted from water supply special rates and sewerage special rates?
- Section 559 Determination as to whether a body is a public benevolent institution or public charity

These sections require a thorough review and revision with a view to bringing it into the 21st century and restricting exemptions to the purposes that they were originally intended for. Doing so may actually add to the Act as further differentiation and categorisation is likely to be required. However, this is an important area where the Associations take the view that clarity is more important than brevity.

**iii. Are there areas in the Local Government Act that are working well but should be removed to another Act or into Regulations, Codes or Guidelines?**

**Chapter 7 – Regulatory functions - Part 1 Approvals**

Apart from the points we made above about refining Chapter 7, there are specific areas covered in the approvals chapter that may be candidates for transfer to other Acts (e.g. operating a Public Car Park may be a candidate for the *Roads Act*).

**Chapter 11 - Equal Employment Opportunity**

Part 4 of Chapter 11 of the Act relates to equal employment opportunity. The objects of Part 4 are twofold<sup>5</sup>:

- (1) To eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital or domestic status and disability in councils, and
- (2) To promote equal employment opportunity for women, members of racial minorities and persons with disabilities in councils.

It is the position of the Associations that with a small amendment to the *Anti-Discrimination Act 1977* (NSW) the entire provisions of Part 4 of Chapter 11 could be removed.

The Associations reasoning is as follows:

Councils are bound by the provisions of the *Anti-Discrimination Act 1977* which make it unlawful to discriminate in employment, education and the delivery of services on the grounds of race, sex, age, marital or domestic status, disability, and carer's responsibilities.

If section 122B of the *Anti-Discrimination Act 1977* were amended to include Local Government Authorities covered by the *Local Government Act 1993* then the provisions of Division 3 (Equal Employment Opportunity Management Plans) of Part 9A of the *Anti-Discrimination Act 1977* would apply to councils. It is appropriate to note that the provisions of Division 3 of Part 9A of the *Anti-Discrimination Act 1977* are identical in terms to sections 345, 346 and 347 of the *Local Government Act 1993* and are therefore an unnecessary duplication of legislative provisions.

**Appointments to be on merit**

Consistent with the proposal to delete Part 4 of Chapter 11, the Associations advocate an amendment to section 349(3) in the following terms:

349 Appointments to be on merit

(1) ....

(2) ...

(3) In determining the merit of a person eligible for appointment to a position, regard is to be had to *provisions and obligations of the Anti-Discrimination Act 1977 including but not limited to the objects of Division 3 of Part 9A of the Anti-Discrimination Act 1977 relating to the Equal Employment Opportunity Management Plans.*

**Offences:**

A number of the provisions in Chapter 16 Part 2 Public Places should be moved out of the Act and into more appropriate legislation. For example, the provisions relating to nude bathing in Section 633 of the Act would be more suited to be places in other legislation such as the *Summary Offences Act 1998* and its provisions relating to offensive behaviour.

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<sup>5</sup> see section 344(1) of the Act

**iv. What is not working well in the Local Government Act (barriers or weaknesses) and should be modified or not carried forward to the new Act?**

**Chapter 7 – Regulatory functions - Part 1 Approvals**

There appear to be large sections of Part 1 that could be culled.

For example s72 appears unnecessarily prescriptive:

72 Determination of applications by the Crown

- (1) A council, in respect of an application for approval made by the Crown or a person prescribed by the regulations, must not:
  - (a) refuse to grant approval, except with the written consent of the Minister, or
  - (b) impose a condition of an approval, except with the written consent of the Minister or the applicant.
- (2) If the council proposes to refuse to grant approval or to impose a condition of approval, it must immediately notify the applicant.
- (3) After the applicant is so notified, the council must submit to the Minister:
  - (a) a copy of the application for approval, and
  - (b) details of its proposed determination of the application, and
  - (c) the reasons for the proposed determination, and
  - (d) any relevant reports of another public authority.
- (4) The applicant may refer the application to the Minister whether or not the council complies with subsection (3).
- (5) After receiving the application from the council or the applicant, the Minister must notify the council and the applicant of:
  - (a) the Minister's consent to the refusal of approval, or
  - (b) the Minister's consent to the imposition of the council's proposed conditions, or
  - (c) the Minister's intention not to agree with the council's proposed refusal and the period within which the council may submit any conditions it wishes to impose as conditions of approval, or
  - (d) the Minister's refusal to agree with the council's proposed conditions and any conditions to which the Minister's consent may be assumed.
- (6) At the end of the period specified in subsection (5) (c), the Minister must notify the council and the applicant:
  - (a) whether the Minister consents to the imposition of any of the conditions submitted by the council during that period and, if so, which conditions, or
  - (b) of the conditions to which the Minister's consent may be assumed.
- (7) The Minister must notify the council and the applicant of the reasons for a decision under subsection (5) or (6).
- (8) If the council does not determine the application within the period notified by the Minister for the purpose, the council is taken, on the expiration of that period, to have determined the application in accordance with the Minister's consent.

