

Local Government Workplace Reform Kit:

MANAGING WORKPLACE CHANGE



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MESSAGE FROM THE PRESIDENT

Local Government NSW (LGNSW) is committed to supporting its members in their efforts to achieve the best possible workplace relations and to cope with the challenges posed by changes to their operating environment. Those challenges may arise from changing community needs and circumstances; from new government policies and programs; from legislation; and from structural reform such as boundary changes and amalgamations as evidenced in announcements by the NSW State government throughout 2016 and 2017.

Structural reform raises numerous workplace issues that members must address as they endeavour to achieve the best possible outcomes for their staff and communities. Resources are often severely stretched as councils strive to maintain normal operations and services whilst restructuring their workforce and operations.

The ***Local Government Workplace Reform Kit: Managing Workplace Change*** (the Kit) has been updated by incorporating recent legislative changes and the requirements of amalgamation proclamations where they relate to workforce matters. Additionally, the Kit has been updated to incorporate amendments to the *Local Government (State) Award 2017*. In this regard readers are advised that Attachment D of the Kit (Legal Advice on the Employment Protections) continues to reference the *Local Government (State) Award 2014*, however this does not detract from the accuracy of the advice in any way.

The purpose of the Kit is to help members manage the critical change and reform processes in a way that meets legal and ethical obligations. While the revised Kit focuses on the processes involved in local government structural reform, much of its content is also relevant to other forms of workplace change that is being undertaken by members. This Kit forms an integral part of our comprehensive web-based Amalgamation Toolkit which is available free for our members, along with briefings, training and access to a wide range of resources.

LGNSW recognises the important responsibility it plays in guiding the membership through the change implementation process. LGNSW is committed to providing strategic guidance, implementation support and identification of emerging issues as they arise.

LGNSW also offers a range of complementary advisory and support services; I commend both the Kit and those services to all members.

Cr Keith Rhoades AFSM



President
Local Government NSW

1. INTRODUCTION

1.1 Dimensions of workplace change

Effective strategic planning and provision of essential services and infrastructure for communities throughout New South Wales depends on the skills and dedication of the 45,000 people who work for their local councils.

Clause 2 of the *Local Government (State) Award 2017* (the Award) states that the parties are committed to co-operating positively to increase the productivity, structural efficiency and financial sustainability of local government and to provide employees with access to more fulfilling, varied and better-paid work. This involves measures that will, among other things:

- Promote cooperative and open change management processes
- Encourage innovation
- Improve skill levels and establish skill-related career paths
- Achieve greater flexibility in workplace practices
- Foster job security.

The integral role and function of local government is clearly enhanced, if there is an emphasis placed on ensuring the best possible workplace environment and employee relations. Councillors, senior management, employees and their representatives must maintain close communication with each other and their relationships must be built on consultation, negotiation and agreement.

At the same time, councils and the way their workforce is managed must be responsive to community needs and aspirations. The Integrated Planning and Reporting (IP&R) framework introduced in 2009 includes requirements for the preparation of Community Strategic Plans and resourcing strategies, including Workforce Plans that will ensure councils' human resources are geared to achieving community goals.

A responsive and cooperative approach to workforce and workplace management is essential at all times, but becomes even more important at times of change. Local government is a dynamic institution that must reflect the changing circumstances of widely differing places and communities across New South Wales. Sometimes changes to councils' circumstances arise as a result of changes in government policy or variations to state or federal funding programs. In any event councils must also review their operational needs regularly and make corresponding adjustments to priorities, their organisational structures, and the mix of skills and positions in different sections of the workforce.

In addition, councils periodically undergo alterations to their boundaries or amalgamate with adjoining local government areas. These are sometimes voluntary as was the case with:

- (a) The amalgamation of Rous Water County Council, Far North Coast Weeds County Council and Richmond River County Council, which was proclaimed on 22 June 2016 and commenced on 1 July 2016;

- (b) The dissolution of MidCoast County Council and the subsumption of its functions and operations by Mid-Coast Council, which was proclaimed on 28 June 2017 and came into effect on 1 July 2017; and
- (c) The dissolution of Southern Slopes County Council and the subsumption of its functions and operations by Hilltops Council and Yass Valley Council, which was proclaimed on 28 June 2017 and came into effect on 1 July 2017.

However, as evident from the Proclamations of 12 May 2016 and 9 September 2016, not all boundary alterations or amalgamations are voluntary. Over the past century the number of local councils in NSW has more than halved. Prior to the State government's 'Fit for the Future' initiative, the last round of amalgamations took place in 2003-2004, and posed major challenges for workplace change and management. There is much to be learned from these experiences and some of those challenges are still to be fully resolved. Councils need to be ever mindful of the dimensions of workplace change and be constantly prepared and ready for responsive and appropriate changes in their operating environment.

1.2 Purpose and scope of this Workplace Reform Kit

The Kit offers detailed and practical guidance on working through workplace change resulting from boundary changes or amalgamations that require staff to transfer from one council to another, or to a newly created council. It is based on both the legislative framework and the lessons learned by councils that have experienced substantial structural reform.

On 12 May 2016 the State government formed 19 new councils in NSW by amalgamating and undertaking boundary changes in 42 council areas. A twentieth new general purpose council was formed with the Proclamation of Bayside Council on 9 September 2016. On 1 July 2016 Far North Coast Weeds County Council and Richmond River County Council were dissolved and their functions and operations were transferred to Rous County Council. While on 1 July 2017 MidCoast County Council and Southern Slopes County Council were dissolved and their functions and operations were subsumed by other general purpose councils. On 27 July 2017 the Government advised that all remaining proposed mergers would not continue.

The material and advice contained in this Kit is designed to be of longer-term value to any council that becomes involved in a boundary change or amalgamation proposal. Much of the material will also be relevant when councils undertake other reforms, such as, internal organisational change, Improvement Plans prepared under the State government's 'Fit for the Future' initiative, or new arrangements for regional cooperation (including voluntary regional cooperation and shared services including the establishment of Joint Organisations).

