

LGNSW Submission to IPART – Review of Reporting and Compliance Burdens on Local Government

August 2015

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1. Introduction

Local Government NSW (LGNSW) is the peak body for NSW Local Government, representing all the 152 NSW general-purpose councils, 12 special-purpose county councils and the NSW Aboriginal Land Council. In essence LGNSW is the organisation for all things Local Government in NSW.

The mission of LGNSW is to be the sword and shield for Local Government in NSW. LGNSW represents the views of its members to the NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

LGNSW welcomes this important review and is pleased to have an opportunity to make a submission to the Independent Pricing and Regulatory Tribunal (IPART) Review of Reporting and Compliance Burdens on Local Government. This review presents a large and very complex task and LGNSW would like to work closely with IPART during the review process.

LGNSW appreciates that this review starts from an advanced position as it has the benefit of the research and findings of two related and relatively recent IPART reviews:

- IPART Inquiry into Reforming Licensing in NSW
- IPART Local Government Compliance and Enforcement Review

Submissions and responses to the questionnaire that has been sent to councils by IPART will further add to the pool of information, as will the series of workshops. LGNSW commends IPART on instituting a comprehensive review process.

LGNSW primarily offers comment in this submission on the principles and preconditions required to establish an effective, equitable and efficient regulatory system. In addition, LGNSW submits a summary of the findings of a Local Government working group established by our predecessors, the Local Government and Shires Associations of NSW (LGSA) in 2012 to progress action 2g¹ of the Destination 2036 Action Plan. This action involved reducing red tape. This is provided in Attachment A.

¹ 2g Review all legislation for impact on local government and identify opportunities to reduce red tape while ensuring accountability and not compromising good governance

2. Overview

LGNSW welcomes this review as it directly responds to a major issue for Local Government and was one of the key recommendations of the Independent Local Government Review Panel (ILGRP)²:

ILGRP Rec: 19.

Commission IPART to undertake a whole-of-government review of the regulatory, compliance and reporting burden on councils.

There is no argument about whether NSW Local Government is subject to an enormous regulatory burden. As noted by the ILGRP, research previously commissioned by IPART in 2012-13 indicates that NSW councils have around 120 regulatory functions involving over 300 separate regulatory roles. Those roles emanate from 67 State Acts administered by 31 State agencies³.

A review of these findings indicates they are not exhaustive as there are several omissions and the load burden has been added to with new reporting and compliance and requirements having been introduced since the research was undertaken. Further, the research did not include the regulatory burden emanating from Commonwealth Acts and agencies, which while not as extensive, is still significant. LGNSW appreciates that the latter is beyond the scope of this review.

The research was conducted for the two previous concurrent IPART Inquiries into *Reforming Licensing in NSW Review* and the *Local Government Compliance and Enforcement Review* (IPART Red Tape Reviews 2012-2014), dealing with the regulatory and compliance burden on business and the community. It is about time that the corresponding burden on Local Government is more extensively reviewed.

The net combined benefits of the draft proposals put forward by IPART in the draft reports of the Red Tape Reviews in May 2014 “would be between \$329 million and \$350 million to NSW each year, with red tape savings to business and the community of between \$295 million and \$308 million, local council savings of more than \$42 million and savings to the NSW Government of about \$1 million per year”⁴. The draft final reports were delivered to the NSW Government in October 2014. It is interesting to note the NSW Government announced its response to IPART’s Report on Reforming Licensing in NSW on 11 August 2015 and the Final Report has been released to the public. The NSW Government is yet to respond to the IPART Report on *Local Government Compliance and Enforcement*.

LGNSW anticipates that a review focussed on the regulatory burden on Local Government will identify savings well in excess of the \$42 million identified by IPART in its previous reports. The most recent LGNSW Cost Shifting survey⁵ identified \$118.5 million in costs related to regulatory functions where cost recovery mechanisms do not allow councils to fully recover the cost associated with the regulatory activity (refer section on Cost Shifting for further detail).

² ILGRP, *Revitalising Local Government – Final Report*, October 2013, p. 58

³ Ibid, pp 54-55

⁴ IPART, “IPART Identifies \$300m Potential Savings from Reducing Red Tape from Licensing & Local Government”, Media Release, 22 May 2014

⁵ The LGNSW cost shifting survey is a survey which seeks to establish the extent of cost shifting by the Australian and NSW Governments on to NSW Local Government. The survey measures the amount of cost shifting for a representative sample of the 152 general purpose councils in NSW, calculates a cost shifting ratio for each council in the sample and for the whole sample and extrapolates, from the sample ratio, an estimate of the amount of cost shifting on to the whole of NSW Local Government. See www.lgnsw.org.au/policy/finance/cost-shifting-survey.

It is a truism to say that the burden is frequently added to and vary rarely eased. This review provides the opportunity to ease the burden by removing or streamlining antiquated, duplicative or unnecessary planning, reporting and compliance requirements.

LGNSW fully recognises that regulation is a necessary function of all spheres of government and that it is intended to protect and advance the best interests of society/the community. However, all laws and regulations need to be subject to regular review of their relevance, necessity and efficacy. Therefore LGNSW strongly supports the key elements of the Terms of Reference for this Inquiry:

- identify inefficient or unnecessary planning, reporting and compliance obligations imposed on councils by the NSW Government through legislation, policies or other means;
- develop options to improve the efficiency of local government by reducing or streamlining planning, reporting and compliance burdens; and
- collect evidence to establish the impacts on councils of reporting and compliance burdens, and to substantiate recommendations for reform.

LGNSW also endorses the application of the seven regulation principles from the NSW Better Regulation Guide as sound assessment criteria:

1. The need for government action should be established.
2. The objective of government action should be clear.
3. The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
4. Government action should be effective and proportional.
5. Consultation with business and the community should inform regulatory development.
6. The simplification, repeal, reform or consolidation of existing regulation should be considered.
7. Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.

However, there are two key omissions to the principles. LGNSW maintains that the following two principles need to be added:

8. Consultation with Local Government where proposed regulation will involve councils in planning reporting or compliance.
9. Provision of funding or a funding mechanism where regulatory requirements generate costs.

3. Addressing the Regulatory Burden

There are several dimensions to the excessive regulatory burden imposed by the planning, reporting and compliance requirements on Local Government that need to be considered in seeking to address the problem. These involve the following:

- Recognition of Local Government as an integral sphere of government.
- Consultation and communication.
- Capping the regulatory burden.
- Costs and cost shifting.
- A partnership approach.

Each dimension is discussed below.

Recognition of Local Government as an integral sphere of government

It is important to comment on Local Government's role and purpose as the third sphere of government in the Australian federated system.

LGNSW supports a system of Local Government in which councils are responsible for governing all matters that affect local communities that are most appropriately dealt with at a local level. 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, child protection 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, waste management and local services such as local human services, health, culture and education. 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, regulation, planning, reporting 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.

Recognition of Local Government as an integral sphere of government is essential if we are to deal with the fundamental problem of the relationship between spheres of government. The relationship between the NSW Government and NSW Local Government is sometimes perceived as patronising. The patronising attitude appears to be firmly embedded in the culture of the NSW

Parliament and the bureaucracy. Inherent in this attitude is a perception that Local Government is an inferior sphere of government and that at best, Local Government is simply an agency of the State, with individual councils treated as branch offices. Many observers, including interstate officials, have commented that Local Government is not afforded the same trust and respect as it is in other jurisdictions. It should not be a surprise given this prevailing attitude, that there is a strong tendency to over regulate Local Government in NSW. This culture needs to be changed if the relationship is to be improved and over regulation diminished.

Consultation and Communication

LGNSW contends that there is a need for closer and earlier consultation. It needs to be genuine consultation, not a 'tick the box' or 'send in your comments within 10 days' exercise. An historical case in point has been in the area of planning reforms. The change that Local Government has been required to adopt in this area has been constant and unremitting. While some of the changes were reasonable in themselves, councils have been frustrated that they have often been poorly advised of pending changes, required to adapt and readapt to evolving policy positions or been notified very late in the process. All these changes have created an administrative burden on councils and in many cases required a review of local policies.