**Chapter 13 – Accountability – Part 4**

As the Associations pointed out earlier it is clear that s428A on State of the environment reports is a strangely circular duplication of s428 and should be removed. The strategic planning in Chapter 13 Part 2 (IP&R) has made this separate requirement redundant.

## **Chapter 15 – Finances**

Generally Chapter 15 Part 2 Limits on Annual Income from Rates and Charges has served councils and their communities badly over the long-run.

The issue of the limit of annual income from rates and charges is one that has made the provision of facilities and services to the community difficult for councils. The cost of the upkeep of council infrastructure is a huge burden and limiting the amount that a council can receive by way of rates and charges makes it a losing battle. From the Associations' perspective this part should be repealed.

If Chapter 15 Part 2 was repealed it would remove the need for manoeuvres such as trying to include street & park litter bins in the domestic waste charging regime, as proposed to the Minister recently: 'That the Local Government Association lobby the Government to amend the *Local Government Act* and the definition of Domestic Waste to include Street Litter Bins and Park Litter Bins' (Local Government Association Conference 2012 resolution 46 sponsored by Marrickville).

If Chapter 15 Part 2 is not repealed the special rate variation regime should be simplified – the Act could just provide for the option to do so based on Chapter 13 Part 2 relating to strategic planning embodied in the Community strategic plan, the Resourcing strategy, the Delivery program, and the Operational plan. There do not need to be any prescribed periods for variations or compounding prescriptions etc. It could basically be a section that reads "council can apply to...for a variation based on Chapter 13 Part 2 strategic planning". If necessary, DLG/IPART guidelines could prescribe the specifics.

**Other comments:**

**Local water utilities**

The Associations propose grouping together and strengthening in the Act and its regulation provisions relating to council owned and operated water supply and sewerage utilities in regional NSW (“local water utilities”).

In regional NSW, councils provide water supply and sewerage services including ensuring supply security through infrastructure provision, demand management and integrated water cycle management. There are currently 102 local water utilities providing water supply and sewerage services to communities in regional NSW, including 97 council-owned and operated local water utilities, four water supply county councils, and one water supply and sewerage county council. Local water utilities service over 1.8 million people. The provision of water supply and sewerage services is a significant responsibility often making up a quarter or more of councils’ annual budget and employing a significant number of their workforce. Water supply and sewerage services are an important element of communities’ understanding of and involvement in Local Government for customer access to essential services and in dealing with local issues. Local water utilities contribute to local and regional economies and employment.

Currently, regulation of local water utilities is based on limited and dispersed provisions in the Act and its regulation (some administered by the Division of Local Government and others by the NSW Office of Water) as well as on other regulatory instruments such as the NSW Office of Water’s *Best Practice Management of Water Supply and Sewerage Framework*, environmental regulation by the NSW Environment Protection Authority and public health regulation of drinking water by NSW Health. This regulatory regime is complex and duplicates regulatory functions resulting in inconsistency and excess regulation (see below).

Ideally, local water utility regulation would be grouped together in the Act and its regulation covering service provision, customer relations, governance and economic regulation and establishing a single regulator for these issues. The Act also should make it clear that Local Government in regional NSW maintains responsibility for the operation and management of water supply and sewerage services and ownership of water supply and sewerage infrastructure.

Other specific regulation such as health, environmental or workplace safety regulation should remain with the relevant regulatory agencies operating under generally applicable legislation.

*Regulation of the alliance model*

The Act should include provisions allowing local water utilities to form regional alliances according to the model developed by the Associations for the *Inquiry into Secure and Sustainable Urban Water Supply and Sewerage Services for Non-Metropolitan NSW*.