Past experience of both forced and voluntary amalgamations and boundary changes shows that managing the workforce and workplace issues is one of the most significant challenges to be faced. For many communities, local government is a very important employer, and councils rely on a high quality workforce to undertake vital roles in service delivery, planning and regulation.

The disruption associated with structural reform can all too easily generate widespread concerns about potential redundancies, reduced local employment and commensurate cuts to services. These risks have been minimised by protective employment legislation, a flexible award and established industrial practices, but considerable expertise is required to use those measures to best effect.

This Kit is focused on the legal and industrial relations framework for workforce and workplace change. It is not designed to be an all-encompassing guide to implementing and managing structural reform, but will complement the broader review, planning and coordination activities that need to be undertaken to get new councils operational and ready to achieve their objectives. Councils are encouraged to seek further advice on related matters as required, and LGNSW can offer additional guidance and support (see Attachment A).

The Kit has four main components:

1. An outline of the current provisions of the *Local Government Act 1993* (NSW) (the Act), *Local Government (General) Regulation 2005* (NSW) (the Regulation), the Award and the 2016 Proclamations that gave rise to the creation of 20 new councils.
2. Advice on some of the key issues involved in implementing those provisions, taking into account the experiences of councils involved in the 2003-2004 amalgamations.
3. A step-by-step guide to planning and managing workplace change.
4. A brief discussion of ongoing requirements for sound workforce planning and management.

2. THE LEGISLATIVE FRAMEWORK

Under the current provisions of the Act and the Regulation, any ongoing process of local government reform involving council boundary changes or amalgamations (forced or voluntary) will involve issues of workplace change in at least six ways:

- The requirement under section 263(3)(e2) of the Act to consider ‘the impact of any relevant proposal on the employment of the staff by the councils of the areas concerned’ when examining the merits of a proposed amalgamation or boundary change.
- The various requirements of Part 6 of Chapter 11 of the Act that govern the process of workplace change and protect the employment and conditions of existing staff when an amalgamation or boundary change takes place.
- The provisions of the Regulation concerning the possible need for Ministerial approval with respect to payments made to senior staff on termination (section 354A(4)), and determinations relating to staff entitlements made by a council during the Proposal Period before an amalgamation or boundary change takes place (section 354E).
- The provisions of the recent amendments to the Regulation with respect to the preservation of leave and other entitlements of senior staff and further that where termination of employment is as a consequence of an amalgamation, the termination of senior staff employment is to be taken as a redundancy.
- Any relevant provisions of a Proclamation including the *Local Government (Council Amalgamations) Proclamation 2016*, the *Local Government (City of Parramatta and Cumberland) Proclamation 2016*, and the *Local Government (Bayside) Proclamation 2016* that gives effect to an amalgamation or boundary change, or that alters the constitution of a county council. Proclamations can be found at www.strongercouncils.nsw.gov.au.

- The requirement for workforce planning for and by the new entity, in accordance with the requirements for IP&R (section 403(2) of the Act).

2.1 Stages in the amalgamation process

As indicated in section 1.2 and as we have seen from the recent round of amalgamations, the various provisions of the Act do not come into play until the Minister makes or receives a formal proposal under section 218E. However, there will often be periods before an amalgamation in which potential boundary changes or amalgamations are being openly discussed, and councils would be wise to consider various aspects of workforce and workplace arrangements during that time (see section 4.2 of this Kit and Attachment I). This may be called the Pre-Proposal Phase.

Once the Minister makes or receives a firm proposal, it must be referred to either the Boundaries Commission or the Chief Executive Officer of the Office of Local Government (OLG) for examination and report pursuant to section 218F of the Act (see Attachment B for an example of a completed Boundaries Commission Report). This initiates the Proposal Period that is defined in section 354B and related employment protection provisions immediately come into effect.

The Chief Executive Officer of the OLG pursuant to section 745(1) of the Act may delegate to any person a statutory function, other than the power of delegation itself. A delegated function may be sub-delegated to the extent that the delegate is authorised to do so. For example, on 6 January 2016 the Acting Chief Executive of the OLG delegated to a range of individuals the statutory function pursuant to section 218F to examine and report on an initial 35 merger proposals (a copy of the delegate reports may be found at www.strongercouncils.nsw.gov.au). A copy of the Instrument of Delegation used in January 2016 is found at Attachment C.

It is important to note that the process relating to the establishment, dissolution or amendment of a county council is distinct from that of a general-purpose council. In this regard the relevant processes relating to a proposal period in relation to a county council are found in Part 5 of Chapter 12 of the Act.

The Proposal Period normally **starts** on the day a proposal for an amalgamation or boundary adjustment is made to or by the Minister. For councils other than a county council the proposal period **ends**:

- On the day the Minister decides not to proceed with the proposal, or declines to recommend to the Governor that the proposal be implemented; **or**
- On the day immediately before the date specified in the Proclamation implementing the proposal.

However pursuant to section 354B(2), the Minister may, by notice in writing to a council, extend the Proposal Period in relation to that council by determining an earlier starting date than the date the proposal was initiated under section 218E. This might occur, for example, if the original proposal is modified or replaced.

Also, it should be noted that current practice in NSW is for a new general purpose council to be created as soon as the Minister makes the decision to proceed with an amalgamation or boundary proposal, as was seen with amalgamations on 12 May 2016 and 9 September 2016. As evident from the Rous County Council Proclamation on 22 June 2016, there is

nothing in the Act to prevent a Proclamation nominating a date sometime in the future on which the new council will commence operations and staff transfers will occur.

The benefits of this alternative approach are that it enables:

- A 'Transition Phase' during which detailed planning for the new council and workforce issues can be carried out before it commences operations; and/or
- Retention of the existing elected councils until such time as elections can be held for the new council (eliminating the need for a temporary Administrator).
- The Proclamation can include a requirement to establish a joint transition committee to carry out detailed planning during a transition phase.