The need for consultation must be firmly imbedded in Intergovernmental Agreements, Regulation Partnerships, NSW Government consultation guidelines and legislation where appropriate. There must be a genuine commitment from agencies to respect the spirit of these agreements and Local Government should reciprocate.

As noted by IPART, the NSW Government signed an Intergovernmental Agreement (IGA) with Local Government (LGNSW) in April 2013 which aims to foster stronger relationships between State and Local Government and to address concerns about 'cost-shifting'. Under the NSW Intergovernmental Agreement, before a responsibility (i.e. service or function) is devolved to councils, Local Government should be consulted.

While LGNSW has had concerns about some aspects of the IGA's implementation and is a keen partner with the Government in a renewed effort in this regard, the goals, structures and processes of the IGA itself are well worth maintaining. In June, LGNSW wrote to the Premier and Minister for Local Government seeking an extension of the IGA, with a view to embarking on that renewed effort around implementation.

The following IGA principles are especially important:

- working together as drivers of change to achieve strong communities through partnership;
- consultation and communication being open on the basis of mutual trust and respect;
- engaging with each other collaboratively and with a shared commitment to joint problem solving;
- addressing issues by focusing on continuous improvement, innovation and community interest; and
- recognising, considering and managing impact of the actions of the parties on each other.

IPART's 2014 review of *Local Government Compliance and Enforcement* noted that there is currently no explicit requirement to have regard to the impact of regulatory proposals on Local Government (as distinct from government in general) in the Better Regulation Guide or in the Subordinate Legislation Act 1989 (SL Act). This is not consistent with the principles agreed under the Intergovernmental Agreement. IPART recommended that the Better Regulation Guide be revised to ensure NSW Government agencies consider the impact of regulatory proposals on Local Government and, in particular, their capacity and capability, prior to devolving regulatory responsibilities to councils⁶. LGNSW is disappointed that these recommendations have not been acted on as yet.

⁶ IPART, *Issues Paper – Review of reporting and Compliance Burdens on Local Government*, July 2015, p. 20

Capping the Regulatory Burden

It is desirable to impose a discipline in all spheres of government where the volume and costs of all proposed new planning, reporting and compliance requirements are at least offset by the removal or streamlining of existing requirements.

This would assist in achieving the seemingly universal objective of government to reduce red tape. It would also necessitate a whole of government approach to regulation that would help prevent agencies from unilaterally imposing new regulatory burdens without reference to regulation imposed by other agencies and the current level of regulatory burden.

Costs

The cost involved with all regulation need to be accurately quantified and the parties that will bear the costs need to be clearly identified. Regulatory requirements should be funded by the sphere of government imposing the burden or alternatively, be accompanied by a funding mechanism, for example provision for cost recovery through fees and charges, levies or rates.

Fees and charges should be deregulated so that councils can fully recover costs. It should be recognised that the costs are not uniform across councils because of the different circumstances they operate under and the variable impacts of regulation across the state. If not deregulated, they should at least be indexed so as preserve cost recovery in real terms.

The issue of cost shifting is more fully addressed in the following section. (Refer Section 4).

Partnership Approach

A potentially effective way of holistically addressing the issues raised above is through the adoption of a partnership model for the development and implementation of regulation. This was a key recommendation of IPART's draft Report on *Local Government Compliance and Enforcement* and is strongly supported by LGNSW. The IPART report promotes the Food Regulation Partnership (FRP) between the NSW Food Authority and Local Government as a better practice example of the partnership model. LGNSW agrees. More detailed comment on the FRP is provided in Section 5 of this submission.

4. Cost Shifting

Regulatory functions and cost shifting

For many regulatory functions councils are required to fulfil, cost recovery mechanisms do not allow them to fully recover the cost associated with the regulatory activity.

For example, councils are not given sufficient financial resources for their responsibilities to regulate development applications, deal with companion animals, manage contaminated land, control noxious weed, manage flood controls, or administer environmental regulation.

Local Government NSW considers this to be cost shifting and measures the shortfall in cost recovery in its regular cost shifting survey.

Definition of cost shifting

Cost shifting describes a situation where the responsibility for, or merely the costs of, providing a certain service, concession, asset or regulatory function are "shifted" from one sphere of government on to another without the provision of corresponding funding or the conferral of corresponding and adequate revenue raising capacity.

LGNSW's cost shifting survey has identified many regulatory activities where cost shifting occurs, including:

- Processing of development applications;
- Administration of the Companion Animals Act (NSW) 1998;

- Functions under the Protection of the Environment Operations Act (NSW) 1997;
- Functions as control authority for noxious weed;
- Administration of Contaminated Land Management Act (NSW) 1997;
- Functions under the Rural Fires Act (NSW) 1997;
- Provision of immigration services and citizenship ceremonies;
- Administration of food safety regulation; and
- Regulation of on-site sewerage facilities.

Impact of cost shifting related to regulatory activity

In 2011/12, total cost shifting was estimated to amount to \$582 million or 6.28% (6.37% in 2010/11) of Local Government's total income before capital amounts.

Of that, the amount of \$118.5 million was related to regulatory functions where cost recovery mechanisms do not allow councils to fully recover the cost associated with the regulatory activity.

Refer to the Attachment B for the table which provides estimates of the shortfall in cost recovery for particular regulatory activities measured in the cost shifting survey for the financial year 2011/12.

5. Case Studies in Better Practice Regulation

The NSW *Better Regulation Guide* states that “better regulation is the result of sound policy development and regulatory design processes” (p 7). LGNSW has identified two examples of better regulation in practice, in the case of:

- The NSW Model Asbestos Program; and
- NSW Food Authority partnership.

Model Asbestos Policy Project

The Model Asbestos Policy⁷, developed in 2012 by LGNSW in partnership with the NSW Government, demonstrates a very successful example of how the State Government can support councils in undertaking one of their key planning and compliance functions.

The ‘Model Asbestos Policy for NSW Councils Project’ has not only issued councils with a model or template as a basis for their local asbestos policy, but has also provided ongoing advice, subsidised training workshops, free forums, updates on asbestos issues and information resources to assist councils in all aspects of asbestos management.

Critical to the success of this project, the State Government provided funding to LGNSW to appoint a Project Manager – Asbestos Policy to formulate the Model Asbestos Policy in collaboration with the Heads of Asbestos Coordination Authorities (in 2012) and to assist councils to adopt and implement the Model Asbestos Policy. Councils were consulted during the preparation of the Model Asbestos Policy, primarily via a Local Government Reference Group.

LGNSW held Asbestos Management Training Workshops for councils across NSW and there has been strong demand for this training⁸. LGNSW consulted councils on their needs and preferences for support and training via two online questionnaires and via feedback forms at the workshops.

The outcome is that over 75% of councils have developed or are developing an asbestos policy based on the Model Policy. Councils are not required to report when they have adopted or updated an asbestos policy and there is not a timeframe or deadline. However, LGNSW is monitoring councils’ progress and is meeting with councils that have not yet adopted an asbestos policy to assist them and ensure compliance with relevant legislation.

Having an ongoing program of support for councils has meant that meaningful assistance across a range of asbestos issues (for example, the ongoing issues with loose fill asbestos) has been provided to councils. The program acknowledges council success through an annual award, case studies of successful projects and creating opportunities to present council initiatives at conferences and forums.

Asbestos issues require a collaborative response by Local and State Government and this support has facilitated effective collaboration. The approach adopted to manage this important issue reflects the first four of the Better Regulation Principles, that is:

1. The need for government action should be established.
2. The objective of government action should be clear.
3. The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
4. Government action should be effective and proportional.