*A modern regulatory framework*

The regulatory framework for local water utilities needs improvement including:

- Reviewing the current complex regulatory environment for local water utilities with the NSW Office of Water as a general “utility” regulator whose functions often duplicate health regulation by NSW Health and environmental regulation by the NSW Environment Protection Authority and whose relationship with the general council regulator, the Division of Local Government is unclear;



- Establishing a modern regulatory framework with economic, health and environmental regulation/regulators based on the NSW Office of Water's *Best Practice Management Framework* and calling up relevant guidelines such as the *Australian Drinking Water Guidelines*;
- Inclusion of contemporary provisions on the general conditions of supply of services where customers are bound by the conditions as amended from time to time (see Part 6, Division 7 of the *Sydney Water Act 1994*);
- Removing unnecessary regulatory duplication arising from ministerial approval requirements for works or other activities under section 60 of the act. Design- or scheme regulation might be redundant/fall under general public health regulation for mature local water utilities (e.g. water treatment plant) or could be dealt with through the normal regulatory framework where necessary (e.g. complex recycling schemes (currently, section 60 triggers ministerial approval requirements, facilitated by the NSW Office of Water, for works or activities that are also regulated by other authorities; e.g. water treatment plants that require section 60 approvals as well as a licence from the NSW Environment Protection Authority, recycling schemes that are covered by the *Australian Guidelines for Water Recycling*);
- Removing unnecessary ministerial intervention power under section 61 of the Act - Ensuring the proper safety, maintenance and working of any works should be the role of the relevant regulator; and
- Removing emergency powers under section 62 of the Act - This should be dealt with by way of general emergency powers of relevant emergency authorities/ministers (e.g. section 7 of the *Public Health Act 2010*, *State Emergency and Rescue Management Act 1989*).

#### *A modern charging regime*

The Act should include a separated, modern charging regime for local water utilities in line with the *National Water Initiative (2004)* and the *National Water Initiative Pricing Principles (2011)* that:

- Is separated from provisions in the act on rating;
- Facilitates usage based pricing and full cost recovery; and
- Includes development contributions which are currently regulated by way of reference to the *Water Management Act 2000* (see section 64 *Local Government Act 1993*). This should be included in the Act.

#### *Increased operational powers for local water utilities*

Operational powers of local water utilities need to be strengthened and brought in line with powers given to other utilities such as Sydney Water pursuant to the *Sydney Water Act 1994* and Hunter Water pursuant to the *Hunter Water Act 1991* including:

- Offences relating to illegal water use and discharge of water under chapter 16, Part 3 of the act should be reviewed against Part 6, Division 6 of the *Sydney Water Act 1994* including the level of penalties;
- The power to introduce permanent water conservation measures including offence provisions (see limited powers under section 137 of the regulation);
- Strengthening the provisions around water meter including giving customers responsibility for the protection of the meter (section 636 of the act);
- Similar exemptions as the ones Sydney Water and Hunter Water enjoy when undertaking works and maintenance (e.g. exemptions for permits for works under roads; section 42 of the *Sydney Water Act 1994*).

*Regulatory framework for metropolitan, Hunter and Illawarra council recycling, reuse and stormwater harvesting schemes*

Currently, where councils are situated in the area of operation of Sydney Water and Hunter Water they do not require any regulatory approvals for recycling, reuse and stormwater harvesting schemes for their own operations (e.g. irrigation of parks or sporting fields). This is because pursuant to section 56 of the Act section 60 does not apply to these councils.

However, regulatory oversight and advice is required to ensure safe functioning of such schemes. This issue is currently reviewed by the NSW Government Metropolitan Water Directorate's Urban Water Regulation Review. The Associations urge the Taskforce to take this review into account.

*Council approvals of water and sewerage schemes under section 68 of the Act*

There are a number of issues with respect to councils' regulatory role under section 68 for private water supply and reuse schemes including recovery of regulatory cost, capacity to regulate complex schemes and clarity with respect to exemptions from section 68 as a result of schemes being covered by the *Water Industry Competition Act 2006*.

Section 68 sets out a range of activities by private persons that require council approval in addition to development consent under the *Environmental Planning and Assessment Act 1979*. In particular, approval is required for:

- Water supply, sewerage and stormwater drainage work; and
- Management of waste – including the construction and operation of sewage management systems.

With the establishment of a licensing regime under the *Water Industry Competition Act 2006*, section 68 activities do not require council approval if they are carried out under the authority of such a licence. However, there are uncertainties as to whether schemes are covered under the *Water Industry Competition Act 2006* and a better regulatory process is required for councils to know whether a section 68 approval is required.

In terms of coverage of private recycling and stormwater harvesting schemes, the regulatory regime around section 68 - including councils' capacity to regulate more complex schemes, the integration of section 68 approvals with the development assessment process under the *Environmental Planning and Assessment Act 1979* and the applicability of relevant guidelines such as the *Australian Guidelines for Water Recycling* and the *NSW Guidelines for the Management of Private Recycled Water Schemes 2008* - is currently being reviewed by the NSW Government Metropolitan Water Directorate's Urban Water Regulation Review. The Associations urge the Taskforce to take this review into account.