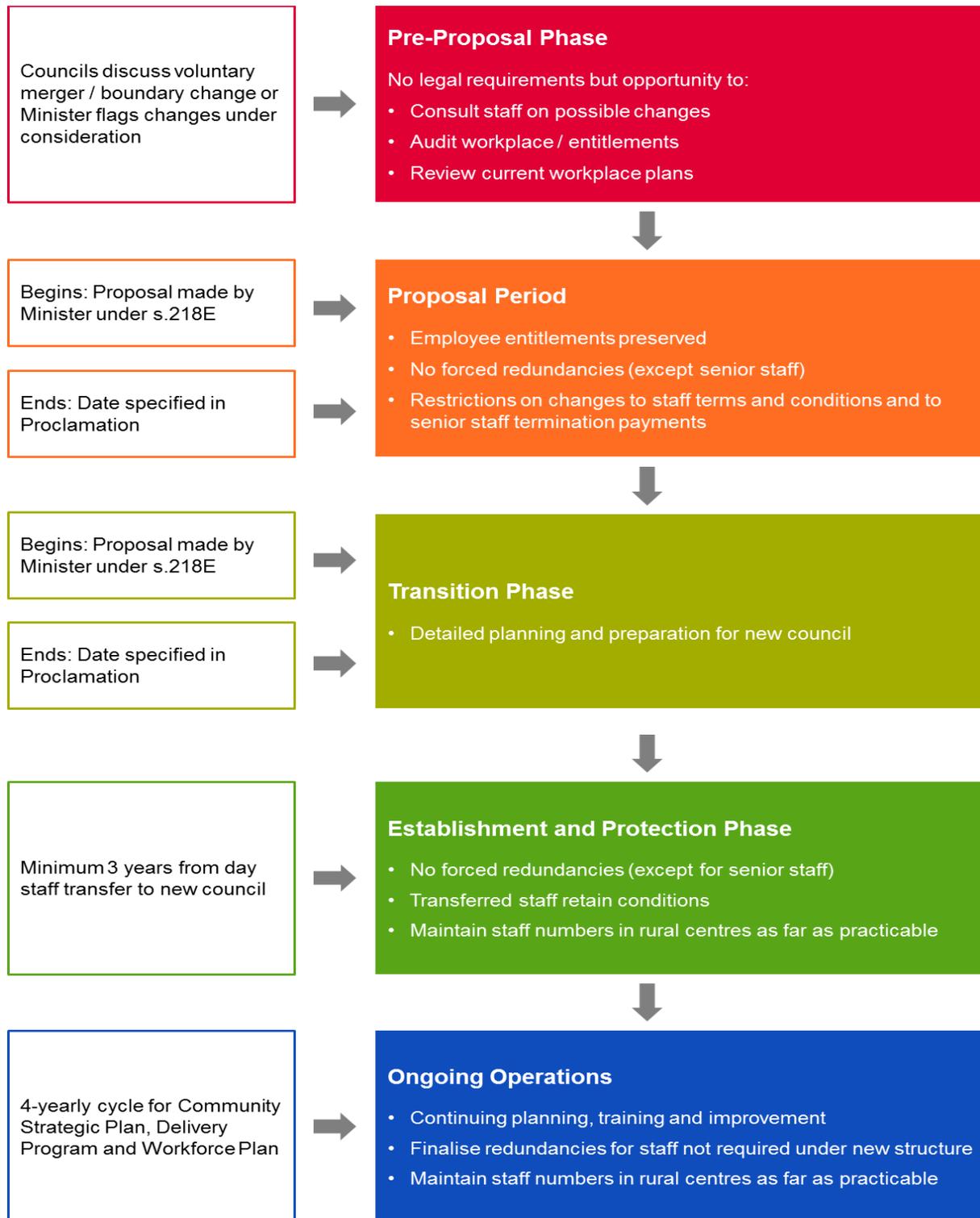
Employment protection provisions (preservation of existing entitlements, no forced redundancies except for designated senior staff) come into effect from the beginning of the Proposal Period. After the 'transfer day', additional protections take effect and apply for three years (or longer by agreement). This period may be called the Establishment and Protection Phase.

Thus in the current circumstances the process of change and steps required to be taken by councils can be considered in five stages:

1. Pre-Proposal Phase
2. Proposal Period
3. Transition Phase
4. Establishment and Protection Phase
5. Ongoing Operations.

The key legal provisions and policy issues that apply to each stage are summarised in Figure 1 (see page 9). Actions required or desirable in each phase are discussed in detail in Part 4. As recent Proclamations did not allow time for a Transition Phase, the activities proposed for that period of time need to be carried out during the Establishment and Protection Phase – although some can get under way during the Proposal Period if the councils concerned are willing to cooperate.

Figure 1: Stages of the Amalgamation or Boundary Change Process



2.2 Main provisions of the legislation

2.2.1 Definitions

Under section 354B of the Act, councils affected by reform are defined as either:

- **Transferor council** - the council from whose employment the staff concerned were transferred on the transfer day (described in this Kit as the '**former council**').
- **Transferee council** - the council into whose employment the staff concerned were transferred on the transfer day (described in this Kit as the '**new council**'); or

Also under section 354B, staff of councils affected by reform are classified as:

- **Existing staff member** – (of a new council) a person who was a member of the staff of the new council immediately before the transfer day and who has not ceased to be a member of that staff. It should be noted that in the situation of amalgamation of council areas, or where all councils involved are dissolved, there are no existing staff members, as all staff are transferred to the employment of a new council;
- **Remaining staff member** – (of the former council) a person who was a member of the staff of the former council immediately before the transfer day and who has not ceased to be a member of that staff. Again, in the situation of amalgamation of council areas, there are no remaining staff members, as all staff are transferred to the employment of a new council;
- **Transferred staff member** - a member of the staff of a council who is transferred to the employment of another council by or under a Proclamation.

2.2.2 Designated senior staff

It is important to bear in mind at the outset that there are important differences in the treatment of designated 'senior staff' compared to other staff.

Under sections 332 and 334 of the Act, senior staff includes the General Manager and the holders of positions that:

- Are identified and determined as 'senior staff' positions in the organisation structure by resolution of the council, and
- Entail responsibilities, skills and accountabilities that are generally equivalent to those applicable to the Executive Band of the Award, and
- Attract a remuneration package, the total value of which is equal to or greater than the minimum remuneration package payable with respect to senior executives whose positions are graded Band 1 under the *Government Sector Employment Act 2013* i.e. \$183,300 (as at 1 July 2017).