A need was identified following a recommendation from the NSW Ombudsman⁹ and the Government’s response¹⁰ was to establish a cross-agency coordination group including a LGNSW

⁷ <http://www.lgnsw.org.au/policy/asbestos-model-policy>

⁸ Over 430 council staff from 130 councils (86% of councils) have attended an Asbestos Management Training Workshop, with several workshops being booked out within two or three weeks.

representative. The impact on councils has been tailored and proportional to meet councils' needs, for example by:

- the development of a Model Asbestos Policy that can be easily adopted or adapted by councils to suit their needs;
- the provision of subsidised training to councils;
- ongoing policy support for councils for developing their policy or for any other asbestos-related matters;
- the adoption of realistic timeframes;
- the absence of any mandatory requirements on councils to develop an asbestos policy; and
- the absence of onerous reporting requirements on councils.

While the asbestos program does not offer direct funding to councils it has nevertheless provided support by funding a dedicated full time Project Manager position (located within LGNSW) for a five-year period as well as providing subsidised training.

Other important features of the asbestos program that demonstrate better practice in terms of coordination, collaboration and communication, include the following:

- A direct line of contact for Local Government into State Government agencies via the Project Manager.
- Consistent advice for councils i.e. one point of contact with the State Government agencies, rather than being referred from agency to agency,
- Regular communication among agencies via monthly meetings which involve regular project updates from the Project Manager and agencies.
- Consistent personnel involved over the course of the program – an indicator of the level of State Government agency and LGNSW commitment to respond to the asbestos issue.

Food Authority Partnership

The Food Regulation Partnership (FRP), established in 2008, is another example of a successful arrangement between Local and State Governments. IPART has acknowledged the FRP to be “leading practice in regard to State and Local Government regulatory interactions”¹¹, noting that “an important feature ... is the 2-way flow of information and communication between the Food Authority and councils”¹². Another key feature of the FRP, which helped get councils on board initially, is that the FRP sets indicative inspection fees and administration charges and protocols for charging fees. This is consistent with recommendations by IPART that effective cost recovery mechanisms should be considered when delegating regulatory responsibility to councils¹³.

Prior to 2008, food regulation in NSW was characterised by:

- The lack of a clear role for councils in food surveillance;
- Some councils being very active in food surveillance, some not at all;
- Duplication of inspections and fees for some businesses;
- Inconsistency;
- Little formal networking between councils and between State Government agencies and councils; and
- A sometimes antagonistic relationship between Local Government and State Government agencies.

⁹ NSW Ombudsman, *Responding to the asbestos problem: The need for significant reform in NSW*, November 2010

¹⁰ NSW Government, *NSW Government Response to 'Responding to the asbestos problem: The need for significant reform in NSW' August 2011*

¹¹ IPART, *Local Government Compliance and Enforcement*, October 2013, p. 35

¹² *Ibid*, p. 36

¹³ *Ibid*, p. 96

Arguably, the FRP's effectiveness is due partly to some key elements, which IPART recognised in its *Review of Local Government Compliance and Enforcement*¹⁴:

- Legislated commitment from the Food Authority.
- Clear delineation of the respective regulatory roles and responsibilities of the Food Authority and councils, through protocols and legislation.
- Guidance and assistance to councils in undertaking their regulatory roles and responsibilities.
- The promotion of a risk-based approach to regulation, through adherence to a National Enforcement Guideline.
- The Food Authority's use and publication of reported data to assess and assist councils' regulatory performance (councils are required to provide specified data on their enforcement activities).
- A dedicated forum (the Food Regulation Forum) for strategic consultation with councils and other key stakeholders.
- A system of periodic review and assessment of the FRP.

Like the Asbestos Policy Project discussed above, there are many features and elements of the FRP that LGNSW, IPART and others recognise have potential to apply to other regulatory activities and relationships between Local and the State Government.

¹⁴ Ibid, p. 35

6. Specific Comments on Local Government Act

The Local Government Acts Task Force was established by the Minister for Local Government in 2012, to review the Local Government Act 1993 and the City of Sydney Act 1988. The Taskforce looked at ways to modernise the legislation, to ensure that it would meet the future needs of councils and communities. This was to be a comprehensive review with the intention of driving a major overhaul of the Acts.

LGNSW's predecessors, the Local Government and Shires Associations of NSW made two submissions and numerous other representations to the Task Force. This included commentary on 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. This commentary is relevant to this Inquiry and an extract from one of the submissions to the Taskforce is provided below:

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 15 – Finances

Generally *Chapter 15 Part 2 - Limits on Annual Income from Rates and Charges (Rate Pegging)* has served councils and their communities very poorly over the long-run.

The issue of the limit of annual income from rates and charges has meant that NSW Local Government revenue has lagged that of other states and as a result has left NSW behind in the provision of facilities and services to the community. It has damaged the financial sustainability of many NSW councils, contributing to infrastructure renewal backlogs, operating deficits and service level decline in some areas. It is LGNSW's view that this part should be repealed.

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 ...for a variation based on Chapter 13 Part 2 strategic planning”. If necessary, OLG/IPART guidelines could prescribe the specifics.

Current Position

LGNSW acknowledges that the Government is considering a streamlined Special Rate Variations process as part of the Fit for the Future program. LGNSW has now also been advised that the new Local Government Act will be phased in with incremental changes commencing from 2016/17. Phase 1 will involve changes to existing provisions to give effect to the Government's Local Government reform agenda. Phase 2 will relate to areas that are subject to, or will be subject to, separate review, including this IPART review.

7. Response to IPART's Review Questions

1 Does Appendix B of this paper accurately represent the regulatory functions of councils, as imposed? Please identify any missing functions or amendments required.

The list of council regulatory functions in IPART's Appendix B appears to have omitted the following:

- Flood planning and management
- Emergency planning and management
- Asbestos planning and management
- Water supply and sewage management
- Subdivision regulation and compliance

2 In relation to Appendix C of this paper:

- Are there any other sources of planning, reporting and compliance obligations imposed on councils by the NSW Government? Sources of obligations may include legislation, policies, directions or guidelines.
- What other plans or reports are councils required to prepare?

Please identify any missing information.

The sources of planning, reporting and compliance obligations imposed on councils by State legislation, regulations, policies, guidelines, etc. are vast. LGNSW is aware that councils maintain their own legislative compliance registers, and these will be a valuable input to the list in IPART's Appendix C. An initial perusal by staff within LGNSW has led to the following list of omissions, additions or amendments to Appendix C:

Community Order

- Part 3 of *Restricted Premises Act 1943* contains onerous requirements to show that premises are being used as an illegal brothel.

Environment

- *Aboriginal Land Rights Act 1983* – legislation administered by the Office of the Registrar, Aboriginal Land Rights Act, 1983
- Coastal Zone Management Plans and Estuary Management Plans are a planning requirement under the *Coastal Protection Act 1979*.
- Model Asbestos Policy for NSW Councils is a guideline issued to all councils by the OLG under section 23A of the *Local Government Act 1993*. Councils must consider the Model Policy in carrying out their functions.
- Floodplain Development Manual (administered by OEH) - Section 733 of LG Act (Flood Liable Land)

Public Health and Safety

- Boarding Houses - councils are required to enforce registration of boarding houses but the OLG guidelines do not make this clear.
- The *NSW Storm Plan (Fire and Rescue NSW)* contains various planning reporting and compliance requirements for councils.
- Regulation of on-site sewage management systems under section 68 of the *Local Government Act 1993*.
- NSW State Emergency Service – a state agency not listed

- *Disability Inclusion Act 2014*

Public Land and Infrastructure

- Plans of Management for Community Land required under the *Local Government Act 1993*
- *Dams Safety Act 1978* – Ensuring safety of dams - councils are responsible either as a local water utility or because a decommissioned/not used dam was transferred to them under the *Dams Safety Act*.
- *Heavy Vehicle (Adoption of National Law) Act 2013 No 42* - this is state legislation passed to adopt the Heavy Vehicle National Law (HVNL) in NSW, with some NSW variations. The main impost for councils is that they are now required to make heavy vehicle access decisions as the road managers for local roads in NSW, and to and impose road and travel conditions on permits and authorities. These require councils to undertake additional administrative, processing and technical route assessment activities beyond what was required prior to the introduction of the HVNL (as introduced in NSW).