Also, the Taskforce should look into the fees councils can charge for their regulatory activity under section 68. Currently, the fee structure only allows partial cost recovery and councils regularly raise the shortfalls as an item in the Associations' cost shifting survey.

**Regional Organisations of Councils**

In undertaking its work the Taskforce is required to consult with key stakeholders and to take into account those recommendations of the Independent Local Government Review Panel (the Review Panel). The Associations understand that the Taskforce will work closely with the Review Panel and take into account the outcomes and recommendations of the Review Panel.

In this regard the Associations consider it necessary to address the Taskforce on the idea that Regional Organisations of Councils (ROCs) should be afforded legal capacity under the Act. The Associations offer these comments, having long acknowledged and supported the importance of voluntary regional organisations of councils for advocacy, planning, and economic development and worked with them on many issues.

In *Better, Stronger Local Government: The Case for Sustainable Change* (November 2012) the Review Panel outlined its current thinking on some key aspects of Local Government. One such aspect being the Review Panel's consideration of "...how to develop much stronger frameworks and new entities for regional collaboration, advocacy and shared services, in order to increase Local Government's strategic capacity and the scope and quality of service delivery".<sup>6</sup>

The Review Panel recognised that there are already three structural options used in NSW Local Government. They are local councils, county councils and ROCs.<sup>7</sup> The Associations are of the view that there are other options to consider prior to affording ROCs legal capacity as a new form of legal entity under the *Local Government Act 1993*. In the Associations' opinion, there already exist a number of available options for establishing or formalising ROCs as legal entities. For example, the existing statutory provisions could be used to establish ROCs as county councils or corporations, subject to Ministerial approval.

Section 383 of the *Local Government Act 1993* provides for the establishment of county councils. A county council is made up of a number of constituent councils across a number of Local Government areas and according to section 394 of the Act, the functions of a county council may be any one or more of the functions of a council under the Act. Whilst existing and previous county councils have tended to be for a single purpose (e.g. water, electricity), in the Associations' opinion there does not appear to be any legal impediment to conferring on a county council a broad range of functions on a regional basis.

In a May 2012 interim report, the Australian Centre of Excellence for Local Government (ACELG) made the observation that "...county councils allow councils to establish a legal entity and constituent councils appear to be comfortable with the familiar governance structures, reporting and compliance requirements afforded by their status under the NSW Local Government Act"<sup>8</sup>. The Associations endorse this observation and view the county council model of regional collaboration to be a more pragmatic option.

### **Information legislation issues**

The interaction between the Act, the *Government Information (Public Access) Act 2009* and the *Privacy and Personal Information Protection Act 1998* needs to be addressed. This is a particular concern relating to the provision of copyrighted material. There is confusion over information that needs to be released for the purposes of one piece of legislation that is prohibited from being released by another piece of legislation.

The Act needs to be updated to reflect the use of social media in Local Government. This can relate to the webcasting of council meetings, the use of computers by the public while at a council meeting or the provision of council information to residents and ratepayers through

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<sup>6</sup> Review Panel paper November 2012, page 22.

<sup>7</sup> Review Panel, p23.

<sup>8</sup> Somerville, D. and Gibbs, M. (2012), *Legal and Governance Models for Shared Services in Local Government: Interim Report*, Australian Centre of Excellence for Local Government, University of Technology, Sydney, May 2012.

the internet (e.g. the setting up of a register of residents and ratepayers that would like to have all council information provided to them by way of email rather than by conventional mail or the advertising of matter by a council where they have a legislative imperative to do so.)

### **2012 Local Government Elections**

It is important to have a good hard look at the 2012 Local Government Elections, in terms of whether the *Local Government Act 1993* itself is playing a strong role in:

- discouraging candidates from standing, and/or
- discouraging councils from running their own elections to the detriment of the local community.

## **Conclusion**

The Associations can see no compelling reasons to scrap the Act and start afresh.

We believe the intent and a substantial part of the structure of the *Local Government Act 1993* remain useful.

Nonetheless, the Associations believe that the legislation needs a major edit to assist it remain contemporary.

Throughout this submission, we have highlighted a significant number of refinements that would help in this major edit.

The Associations have stressed that in planning for a new or revised Local Government Act there is the need to focus strongly on:

- recapturing the idea of enabling legislation,
- affording more autonomy for councils,
- imposing less regulation of councils and the communities they serve, and
- equipping councils to be the leaders, identity & place makers, and service providers their communities want them to be.