Thus although an employee's position may be described as 'senior' at a council, if the position has not been properly designated as such by resolution of the council, and/or the employment conditions do not comply with the criteria described above, then the position holder is entitled to the same protections as non-senior staff.

Termination Payments and Changes to Entitlements

Section 354A of the Act provides that the Minister must approve termination payments made to designated senior staff and the General Manager. It applies at all times, not only when councils are amalgamated or boundaries changed. Payments covered include termination payments made under or in addition to contract requirements.

The reasoning for this provision can be found in the Hansard extract of 25 June 2003, which indicates that the provision is designed

‘...to promote greater transparency and accountability in local government ... to prevent inappropriate ‘golden parachute’ payments ...[and] will apply at all times - not only in cases of council restructure’.

However, some payments may be exempted from these provisions by Regulation. To this end, regulation 405 of the Regulation provides that the following kinds of payments do not require Ministerial approval:

- Termination payments up to the value of the designated senior staff member’s total remuneration package over the 12 months preceding termination of employment [regulation 405(1)(a)];
- Statutory entitlements on termination of employment under any Act [regulation 405(1)(b)]
- Payments for untaken long service leave or untaken sick leave that is an entitlement pursuant to any Act or award (within the meaning of section 27 of the *Industrial Relations Act 1996* (NSW) [regulation 405(1)(c)].

In addition, regulation 406 applies to increases or decreases in staff entitlements during a Proposal Period, and removes the need for approval by the Minister under section 354E of the Act (see below, section 2.2.3). This applies to all staff, senior and non-senior.

Regulation 406 also contains two relatively new sub-regulations that affect the entitlements of designated senior staff. Regulations 406C and 406D canvass a number of circumstances that directly relate to the entitlements of designated senior staff on transfer following amalgamations or boundary alterations. If a designated senior staff member is transferred, the employment conditions continue on the same terms and conditions that applied immediately before the transfer day. If a designated senior staff member was a staff member immediately prior to the Proclamation and was not transferred to the newly created council; or was transferred to the newly created council and then terminated prior to the first election of the new council as a consequence of the amalgamation, the termination may be taken to be a redundancy for taxation purposes.

2.2.3 Non-senior staff

Proposal Period

Section 354C of the Act provides that during the Proposal Period the employment of a member of staff (other than designated senior staff) affected by a proposal must not be terminated, without the employee’s agreement, on the ground of redundancy (i.e. an employee can take a voluntary redundancy, but a council cannot implement any forced redundancies).

There may be situations where a council has entered into discussions with employees prior to commencement of the Proposal Period regarding such matters as organisational restructuring and redundancies. It may be that council had formally resolved that certain positions are redundant prior to commencement of the Proposal Period, however, the enactment of the redundancies falls due during the Proposal Period. Section 354C of the Act is clear in that a council cannot terminate the employment of any staff member during a Proposal Period by reason of redundancy without the employee's agreement regardless of when the original decision was made.

Also, without the Minister's approval, changes to entitlements made during the Proposal Period may not be binding on the new council. During the Proposal Period the Minister may, pursuant to section 354E of the Act, refuse to approve any unjustifiable increase or decrease in the terms and conditions of staff arising from, or in anticipation of, a proposal to constitute, amalgamate or alter council areas. The provision relates to all council staff and covers conditions of employment established under industrial agreements and council policies, including offering new contracts and changing the terms of existing contracts.

However, regulation 406 qualifies this provision by removing the need for Ministerial approval where a change in entitlements:

- Is authorised by an industrial instrument, or employment policy of the former council, made or approved before the Proposal Period;
- Is either in or authorised by an award, enterprise agreement or other industrial instrument made or approved by the NSW Industrial Relations Commission or the Fair Work Commission;
- Comprises the renewal of an employment contract entered into before the Proposal Period.

Therefore, increases in terms and conditions that result from competency-based progression up the salary scale, or from changes to the Award or a council/enterprise agreement (including rates of pay) may be granted during the Proposal Period in the normal manner without Ministerial approval.

Similarly, Ministerial approval is not required where a council recruits and employs a person(s) into a position(s) on the organisational structure during the Proposal Period and prior to the Proclamation date. Such an employee is taken to be a transferred staff member.

Any determinations on salary grading and placement within the salary system by a council for new employees during the Proposal Period are binding on the new council subject to the following requirements:

- The determination of the former council to employ the employee at a specified grade/salary is actually in accordance with the approved salary system of the former council;
- The salary system was made or approved prior to the Proposal Period.

Any specific terms and conditions of employment determined by a council for new employees during a Proposal Period would only bind the new council (absent agreement from the Minister) if and only if such terms and conditions were determinations by the former council that were:

- Authorised by an industrial agreement including an award, enterprise agreement and council agreement; and/or
- In accordance with an employment policy of the council which was made or approved before the Proposal Period.

When a council during a Proposal Period changes an employee's terms and conditions of employment to comply with an award, such changes are allowed, without the approval of the Minister, by virtue of falling within the exclusion of section 354E and regulation 406.

It is important to note that if council has concerns about any change of employment terms and conditions for a particular employee(s) which may be unusual, it is always open to the council to obtain Ministerial approval in accordance with section 354E(2) and (3).

Establishment and Protection Phase

The following provisions come into effect for three years from the transfer day. They apply only to non-senior staff, and are discussed further in section 3.2 of this Kit.