Water and sewerage

- Best practice management and performance reporting for councils' local water utilities under the Country Towns Water Supply and Sewerage Program and its best practice management guidelines (DPI Water).
- Water entitlement management for local water utilities under the Water Act and the Water Management Act.

In addition to the above existing sources of planning, reporting and compliance obligations, the NSW Government has stated its intentions to hand over new regulatory functions to Local Government on a number of issues in the next two or so years. While this may not be entirely within the scope of IPART's review (as the 'regulatory burden' is not yet there), it is worth noting that transfers of responsibility to Local Government are earmarked in relation to the following areas:

- Underground Petroleum Storage Systems (UPSS).
- Vapour Recovery under the POEO (Clean Air Regulation) 2010.
- Biodiversity Reforms - Native Vegetation Clearing, in which Local Government is to have a significantly new role in managing native vegetation for new agricultural development through the *Environmental Planning and Assessment Act 1979*.

LGNSW can provide more details on each of these if required.

3 Are the best practice regulatory principles (as outlined in this paper) a sound basis for assessing whether the planning, reporting and compliance obligations imposed by the NSW Government on councils are unnecessary or excessive?

As previously noted, LGNSW endorses and encourages the application of the seven better practice principles. However, LGNSW would add the following two principles:

8. Consultation and agreement with Local Government where proposed regulation will involve councils in planning, reporting or compliance.
9. Provision of funding or a durable funding mechanism that escalates in real terms where regulatory requirements generates costs.

4 How should IPART take into account the NSW Government's Open Data Policy when developing options to streamline or remove reporting requirements on councils?

Data that is collected by one NSW Government agency should be available for use by all other NSW Government agencies. NSW Government agencies should not require councils to provide reports containing the same or similar information already provided to a different agency. Where the same information is required in different timeframes, the government agencies should liaise and coordinate to determine what time frame would best ensure information is only reported once.

The NSW Government's Open Data Policy LGNSW provides a basis for addressing unnecessary duplication. LGNSW proposes that it be made a requirement for NSW Government agencies to thoroughly scan all government databases to ensure that the desired data has not already been collected before introducing new planning and reporting requirements.

5 Are there any other developments of best practice regulatory principles by other bodies or in other jurisdictions that IPART should consider in this review?

IPART has already identified developments in Queensland, Victoria and Western Australia. These would appear to be the most relevant jurisdictions for comparison with NSW.

LGNSW notes that the ILGRP recommend that the Victorian model be followed.

6 What planning, reporting or compliance requirements imposed by the State on councils could be removed? Please provide reasons as to why you believe removal of the requirement is justified.

Refer to Attachment A.

7 What planning, reporting or compliance requirements imposed by the State on councils could be streamlined or reduced in some manner? If you have any suggestions for how the requirement can be streamlined or reduced, please specify.

Refer to Attachment A.

8 How could the State Government provide greater support to councils to help manage planning, reporting and compliance requirements? Please provide details of the type of support you believe could be provided, and in relation to which planning, reporting or compliance requirement/s.

The two better practice case studies featured earlier in this paper, the Model Asbestos Policy and the Food Authority Partnership, provide good examples of how to provide greater support to councils with planning, reporting and compliance arrangements.

Generally speaking the types of support that would assist include;

- Early and genuine consultation.
- Clear, concise and accessible information.
- Provision of training where appropriate.
- Provision of templates and resource materials.
- A reasonable notice period for the introduction of new requirements to enable councils to understand the new requirements make software changes etc. This principle of early or timely notification is widely applicable, and has been a challenge for councils particularly in relation to planning laws, as discussed earlier.¹⁵
- Provision/inclusion of funding or funding mechanisms where additional costs are involved.

¹⁵ A simple example of a lack of notification which has been raised by several councils is that from time to time, amendments are made to Local Environmental Plans (LEPs) originating from an authority other than the relevant council, yet councils are not made aware when such a change takes place. Councils requesting that the Department implement a system by which notification of a legislative change occurs in a timely manner.

- Regular communication.
- A single point of contact within a State agency, and ideally for multi-agency issues (as in the case of the asbestos policy project), a single point of contact across State agencies.

9 Do the cost categories (as outlined in this paper) adequately cover the impacts of the planning, reporting and compliance obligations placed on local government by the State Government? If not, please detail any additional impacts.

The cost four cost categories appear wide enough to capture all relevant costs. LGNSW notes that administrative costs and substantive compliance costs may need to be interpreted more broadly than the Issues Paper indicates. For example, compliance costs may involve inspections monitoring and testing.

10 Do the planning, reporting and compliance obligations placed on local government by the State Government have any additional qualitative impacts? These may be impacts on councils, the NSW Government or the wider community.

A working group was formed by LGNSW's predecessors, the Local Government and Shires Associations of NSW (LGSA) to proceed with action 2g of the Destination 2036 Action Plan. Action 2g required reviewing all legislation for impact on Local Government and identifying opportunities to reduce red tape while ensuring accountability and not compromising good governance. The group noted the statement relating to the action in the Destination 2036 Action Plan which says:

"While there are a number of legitimate regulatory functions for councils at the local level, their primary role is to provide services to their communities. It is therefore important that council resources are freed up to the maximum extent possible to focus on providing services to meet local needs, rather than being bogged down in process and compliance activities."

It can be derived from this that the qualitative benefits would involve a stronger focus on serving the community and the resultant satisfaction of the community and staff.

11 In relation to any planning, reporting or compliance obligations that you identify as unnecessary or excessive please provide details of the costs involved in undertaking the obligation.

Please see advice on cost shifting elsewhere in this paper.

12 In relation to any planning, reporting or compliance obligations that you identify could be removed, streamlined or reduced, what proportion (%) of the costs involved (as identified in response to question 11) would be saved by doing so (e.g. 100%, 50%, 10%)?

As above.

13 In relation to any planning, reporting or compliance obligations that you identify as unnecessary or excessive, what are the savings to NSW Government agencies from removing or streamlining these obligations?

The NSW Government is in the best position to assess the resulting costs savings to itself. Information in relation to this question will be uncovered through the IPART questionnaire, information requests to State Government agencies and workshops that are being conducted as part of this review.

14 Are there any more qualitative benefits that would be realised through a reduction in the regulatory burden on councils? If so, please describe these benefits.

Refer to response to Question 10.

15 What are the risks to the community or the NSW Government from removing or reducing the planning, reporting or compliance obligations identified as inefficient or unnecessary?

If a planning, reporting or compliance requirements were objectively assessed in consultation with the relevant parties and found to be inefficient or unnecessary, there would be almost absolute certainty that the risk of removing the requirement is negligible. In the unlikely event that any negative unintended consequences should emerge, they could be quickly contained and rectified.

16 What are the risks to councils from removing or reducing the planning, reporting or compliance obligations identified as inefficient or unnecessary?

Refer to response to Question 15.

8. Conclusions

LGNSW commends the NSW Government for acting on ILGRP Recommendation 19 by establishing this Inquiry. LGNSW appreciates that the accurate identification and costing of the planning, reporting and compliance burden on Local Government is a vast and complex exercise that will require input from the whole Local Government sector as well as state government agencies. LGNSW is willing to make an active contribution to this task and looks forward to working constructively with IPART for the duration of this process.

Attachment A

Extract from *Destination 2036 Action 2G Working Group – Final Report, January 2013*

Priority areas that “bog councils down”

The following priority areas of real frustrations where council are bogged down in delivering services and performing functions by compliance requirements and processes required by legislation and other regulatory instruments were identified:

1) Public advertising and exhibition requirements

- a) Advertising and exhibition/public notice requirements that can only be satisfied by using old-fashioned print media not modern/electronic media or council website (currently LG Reg require this to be done in (local) newspaper).
- b) Avoidance of significant advertising cost in print media.
- c) Can exhibition processes and timeframes be more flexible depending on the issue and engagement tools applied (as distinct from a time-fixed printed copy exhibition)? Faster processing would help councils in certain circumstances.