- All staff have the right to continue on the same terms and conditions as applied to each staff member immediately before the transfer day until **another provision is duly made under an Act or law** – see sections 354D(1) and (2) of the Act – but changes may be made by negotiation.
- Employees' continuity of service and accrued rights will be preserved following transfer – see section 354D(3).
- A transferred staff member is not entitled to receive any payment or other benefit merely because the staff member ceases to be employed by the former council – see section 354D(4).
- The transfer of a staff member does not affect any accrued rights (annual leave, sick leave, long service leave and superannuation) the staff member had immediately before the transfer, but does not entitle the staff member to claim dual benefits for the same period of service – see section 354D(5).
- A staff member's employment must not be terminated by the new council on the ground of redundancy **arising from the transfer** without the staff member's agreement – see section 354F.
- Preference shall be given to both transferred and existing staff that had been performing substantially the same duties prior to a transfer occurring in connection with the constitution of a new area, where appointments by way of lateral transfer are being made. Where there is more than one applicant in such cases, selection will be made on merit – see section 354G.
- Except for designated senior staff positions, external advertising is prohibited where in the opinion of the General Manager there are one or more suitably qualified transferred and/or existing staff available for selection – see section 354H.
- A staff member must not be required to be based outside the boundaries of the area of their former council as it existed immediately before the transfer day, **unless** the staff member gives written consent to the change of work base, **or** such a requirement would not cause the staff member to suffer unreasonable hardship because of the distance required to travel to the proposed work base – section 354I.

Staff numbers in rural centres

Section 218CA of the Act requires new councils to ensure that the number of 'regular staff' of the council employed at a 'rural centre' is, *as far as is reasonably practicable*, maintained at the same level as were employed by the previous council at the centre immediately before the amalgamation or alteration of boundaries took effect. This provision applies beyond the Establishment and Protection Phase and impacts the ongoing operations of the amalgamated or new council.

A **rural centre** is defined as a centre of population of 5,000 people or fewer. It may also include a geographical area that is prescribed, or is of a kind prescribed, by regulation as being a rural centre, but at present no such regulation is in force. Lack of a more precise definition of 'rural centre' can create problems (see section 3.3 below).

The **regular staff** of the council includes all appointments made within the organisational structure of the council, as well as casual staff who are engaged by the council on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months, and who have a reasonable expectation of continuing employment with the council. It does not include temporary appointments or senior staff (see section 3.3 below).

2.2.4 Proclamations

As noted earlier, the Proclamation establishing a new or altered local government area may contain specific provisions concerning the workforce and workplace management. The Proclamations made on 12 May 2016 provided direction in the following areas:

- Appointment of Administrators;
- Appointment of interim General Managers and Deputy General Managers;
- Delegations;
- Codes, Plans, Strategies and Policies;
- Organisation Structure;
- Transfer of designated senior staff and other staff;
- Codes of Conduct and Meeting Practices;
- Matters or things that may need to be determined by the Minister;
- The staff arrangements that would apply in the case of a boundary change pending an agreement of the amalgamating entities or a determination by the Minister.

Whilst Proclamations may include a number of generalised provisions, councils need to be careful to note and attend to any matters that apply specifically to them. Additionally, it is important to note that if there are inconsistencies with legislative requirements, the Act and/or Regulation override the directions in a Proclamation.

2.3 The Award and council agreements

Some of the provisions in the Act and Regulation are supplemented by clauses in the Award and/or individual enterprise or council agreements. It is beyond the scope of this Kit to deal with the latter.

2.3.1 Consultative Committee

Under Clause 32 of the Award each council must have a Consultative Committee which shall:

- provide a forum for consultation between the employer and its employees that encourages a free and open exchange of views;
- positively co-operate in workplace reform to enhance the efficiency and productivity of the employer and to provide employees with access to career opportunities and more fulfilling, varied and better paid work.

Consultative Committees are advisory, but can and should be valued as a key element of sound workplace relations and a starting point for discussion of change management issues (see section 3.1.2 below). An effective Consultative Committee is vital when significant structural reforms or organisational changes take place (see section 2.3.4 below).

2.3.2 Place of work

Clause 15(x)(e) of the Award relating to travel allowances provides that an employee may be transferred to a different normal place of work at any time by agreement or by giving reasonable notice, provided that the relocation is reasonable in the circumstances and does not *unreasonably disadvantage* the employee (see section 3.2.4 below). In the event of a dispute, grievance and dispute procedures under clause 35 apply.

This provision of the Award applies at all times, but during the 3 years of the Establishment and Protection Phase section 354I of the Act also needs to be taken into account. The test is essentially the same: that the employee shall not suffer 'unreasonable hardship'.

2.3.3 Training Plan and budget

Clause 31(iii) of the Award provides that the employer shall develop a Training Plan and budget consistent with:

- the current and future skill requirements of the employer;
- the size, structure and nature of the operations of the employer;
- the need to develop vocational skills relevant to the employer and the local government industry.

The Training Plan is to be designed in consultation with the Consultative Committee. It needs to be closely linked to organisational objectives and performance review and salary systems. In developing the plan, consideration should be given to corporate, departmental and individual training needs. Review and updating of Training Plans is a key element of change management associated with structural reform (see section 3.4).

2.3.4 Workplace change

Clause 39 of the Award provides detailed guidance on steps to be taken where workplace change will have 'significant effects' on the workforce. Significant effects are defined in clause 4(xi) of the Award to include:

... termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required, the elimination or diminution of job opportunities, promotion opportunities or job tenure, the alteration of hours of work,

the need for retraining or transfer of employees to other work or locations and the restructuring of jobs. Provided that where the Award makes provision for the alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

Clearly, such 'significant effects' are highly likely to arise as part of structural reform. Clause 39 therefore needs to be applied in conjunction with relevant sections of the Act. Key provisions of clause 39 are as follows:

- Nothing in this clause prevents the council from immediately implementing a change in organisation structure with the consent of the affected employee(s), and where the union(s) to which they belong have been provided at least seven days' notice of the proposed change.
- Where a proposed change in organisation structure is likely to have significant effects on employees and/or result in a reduction in the size of its workforce, the council shall notify the union(s) whose members may be adversely affected by the proposed change at least twenty-eight (28) days before the change is implemented. Notice to the union(s) of a proposed change in organisation structure shall include the nature of the proposed change, the reason(s) for the proposed change and the position(s) likely to be affected (NB: the Award does not prevent notification being given before a proposed change has been finalised and adopted formally by the council, so consultations can commence at an early stage while a range of options are still under consideration – see section 3.1 below).
- The council shall discuss with the employee/s affected and the union(s) to which they belong, inter alia, the introduction of the changes proposed, what effects the changes are likely to have on the employee/s, and measures to avert or mitigate the adverse effects on the employee/s. It shall give prompt consideration to matters raised by the employee/s and/or their union in relation to the changes and may reconsider its original decision.
- Discussions shall commence as early as practicable after a definite decision has been made to make the changes, and the council shall provide to the employee/s concerned and the union to which they belong, all relevant information about the nature of the changes proposed, the expected effects on the employee/s and any other matters likely to affect the employee/s (see section 3.1 below).

Clause 40 details steps to be taken with respect to individual redundancies and termination of employment (see section 3.2.2 below).

3. INTERPRETING AND IMPLEMENTING THE PROVISIONS

Experience shows that, in practice, implementing the provisions of the Act, Regulation and Award does not always proceed smoothly. Sometimes this is because the wording of the provisions are open to varied interpretations, particularly where different provisions overlap; on other occasions the individual workplace is characterised by a lack of adequate consultation or communications in general between the parties are less than satisfactory.

This part of the Kit focuses on some of the key areas in which councils need to have a very clear understanding of what can and should be done to get the best results for all concerned from the legislative and Award framework. It draws in particular on the experiences of councils affected by the 2003-2004 amalgamations.

3.1 Getting the process right

The early weeks after an amalgamation offer a unique opportunity for management and employees to 'brand' the new entity. However, grasping this opportunity depends on all parties understanding what needs to be done, knowing the best process to follow, and having the skills required to do the job properly.

3.1.1 Awareness, understanding and preparedness

It is of fundamental importance that councillors, senior managers and staff are aware of **all** the relevant provisions of the Act and the Award and as far as possible agree on what those provisions mean and how they can best be implemented. Councils should consider well in advance their statutory obligations and what they need to achieve in terms of workforce management and staff relations at all stages of the change process (see Part 4 of this Kit). This should not be left until after the Minister makes a proposal.

New councils (whether amalgamated or formed after boundary changes) will need to be aware of potential problems both before and after the transfer day: possible disputes with the union(s) over terms and conditions of transferred staff; the emotional impact on staff of transferring to a new council, and the potential for associated stress claims or work, health and safety concerns, including by management staff who are responsible for implementing and managing change; and appeal mechanisms (if applicable).

Effective consultative procedures, coupled with sound, up-to-date workforce planning will provide a firm basis for change management (see Part 5 of this Kit on workforce planning).

3.1.2 Maximising communication and consultation

There are three vital strands to communication and consultation during the change process:

- Establishing a clear sense of strategic direction from the outset, and then maintain continuous communication amongst all concerned.
- Ensuring that employees are treated with respect and that their *individual* needs are recognised and addressed.
- Making the best possible use of the Consultative Committee.

These three strands should be brought together in the form of an agreed communications plan. Consistent with the Workplace, Change and Redundancy provisions of the Award, an agreed communications plan should reflect the requirement to provide a 28-day period of notice that must be provided to affected employee/s and the union/s to which they belong.

Case Study: Metropolitan Council Change Process

Key principles:

- Genuine and wide consultation on draft structure, given time constraints
- Improvements to the organisation will be the main consideration, but staff will provide

input and their interests will be taken seriously

- Employees affected by any restructure will be treated with respect
- Staff will receive timely information and support to make decisions regarding their future
- For newly created positions, all recruitment will be based on merit
- All regulations, including awards and employment contracts, will be complied with.

Formal 28-day consultation required under the Award was undertaken before any council decision in order to:

- Provide more genuine staff input and enable staff welfare to be supported
- Facilitate organisational agility including improvements to draft structure
- Assure council that staff are being supported when decisions need to be made.

Process elements:

- Draft structure and position descriptions for new roles given to all staff and unions
- Numerous staff and union briefings, emails and individual discussions
- One-on-one briefings for affected staff prior to release of draft structure
- All staff briefings given by the General Manager
- Questions answered as promptly as possible
- Additional support provided to staff through the Employee Assistance Program, superannuation advice and career counselling
- Draft structure altered in response to feedback.

Strategic direction

If staff understand the context within which the change is occurring and the council's strategies, goals and expectations in response, then employees are more likely to be willing to have constructive discussions about what needs to be done, and will accept (albeit for some with reservations) the decisions that are finally taken.

Employees therefore need to be fully informed on the big picture from day 1 – as soon as the council and senior management become aware that changes are likely. Even if there is no 'hard' information, discussion and exchange of views between council, management and staff is better than anxious speculation and predictions of 'doom and gloom'. Structural reform usually forms part of a bigger State government agenda and that also needs to be understood so that potential local implications can be considered.

As soon as a definite sense of direction can be established, council and senior management need to adopt and communicate a clear statement of principles and intent regarding potential workforce change and how the process will be handled. This may well need to be modified as further information comes to hand and in light of staff feedback, but nevertheless workplace discussions need to begin as early as possible. As noted in section 2.3.4 and in the Metropolitan Council case study, consultation can – and wherever possible should – begin before council makes any definite decisions regarding its preferred options for workforce change.

Addressing individual needs

Different individuals and groups of staff will react in different ways to the prospect of change, and will have different ways of understanding and coming to terms with what may be involved.

Communications in general and one-on-one contact in particular must reflect an appreciation of these differences. For example, professionals and administrative staff will usually be more accustomed to electronic communications than their colleagues in the 'outdoor' workforce. Also, their working lives are more likely to have involved moves from one employer and one location to another.

It is essential that those employees whose positions are most likely to be affected by change are first informed individually and given the opportunity to discuss the situation in private. In this regard, councils should ensure that they have access to suitable professional support for counselling needs, such as through an adequate Employee Assistance Program (EAP).

Once workforce arrangements for the new council are finalised, each member of staff should receive a fresh letter of appointment confirming their terms and conditions, the continuity of their employment and welcoming them to the new organisation.

Consultative Committees

Consultative Committees provide a structured and formal focal point to facilitate continuous communication and effective consultation between the council, senior management and employees. They can provide both a sounding board and 'litmus test' for staff sentiment, and – most importantly – they can help to create a positive climate in which employees are more likely to embrace change.