Public exhibition/notice requirements in LG Act and LG Reg

Section in LG Act or LG Reg	Further detail	Comment
Section 9 - Public notice of meetings (council meeting)	s705 public notice (non-descriptive in terms of medium)	Appropriate
Sections 160, 161, - Local policy (approvals and orders) – public notice and public exhibition	28-42 days regime; s705 public notice (non-descriptive in terms of medium) s166 public notice refers to regs 77 and 100 (local newspaper; twice)	Appropriate Reg 77 and 100 seem to both contain the same requirement
Sections 361, 362 – Code of meeting practice – public notice and public exhibition	28-42 days regime; s705 public notice (non-descriptive in terms of medium)	Review: Is this something that requires one-off public notice and exhibition or should it be required to be on website with essential meeting practices required by legislation/regulation?
Section 34 - Public notice to be given of classification or reclassification by council resolution (community land)	28 days regime; s705 public notice (non-descriptive in terms of medium)	Could that be integrated more generally into IPR?
Sections 38, 40 - Plans of management (community land) – public notice and public exhibition	28-42 days regime; s705 public notice (non-descriptive in terms of medium)	Could that be integrated more generally into IPR?
Section 47, 47A, 47AA – Leases of community land – public notice and individual notices	s705 public notice (non-descriptive in terms of medium) s47AA refers to additional requirements in LG Reg	No comment

Section in LG Act or LG Reg	Further detail	Comment
Section 32 - Reclassification of land dedicated under s 94 of the <i>Environmental Planning and Assessment Act (NSW) 1979</i> (to operational land; public notice)	28 days regime; s705 public notice (non-descriptive in terms of medium)	No comment
Reg 112 - Consultation concerning categorisation of community land as an area of cultural significance - public notice, advertising	<ol style="list-style-type: none"> 1. Written notice to the following: <ol style="list-style-type: none"> a. the Local Aboriginal Land Council for the area concerned, b. NSW Native Title Services), c. (iii) the Registrar appointed under the <i>Aboriginal Land Rights Act 1983</i>, d. Director-General of the Department of Aboriginal Affairs, e. Director-General of the Department of Environment and Conservation; 2. Placing an advertisement in a newspaper circulating across the State that is primarily concerned with issues of interest to Aboriginal people; and 3. Placing a written notice on the land in a position where the notice is visible to any person on adjacent public land. 	No comment
Section 253 – Adoption/amendment of policy concerning expenses and facilities provided to councillors – public notice	28 days regime; s705 public notice (non-descriptive in terms of medium)	No comment
Section 715 - Notice of proposal to sell land (Sale of land for unpaid rates and charges)	Gazette and newspaper	Review adequacy of requirement
Section 405 - Operational plan (IPR) – Public notice, public exhibition, and consideration of submission	28 days regime; s705 public notice (non-descriptive in terms of medium)	No comment
Section 532 - Making of rates and charges in operational plan under s405	Public notice under s405 suffices	Integrate into s405 regime?
Section 610F - Public notice of fees (for non-business activities)	According to s405 if with operational plan; otherwise s705 and 28 day regime	Integrate into s405 regime?
Section 410 - Alternative use of money raised by special rates or charges – public notice if alternative use has been proposed in operational plan under s405	Only if a proposal to that effect has been included in a draft operational plan for the current year or for a previous year, and public notice of the fact that the proposal was included in the operational plan adopted by the council for that year has been	Is it not sufficient to have the potential alternative use in operational plan? Is an additional public notice requirement necessary?

Section in LG Act or LG Reg	Further detail	Comment
	<p>published in a newspaper.</p> <p>See also below for ministerial approval requirement for internal loan of such funds for other purpose if not yet required for intended purpose</p>	
Section 404 – Delivery Program (IPR) – Public exhibition and submissions	<p>Note: no public notice required;</p> <p>28 day regime for exhibition</p>	No comment
Section 402 – Community Strategic Plan (IPR) – Public exhibition and submissions	<p>Note: no public notice required;</p> <p>28 day regime for exhibition</p>	No comment
Section 418 - Public notice to be given of presentation of financial reports (auditor's report)	s705 public notice (non-descriptive in terms of medium)	Could that be part of annual report without separate public notice requirement?
Reg 216 - Council's annual financial reports to be amended on request of director-general – Public notice of amendment	Newspaper circulating in council area	No comment
Section 210A - Proposals regarding ward boundaries – consultation with Electoral Commissioner and the Australian Statistician, public notice and exhibition	Reg 277 - The notice is to be given (a) by advertisement in a newspaper circulating generally in the council's area, and (b) in writing displayed at the office of the council, and (c) in writing delivered or sent to the Electoral Commission.	No comment
Section 356 - Financial assistance to persons for the purpose of exercising its functions – recipient who act for private gain	<p>A proposed recipient who acts for private gain is not ineligible to be granted financial assistance but must not receive any benefit under this section until at least 28 days' public notice of the council's proposal to pass the necessary resolution has been given.</p> <p>Public notice is not required if: (a) the financial assistance is part of a specific program, and (b) the program's details have been included in the council's draft operational plan for the year in which the financial assistance is proposed to be given, and (c) the program's proposed budget for that year does not exceed 5</p>	Review appropriateness of public notice requirement, particularly in light of complex exemption regime. Perhaps all such assistance should be part of a "program"?

Section in LG Act or LG Reg	Further detail	Comment
	per cent of the council's proposed income from the ordinary rates levied for that year, and (d) the program applies uniformly to all persons within the council's area or to a significant group of persons within the area. Public notice is also not required if the financial assistance is part of a program of graffiti removal work.	
Section 610E - Council may waive or reduce fees (non-business activities) - determination of eligible hardship or other categories	public notice of the proposed category; same way as s610F; i.e. according to s405 if with operational plan; otherwise s705 and 28 day regime	Require integration into operational plan regime without separate public notice requirement?
Section 224A - Approval to reduce number of councillors	42 days public notice; s705 public notice (non-descriptive in terms of medium)	No comment

Advertising requirements in LG Act and LG Reg

Section in LG Act or LG Reg	Further detail	Comment
Sections 55 tendering requirements – Inviting tenders/expressions of interest (selective tendering by public notice/advertising in “relevant newspapers”	s55(2) refers to LG Reg, Part 7 r164 LG Reg states; "relevant newspapers", in relation to a council, means (a) a Sydney metropolitan daily newspaper, and (b) either or both of the following: (i) a newspaper circulating in the council's area, (ii) a newspaper circulating in the district where potential tenderers are likely to be carrying on business or to be residing.	Invitation should be allowed to be placed in other media (electronic media)
Regulation 179 - Notification of acceptance of successful tender	Display of notice to public in a conspicuous place that is accessible to members of the public.	Is the council website okay?
Section 348 - Advertising of staff positions	Generally: advertised in a manner sufficient to enable suitably qualified persons to apply for the position. If senior staff position, advertisement at least twice in a daily newspaper circulating throughout the state.	Overregulation – should be up to council. The requirements under s348 of the <i>Local Government Act 1993</i> (NSW) relating to the advertising of vacant

Section in LG Act or LG Reg	Further detail	Comment
		positions is overly prescriptive. The provision should simply require that positions be advertised in a manner that is sufficient to enable suitably qualified persons to apply for the position.