During the Proposal Period the Consultative Committees of the existing councils should be used to help consider options for future workforce arrangements and for ongoing communication programs, as well as dealing with specific collective industrial relations issues as they arise. The Consultative Committees can begin to discuss how the process of workplace change will be handled, and how the personal needs of employees will be identified and addressed.

Once the outcome of the amalgamation/boundary change proposal become clear and the change process gets under way, management and the Consultative Committee must work in partnership to develop and implement an effective communications plan. The fundamental goal must be to ensure that employees fully understand the background to the changes taking place, why those changes are necessary, and how they are being handled.

3.1.3 Establishing a new Consultative Committee

Clearly, Consultative Committees have a central role to play in ensuring that the structural reform process is undertaken in a manner that enables a smooth transition, and that all employees are able to adapt to new structures and new procedures – particularly having regard to the provisions of clause 39 of the Award.

After a Proclamation has been issued, steps should be taken as quickly as possible to establish a single Consultative Committee for the new council. A joint meeting of the committees chaired by the (Interim) General Manager is a good way to begin the process of integration. This provides an opportunity for all parties to get to know each other and discuss the task at hand, and to begin identifying representatives to form the new council's Consultative Committee. Initially this is likely to consist of all or most of the members of the

previous committees, but a process should be agreed to reduce the membership to a manageable number for ongoing operations. The efforts of members of the previous committees need to be recognised, perhaps through an event linked to the first meeting of the new committee.

Once established, the new Consultative Committee will make important contributions across a wide range of the tasks involved during the Establishment and Protection Phase. These are identified in section 4.2 below (Figure 2). A number of the issues and tasks involved will be quite complex, and group training should be provided to Consultative Committees to enable **all** members to enhance their skills.

The size and composition of the new Consultative Committee in the early stages of the merger needs careful consideration. Clause 32B of the Award sets out minimum membership requirements as follows:

- The size and composition of the Consultative Committee shall be representative of the employer's workforce and agreed to by the employer and the local representatives from the following unions: USU; depa and the LGEA, and such agreement shall not be unreasonably withheld.
- The Consultative Committee shall include but not be limited to employee representatives of each of the unions who have members employed at the employer.
- Officers of the union(s) or LGNSW may attend and provide input to meetings of the Consultative Committee, at the invitation of the Consultative Committee or their respective members.

Over and above these minimum requirements, consideration should be given to a membership structure that ensures effective workforce representation by having a mix of employees from a range of different workplaces – and from each of the former councils. An appropriately structured membership that is seen to offer sound representation of employees across the entire organisation, coupled with an effective communications plan, can go a long way to minimising negative perceptions of workplace change.

A new Consultative Committee constitution should be adopted as soon as possible to fully describe the committee's aims, objectives, membership structure and scope of functions. At a minimum, the constitution should cover the following functions and activities:

- Award implementation;
- Exploring cultural change options;
- Training including change management strategies;
- Consultation with regard to organisation restructure;
- Job redesign;
- Salary systems;
- Communication strategies and education mechanisms;
- Performance management systems;
- Changes to variable working hours arrangements for new or vacant positions;
- Proposed variations to leaseback vehicle arrangements;

- Workforce management planning including options to implement provisions of employment legislation.

3.1.4 Creating a new salary system

One of the main priorities after an amalgamation or boundary change is for the new entity to develop, and ultimately implement an integrated salary system for all employees of the new organisation. This will avoid the problems associated with staff undertaking the same duties but with different employment conditions, or new employees having different conditions from transferred staff.

There are, however, risks involved in moving too quickly. These include:

- Failing to give sufficient thought to the changed circumstances, priorities and operational needs of the new council – and hence the implications for workforce structure and employment conditions.
- Overlooking the protection outlined in clause 7(xii) of the Award that employees shall not suffer a reduction in salary range because of a change to the salary system structure.
- Acceding to pressure to ‘round-up’ salaries and other employment conditions to the most generous offered by one or more of the former councils.

Consideration of these issues may lead to extensive use of Current Occupant Only (COO) arrangements for some years alongside a new salary structure (see below).

Case Study: Clarence Valley Council

Clarence Valley Council was proclaimed in February 2004 following a merger of four former councils and two county councils.

Initially, a series of working groups was established, each with broad staff representation from all the former Councils, to address specific aspects of workforce change. The roles of these working groups were adjusted over time, or they were disbanded if no longer required. Considerable effort was put into establishing good communication processes that appealed to the staff e.g. FAQs sheets, HR bulletin, HR road-shows, as well as formal reporting to the working groups as well as senior management. Also the consultation process with staff was carefully structured and extensively ‘road showed’ so that everyone understood how they could participate.

The Terms and Conditions working group was the precursor to the first joint Consultative Committee, and developed a number of protocols as the basis for implementing change e.g. a recruitment protocol and the process for lateral transfers (see Attachment G). As well, it assisted in identifying, listing and quantifying all the pre-existing working conditions of staff of the former councils that had either to be maintained or changed by negotiation.

The first salary structure was also negotiated through the Terms and Conditions working group, prior to establishment of the joint Consultative Committee. A key issue to arise was the complexity of the salary structure: a decision was made to capture as many previous positions as possible in the new structure, but this resulted in a structure with 20 grades, 4 steps across and a spread from entry to step 4 of almost 20%. This approach was successful in minimising the number of current-occupant-only positions (only 27 amongst 500+ employees), but created a major task in developing competencies for so many steps, and

tended to increase staffing costs overall.

Current Occupant Only (COO)

A COO can be defined as a person whose current rate of pay (for whatever reason) exceeds that which would be paid based upon the evaluated skills grade or salary step for their position under the new salary system. This is likely to be a common occurrence unless the new council makes the costly decision to place all staff on the previously most generous conditions.