2) Ministerial approvals

- a) Process for obtaining ministerial approval is often cumbersome, lacks response commitment by ministers and represents another step in the process.
- b) Section 60 LG Act (council water infrastructure); significant delays in response; ministerial approval is not necessary and does not add value for mature local water utility that operates under the NSW Office of Water best practice guidelines and the Public Health Act (NSW) 2010
- c) Lease of land approval requirement
- d) Council dredging and land reclamation and ministerial approval under Fisheries Management Act
- e) Setting up of council owned corporation

List of ministerial approval requirements in LG Act and LG Reg:

Section in LG Act or LG Reg	Further detail	Comment
Section 354A - Ministerial approval for certain termination payments to general manager and senior staff	See for exemptions r405 LG Reg	Internal audit instead of ministerial approval?
Section 354E – Constitution/amalgamation/alteration of councils – Ministerial approval required for certain increases or decreases in staff entitlements during proposal period to be binding on transferee council	See for exemptions r406 LG Reg	No comment
Section 60 - Council works for which the approval of the Minister for Land and Water Conservation is required	Applies to: (a) construct or extend a dam (for water supply, (b) construct or extend water treatment works, (c) works that provide for sewage from its area to be discharged, treated or supplied to any person, (d) as to flood retarding basins prescribed by the regulations-construct or extend any such basins. See also rr138 (process etc), 147 LG Reg	Design/scheme regulation, if at all necessary (e.g. normal water treatment plant), should be undertaken by relevant health, environment regulator according to general standards.
Section 224A - Approval to reduce number of councillors – public notice and application to Minister for approval		No comment
Section 210B - Abolish all wards in council's area - public notice and		No comment

Section in LG Act or LG Reg	Further detail	Comment
application to Minister for approval		
Section 126 - Giving ss124ff orders to public authorities requires prior ministerial consent.	<p>“Public authorities” means:</p> <ul style="list-style-type: none"> • vacant Crown land; • a reserve within the meaning of Part 5 of the <i>Crown Lands Act (NSW) 1989</i>; • a common. 	Appears unnecessary.
Section 187 – Land acquisition by council – For compulsory acquisition: giving of acquisition notice under the <i>Land Acquisition (Just Terms Compensation) Act (NSW) 1991</i> requires ministerial approval		No comment
Section 111 – Revoking or modifying ss68ff approvals given to Crown or s72 persons – Notice to minister and ministerial consent required		No comment
Section 47 - Leases, licences and other estates in respect of community land-terms greater than 5 years – ministerial approval required if objections or lease longer than 21 years	s47(5)	No comment
Section 47A - Leases, licences and other estates in respect of community land-terms of 5 years or less – Minister may require council to apply s47(5) (i.e. ministerial approval required if objections and s47A(3) required)	s47A(2)(c)	?? Confusing reference back to s47(5) and confusing process under s47A(3)
Section 358 – Ministerial approval for formation of corporations and other entities of acquisition of controlling interest in such	<p>Council must not form or participate in the formation of a corporation or other entity, or acquire a controlling interest in a corporation or other entity, except:</p> <p>(a) with the consent of the Minister and subject to such conditions, if any, as the Minister may specify, or (b) as provided by this Act.</p> <p>See also r410 LG Reg</p>	See below 3.
Section 625 - How may councils invest?	In accordance with ministerial investment order	No comment
Section 622 – Ministerial approval required for means of borrowing other than overdraft and loan		Generic regulation rather than case by case approval?
Section 410 - Alternative use of money raised by special rates or charges – ministerial approval for internal loan of such funds	Ministerial approval required for internal loan of such funds for other purpose if not yet required for intended purpose	Review whether this ministerial approval is necessary or general financial audit would be sufficient (what about internal loans from other funds; e.g. development contributions; do they require ministerial approval)
Section 633 – Ministerial consent for regulation by council of water use by vessel with respect to bathing (including	(4C) A notice referred to in this section cannot prohibit or regulate the use of any waters by a vessel (within the	Very specific and complex.

Section in LG Act or LG Reg	Further detail	Comment
nude bathing) and other water-based recreational activities	meaning of <i>the Ports and Maritime Administration Act (NSW) 1995</i> : (a) in the case of a notice erected after the commencement of this subsection-unless the Minister administering that Act has consented to the erection of that notice, or (b) in the case of a notice erected before that commencement-if the Minister administering that Act has directed the council to remove the notice.	
Section 424 – Removal of (financial auditor) before term of office ends requires ministerial approval		Why would that be the Minister's business? Should be up to council.

3) Uncertainties around using the corporate models to separate and run business units, particularly among councils

- a) Ministerial approval required, section 358 LG Act.
- b) Anecdotal evidence suggests that approval process and operating structure is cumbersome and provides disincentive to use corporations (from submissions to Local Government Review Panel, but not substantiated). It should be reviewed whether this is mainly based on industrial issues (when moving employees from council to a corporation) and taxation implications, particularly potential loss of payroll tax exemption (however, LWUs pay already payroll).
- c) As autonomous bodies, councils should have the ability to form or participate in the formation of a corporation or other entity, or acquire a controlling interest in a corporation or other entity if they so wish based on legislative framework (see below NZ model).
- d) Administrative requirements of the ministerial approval process contained in DLG Circular 07-49 are likely to impede establishment of corporations.

DLG Circular 07-49 Criteria for Applications under Section 358 of the Local Government Act (NSW) 1993 – Formation of corporations or other entities requires:

In applying for the Minister's consent under section 358, the council must demonstrate that the formation of, or the acquisition of the controlling interest in, the corporation or entity is in the public interest. After assessing the application, the Department will make a recommendation to the Minister on the council's proposal. As part of the Department's assessment of a council's application, we will have regard to the following:

1. Is the proposal consistent with the functions of the council or an existing service that the council provides?

This requirement is drawn from the power of a council to "provide goods, services and facilities and carry out activities appropriate to the current and future needs within its local community and of the wider public" that is contained in section 24 of the Act. This requirement is also consistent with council's general charter in section 8 of the Act.

To establish that a proposal is consistent with council's functions or services, the following should be provided in support of the application:

- *Demonstration of the link between the proposal and community or public needs*
- *Detail on the general appropriateness of the council's involvement in the corporation or other entity*
- *Explanation as to how corporatisation or involvement in the entity would improve the economic performance and ability of the council to carry out its responsibilities*
- *Explanation of what measures will be employed to ensure that the activities of the corporation or entity will be accountable.*

2. Will the proposed entity be legally separated from the council?

Applications must demonstrate that the initial capital and working capital of the corporation/entity can be identified and separated from the council. The application must also indicate how the council (both as a corporate body and its members personally) are protected from any liability that might arise as a result of the activities of the corporation/entity (including the activities of other partners). To demonstrate adequate legal separation, council should address three main areas or activities of the proposed corporation or entity. These are:

- *Legal structure (including liability of the council, councillors and council staff)*
- *Financial separation (confirmation that the accounting for the corporation or other entity is separate to the council's accounts)*
- *Management separation (details of the management structure of the corporation or other entity).*

3. Is the council currently financially viable?

An assessment of the council's overall financial viability will be made on the basis of data that the council is routinely required to supply to the Department. However, council should also provide details about the costs expected to be incurred, and revenues expected to be received, by the council as a result of being involved in the corporation or other entity.

4. What is the impact of the proposal on existing council staff?

Will the proposal result in existing council staff being transferred to the employment of the corporation and if so, will the staff be employed on terms and conditions consistent with their previous employment with the council? Will the corporation guarantee the continued employment of transferred staff for a period of at least 3 years? Will the corporation adopt an agreement to refer any industrial disputes to the NSW Industrial Relations Tribunal? Will the proposal result in existing council staff being made redundant.

From Peter McKinlay's speech at the 2012 LGA Conference:

New South Wales local government has long had the statutory power to form companies but this is constrained by a requirement for ministerial approval. Under the previous Labour government approval was only very reluctantly given, and then strongly conditioned in order to protect the terms and conditions of existing employees - in other words, effectively preventing the use of companies as a means of significantly improving productivity.

Another barrier to approval has been the fact that there is nothing in the legislation regulating the post-establishment governance of local authority owned companies. This has created reluctance at an official level to recommend approval because of the risk involved if something should later go wrong. It also means that it is difficult to give any kind of firm assurance either to elected members, or to a council's public that activities will remain appropriately accountable - there is a real fear that placing activity in a company structure simply takes it outside the council's control and oversight.

New Zealand has been pioneering a new approach to the governance of local authority owned companies. It's explicitly designed to ensure that on the one hand, the company remains accountable to elected members and on the other that the Board of Directors is free to get on with the business of the company. It involves an iterative process based around a document known as the statement of intent agreed between the board and the council, and setting out a wide range of matters, including the nature of the business the company will undertake, key financial and non-financial reporting indicators, accountability provisions, how it will handle major acquisitions or disposals and much more.

It's proving a very useful tool in lifting capability, and bringing new skills into the council family which could not be recruited directly onto staff. It is showing great promise in underpinning a new and much more productive approach to developing shared services, and it is improving accountability to elected members as compared with the situation with (say) a conventional council business unit.

- e) Difficulty to use corporate model represents missed opportunity to provide for shared services, regional delivery.
- f) NSW model lacks rules and safeguards to keep council in control (a barrier to the formation of shared corporate entities could be the feeling of elected council members or senior staff that council is effectively responsible for an entity it has no control over).
- g) See New Zealand model in Part 5 of the *Local Government Act (NZ) 2002*

- i) No ministerial approval for establishment but special consultative procedure required (s56) (i.e. public notice of proposal and public exhibition plus public submission process; see s83)
- ii) Skills based board appointed by council,
- iii) Comprehensive statement of intent (s 64 and schedule 8) with the purpose to:
 - (1) State publicly the activities and intentions of a council controlled organisation for the year and the objectives to which those activities will contribute; and
 - (2) Provide an opportunity for shareholders to influence the direction of the organisation; and
 - (3) Provide a basis for the accountability of the directors to their shareholders for the performance of the organisation.

4) Reporting to state agencies

- a) Reporting to different agencies is not aligned and there is often duplication of information provision to different agencies in different formats (not further specified)
- b) Data warehousing rather than councils reporting directly to each agency – “One of the biggest drains is the production of report and compliance activities for government departments (both Commonwealth and State). The sector needs to develop some automation of reporting so that agencies can “self-help” from data warehousing or the like rather than requiring direct reporting from councils (Eurobodalla to Destination 2036).

5) State of the Environment (SoE) reporting under LG Act

- a) SoE was not identified as a big issue as it is now determined by councils’ community strategic planning framework (council’s objectives and delivery actions) what they need to report on – this is seen as appropriate by the sector.
- b) However, there might be some duplication of what the state government administration does and what councils do. LGSA, the Office of Environment and Heritage and other agencies have formed a working group to address this issue.

6) Annual report

- a) Overly detailed reporting requirement in annual report on specific expenditure items on councillors as well as council contracts; see regulation 217 of LG Act; particularly:

Councillor activities/expenses, Reg 217 (1) requires in annual report:

- (a) Details (including the purpose) of overseas visits undertaken during the year by councillors, council staff or other persons while representing the council (including visits sponsored by other organisations),
 - (a1) details of the total cost during the year of the payment of the expenses of, and the provision of facilities to, councillors in relation to their civic functions (as paid by the council, reimbursed to the councillor or reconciled with the councillor), including separate details on the total cost of each of the following:
 - (i) the provision during the year of dedicated office equipment allocated to councillors on a personal basis, such as laptop computers, mobile telephones and landline telephones and facsimile machines installed in councillors’ homes (including equipment and line rental costs and internet access costs but not including call costs),
 - (ii) Telephone calls made by councillors, including calls made from mobile telephones provided by the council and from landline telephones and facsimile services installed in councillors’ homes,
 - (iii) The attendance of councillors at conferences and seminars,
 - (iv) The training of councillors and the provision of skill development for councillors,
 - (v) interstate visits undertaken during the year by councillors while representing the council, including the cost of transport, the cost of accommodation and other out-of-pocket travelling expenses,

- (vi) overseas visits undertaken during the year by councillors while representing the council, including the cost of transport, the cost of accommodation and other out-of-pocket travelling expenses,
- (vii) the expenses of any spouse, partner (whether of the same or the opposite sex) or other person who accompanied a councillor in the performance of his or her civic functions, being expenses payable in accordance with the *Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors for Local Councils in NSW* prepared by the Director-General from time to time,
- (viii) expenses involved in the provision of care for a child of, or an immediate family member of, a councillor, to allow the councillor to undertake his or her civic functions,

Contracts and private works, reg 217 (1) requires in annual report:

- (a2) details of each contract awarded by the council during that year (whether as a result of tender or otherwise) other than:
 - (i) employment contracts (that is, contracts of service but not contracts for services), and
 - (ii) contracts for less than \$150,000 or such other amount as may be prescribed by the regulations, including the name of the contractor, the nature of the goods or services supplied by the contractor and the total amount payable to the contractor under the contract,
- (a3) a summary of the amounts incurred by the council during the year in relation to legal proceedings taken by or against the council (including amounts, costs and expenses paid or received by way of out of court settlements, other than those the terms of which are not to be disclosed) and a summary of the state of progress of each legal proceeding and (if it has been finalised) the result,
- (a4) details or a summary (as required by section 67 (3) of the LG Act) of resolutions made during that year under section 67 of the LG Act concerning work carried out on private land and details or a summary of such work if the cost of the work has been fully or partly subsidised by the council, together with a statement of the total amount by which the council has subsidised any such work during that year,

Companion animal regulation, reg 217 (1) requires in annual report:

- (f) a detailed statement, prepared in accordance with such guidelines as may be issued by the Director-General from time to time, of the council's activities during the year in relation to enforcing, and ensuring compliance with, the provisions of the *Companion Animals Act (NSW) 1998* and the regulations under that act.

7) Quarterly Budget Reporting Statement

- a) Too complex and prescriptive, some reporting excessive unnecessary (e.g. contracts listing), level of financial reporting required not appropriate for councillors.
- b) Allow council to vary what level of detail they provide on financial data, specify outcomes (e.g. enabling of councillors to assess financial sustainability, flexible reporting to councillors on delivery program, operating plan and financial situation/planning).

8) DLG Capital Expenditure Guidelines, (2010)

- a) Guidelines apply to capital projects for infrastructure facilities, including renovations and extensions that are expected to cost in excess of 10% of council's annual ordinary rate revenue or \$1 million, whichever is the greater (GST exclusive). In addition to the minimum requirements for a Capital Expenditure Review, a council is also required to complete additional requirements in cases where a project's cost is forecast to exceed \$10 million (GST exclusive).
- b) Notification of DLG and provision to DLG of business case etc.; process requirements by DLG.
- c) Delays and no added value associated with these sub-regulatory requirements

- d) Suggestion: process to be abolished with the introduction of integrated planning and reporting.

9) Procurement/tendering

- a) Tendering requirements are comprehensive and compliance costly for councils as well as providers.
Regulation should be clearer on who undertakes selective tender invitation, evaluation etc. – council proper or senior management (e.g. r166, 168 LG Reg). Regulation could allow for council to establish evaluation panel comprising senior staff and delegate
- b) Tendering threshold not cognisant of council and project size.
There is a confusing discrepancy between the limit of \$100,000 in s55 LG Act and the limit of \$150,000 in r163 LG Reg. Threshold is too low. \$250,000 would be more appropriate; or even different thresholds for different council sizes.

Clarification is also required what the threshold definition actually means – the total expenditure over a 3 year contract period per contract (not an individual supplier) is the best method. Differing calculation methods are already used to avoid tendering. Some examples are: annual spend per supplier; value of an individual purchase order; annual council approved budget.

- c) Tendering timelines still depend on publication in print media; electronic publication does not satisfy act; see above under 1. and r167 LG Reg – It is suggested that this be more flexible allowing for electronic media advertising only where council choose to do so (e.g. website). This appears industry practice and systems like *Tenderlink* allow for this.

Note: With the implementation of joint procurement on a regional and state wide basis the number of council tenders has dropped significantly and hence total compliance cost for both councils and providers

10) Complaint handling and code of conduct

- a) Council panels should be abolished and DLG take over the complaint handling process (152 council review panels are too costly and quality might not be ensured).
- b) Code of conduct is too long, complex and prescriptive – 80 pages vs. two pages for members of NSW Parliament.

11) Lack of alignment of state and local strategic planning frameworks

- a) State regional and agency planning does not take account of and hence often frustrates councils community strategic planning.
- b) LEPs or new framework according to the Planning Review Green Paper establish a separate process to community strategic planning process
- c) RDAs planning and funding not aligned to community strategic planning?

12) Administrative complexity of applying for and monitoring of grant funding

- a) Identification of grant funding opportunities, complex and inconsistent application processes, and onerous grant monitoring require significant resources.
- b) Resources are spent on administration rather than the project itself.
- c) Smaller councils with limited resources miss out.
- d) Need to develop grant portal comprising all grants and consistent and uniform administration that takes account of applicants size;
- e) Risk based approach to grant monitoring; e.g. selective audits.
- f) Annual grant funding period limit ability/provide disincentive to plan/seek funding for longer term activity (strategic plan, delivery program) and favour short term projects that might discontinue when funding ceases.

- g) Comments from submission to Local Government review Panel include:
 - i) The system is too complex – too many grants administered by different agencies, with different application and reporting requirements.
 - ii) Small councils are disadvantaged by “dollar for dollar” funding schemes, because they don’t have the resources to provide their share of funds.
 - iii) Peri-urban councils are disadvantaged because they fall within multiple state boundaries and may not qualify.
 - iv) Small councils find it difficult to compete against larger, well-resourced councils in preparing their grant applications.
 - v) Individual councils all competing with each other for grants discouraging regional collaboration.
 - vi) Application processes are excessively complex and expensive.
 - vii) Need to streamline access to government grant funding into a single portal.

13) Employment/workforce

- a) Employment requirements are included in different acts (LG Act and specific acts on water and roads)
- b) The requirements under s348 of the Local Government Act 1993 (NSW) relating to the advertising of vacant positions is overly prescriptive. The provision should simply require that positions be advertised in a manner that is sufficient to enable suitably qualified persons to apply for the position (see above under 1., table on advertising requirements).
- c) The requirement under s351(2) LG Act that persons appointed to a position temporarily may not continue in that position for more than 12 months (or 24 months in the case of parental leave) is overly prescriptive and removes councils’ flexibility to use temporary appointment in situations where a temporary appointment may otherwise be the most appropriate form of employment – e.g. to temporarily replace an employee that is on extended workers compensation, long service leave or secondment to a different position.
- d) Flexibility in sharing staff among councils – Northern Sydney ROC’s Submission to Destination 2036).
- e) Modernise employment opportunities (Eurobodalla Shire Council’s Submission to Destination 2036).
- f) Inflexibility of State Award (Mid-Western Regional Council’s Submission to Destination 2036).

14) Complexities in interaction of certain pieces of legislation

- a) Cumbersome and complex assessment of rate exemption on Aboriginal land (interaction between LG Act and Aboriginal Land Act.)

The *Aboriginal Land Rights Act (NSW) 2002* sets out what land can be exempt from the payment of rates and the process for such exemptions. Firstly, a rate exemption will apply to land that is vested in a local Aboriginal land council (LALC) and the land is not being used for a commercial or residential purpose. Secondly, a rate exemption will apply to land that is of spiritual or cultural significance to Aboriginal people and the LALC have sought and been granted an exemption by the Minister on this basis.

The uncertainty surrounds how a council is to make a decision on whether Aboriginal land is being used for commercial or residential purposes. This would usually require an inspection of each property to ascertain the use to which each property is being put which can be time consuming and resource intensive.

A simpler solution would be to define commercial and residential in the LG Act and require the LALC to sign that the property in question is not being used for either of those purposes.

- b) Access to Commonwealth e-servicing database requires compliance with federal privacy regulations that are different to state regulation (in the context of rate concessions).

15) Complexities and uncertainties around roads signage and road closures

- a) Roads Act requires ministerial approval for road closures.

The *Roads Act (NSW) 1993* (the Act) provides that all members of the public are entitled to, as a right, to pass along a public road.

An application to close a public road may be made by any person in the case of a Crown road and in the case of any other public road by the roads authority for the road or by any other public authority. An application may also require the payment of a fee to the Minister for Roads to offset the costs of the application. The Minister may also propose the closing of a public road on their own initiative.

A notice proposing the closing of a public road must be published in a local newspaper. The notice must come from the Minister and identify the road to be closed and provide that any person is entitled to make a submission. After considering any submissions the Minister may close the road but where the road is owned by a council, the council must consent to the closure.

The red tape arises where a council wants to close a public road, that is under the control and in the ownership of the council, and they have to go through all the above steps to achieve this.

16) Noxious weed regulation

- a) Issuing of order to public authority to remove weeds on public authority land requires involvement of relevant minister.

17) Carbon tax and council landfills

- a) Significant and complex reporting requirements.
- b) Might be unnecessary because only 3% of carbon emissions are generated by the waste sector in Australia (and even less by liable council landfills).

18) Complex regulation around land use and development assessment (from submissions to Local Government Review Panel)

- a) Addressed by Planning review

Attachment B

Shortfall in cost recovery in the provision by NSW councils of various regulatory functions

Shortfall in cost recovery is measured as cost in \$ of services/functions less any revenue related to them (fees, state government payments/subsidies).

Source: LGNSW Cost Shifting Survey for the Financial Year 2011/12.

Regulatory function	Description	Shortfall in cost recovery in \$million in 2011/12	Comment
Processing of development applications	Councils process development applications under the Environmental Planning and Assessment Act (NSW) 1979 and associated regulations.	59.1	This includes costs associated with services by other agencies (e.g. initial fire safety reports from the NSW Fire Brigades, s144 of the Environmental Planning and Assessment Regulation (NSW) 2000).
Administration of the Companion Animals Act (NSW) 1998	Councils' role was expanded from a pure enforcement role to a regulatory body with functions including preparation of companion animal management plan, operation of lifetime registration system, separation of cats and dogs, maintaining facilities, enforcement, and the collection of fees for the Office of Local Government which returns only a small proportion of those fees to Local Government.	20.7	
Functions under the Protection of the Environment Operations Act (NSW) 1997	Councils are required to administer the licensing system and enforce protective regulation (issuing of environmental notices, prosecution of environmental offences, undertaking of environmental audits) in relation to all non-scheduled activities not regulated by the NSW Environment Protection Authority.	10.7	
Functions as control authority for noxious weed	Councils are required to regulate and control noxious weeds pursuant to the Noxious Weeds Act (NSW) 1993 and s183 of the Local Government Act (NSW) 1993.	11.0	Costs include only reasonably necessary regulation of noxious weeds on land other than council land and council managed Crown land. Costs do not include cost of other environmental weeds control or general bush land care.

Regulatory function	Description	Shortfall in cost recovery in \$million in 2011/12	Comment
Administration of Contaminated Land Management Act (NSW) 1997	Councils are required to respond to contaminated land issues, undertake the administration, registration and mapping of contaminated sites not regulated by the NSW Environment Protection Authority, develop policies, and consider contamination in land-use planning processes.	2.0	
Functions under the Rural Fires Act (NSW) 1997	Councils are required to administer and remedy complaints about fire hazards on council property, and to map and administer bushfire prone land (e.g. asset protection work, fire trails).	7.3	This includes net cost of assistance provided to the Rural Fire Service to fight bushfires declared under s44 of the Rural Fires Act (NSW) 1997 on any land within the council area.
Provision of immigration services and citizenship ceremonies	Councils conduct citizenship ceremonies under the Australian Citizenship Act (Cwth) 2007	1.0	
Administration of food safety regulation	Councils are required to undertake registration and inspection of food and food premises under the Food Act (NSW) 2003.	4.9	
Regulation of on-site sewerage facilities	Councils are required to regulate the installation, approve and monitor the operation and keep a register of all on-site sewage management systems (section 68 Local Government Act (NSW) 1993).	1.8	