It is essential to ensure that identification of COO positions is undertaken correctly and that staff members are formally notified that their terms and conditions are COO. Before any position can be declared a COO position the new council should review a number of aspects of the salary system and the placement procedures of any affected employees as follows:

- Involve the affected employee in the review process;
- Review and evaluate the position and identify those areas that may not have been evaluated;
- Determine whether the salary range and nature of the work, including any peculiar features or ancillary duties have been taken into consideration;
- Review the skills and expertise required for the position at each salary point;
- Review the skills and expertise the employee is required to bring to the position;
- Examine all agreeable job redesign alternatives;
- Offer training to affected employees as a priority in order to bring their level of skill into line with the salary payable;
- Ensure the methodology is transparent and undertaken in accordance with approved processes and procedures as communicated to the Consultative Committee.

As salary systems are dynamic an issue that arises is the extent to which a new council is able to absorb subsequent award increases into the COO's rate of pay, ultimately with the intention of bringing the COO back into synchronisation with the salary system. Opportunities to implement such arrangements (without agreement) whilst restricted are available and may arise where:

- A COO has been subsequently employed in a position where the rate of pay is in excess of the maximum grade and salary range for the position under the new salary system.
- An employee's income has been maintained by agreement as opposed to an obligation under the employment protection provisions and the income maintenance is above the maximum grade and salary range for the position under the new salary system.

The important factor here is to ensure that proper identification and notification procedures for all declared COO positions are completed correctly.

3.1.5 Re-allocating staff when boundaries change

Boundary changes, in isolation or in conjunction with amalgamations, require an assessment of how to divide staff numbers either between their former council and a neighbouring council with expanded boundaries, or between two or more new councils. In 2004, for example, this occurred when the former Barraba Shire Council was split between the new Gwydir Shire Council and Tamworth Regional Councils; and when the former Hume Shire was split between the new councils of Greater Hume, Albury and Corowa.

There are no clear guidelines for precisely how staff should be re-allocated in these circumstances. In such circumstances disagreements can easily arise between the new councils as to what proportion of the former council's staff will be re-allocated, and which of the former employees are required to meet operational requirements. Of course, members of staff themselves will also wish to express their own views. Some form of dispute resolution between the councils concerned, and under the Award, may be required.

A Proclamation may allow for a new council and an altered council to agree on a transfer of staff. According to the Proclamation giving effect to the City of Parramatta and Cumberland councils, any dispute as to the numbers of transferred staff affecting a boundary change is to be referred to the Minister for determination.

The *Local Government (City of Parramatta and Cumberland) Proclamation 2016* requires that the initial organisation structure of the new council, as far as practicable, is to be a composite of the organisation structures of each of the former councils.

The councils are to reach agreement on the transfer of staff as a result of the boundary changes. Where no agreement can be reached clause 5 of the Proclamation provides that the Minister can make the determination.

An altered council and a new council may agree to the transfer of staff from the altered council to a new council as a consequence of a boundary alteration. Where staff are transferred to the new council in accordance with the agreement, it is taken that such transfers have effect from the amalgamation day.

Case Study: Greater Hume

Greater Hume Shire council was created in May 2004 amalgamating the former Culcairn, Holbrook and Hume Shires, and at the same time adding parts of Hume Shire to Albury and Corowa Councils. The Proclamation simply stated that Greater Hume, Corowa and Albury should divide the staff of the former Hume Shire 'by agreement'. Subsequently a Severance Agreement entered into by the three councils' allocated numbers of former Hume staff on the basis of each council's share of the former Shire's rate revenue.

Albury and Corowa were required to provide a list of possible positions for transfer and Expressions of Interest (EOI) were sought in the first instance from former Hume staff. Former employees of Holbrook and Culcairn were also considered for transfer where there were exceptional circumstances and where it assisted Albury and Corowa to meet their staff transfer obligations.

Following the closure of EOIs, Albury and Corowa went through an interview process and selected staff that had the requisite skills and experience for the positions on offer. However, if insufficient EOIs had been lodged to fill all the vacancies with suitably skilled and

experienced employees, there was no effective mechanism for Greater Hume to make all the transfers required to reduce its staff numbers to the level specified in the Severance Agreement.

3.2 Interpreting the Act and Award

3.2.1 Protected conditions of employment

Determining what actually constitutes the pre-existing terms and conditions of employment of a staff member for the purposes of section 354D can be problematic. As well as the provisions of the Award, protected conditions of employment may include arrangements that have been established over time with **individual** employees. Usually such arrangements relate to an extra benefit or entitlement that has been conferred on an employee by either express written agreement, or even by oral agreement (a 'handshake deal'). By definition, these arrangements must usually be examined on a case-by-case basis, and are often difficult to pin down precisely, especially if there is no written record of what exactly was agreed, and why. Thus **a detailed audit and examination of individual over-Award arrangements is essential** to enable a council to make an accurate assessment of its exposure under section 354D.

An appropriate 'test' that can be applied is as follows: in **all** the circumstances of the case, did the former council or the individual employee have the ability to vary the arrangement?

If the answer is 'yes', then the new council has in effect formed the view that the proposed change does not involve a protected term or condition of employment. If the answer is 'no', then section 354D would apply and the proposed change can only be made by agreement.

Example: Regular Payment of Penalty Rates

An employee's letter of appointment from the former council included an unqualified requirement to work a 9-day fortnight including every Saturday and Sunday, and such work attracts specified penalty rates. The new council has adopted different arrangements and no longer has this requirement. However, because the employee's original terms and conditions were clearly stated in writing, and without qualification, they could not have been changed by the former council and would be deemed protected under s.354D. Hence the new council is obliged to continue paying an amount equivalent to the penalty rates, regardless of its operational needs.

Example: Use of a motor vehicle to travel to and from work

An employee has been allowed to drive a council vehicle to and from home each day because the vehicle is used routinely for operational purposes out-of-hours and/or between the employee's home and work base. The new council wishes to change those operational requirements and withdraw the approval to drive the vehicle home. Applying the 'test' suggests that the practice was based on operational needs, the former council could have withdrawn the right to drive a vehicle home, and it is not a term or condition of employment. It is possible, however, that if the practice has continued for many years and there is no written record that it is NOT part of the employee's remuneration package, so the employee and union may be able to argue that it is a condition of employment by way of custom and practice and section 354D could apply. In those circumstances negotiation and perhaps a

buy-out of the entitlement may be appropriate.

Neither the council nor the employee has the power to unilaterally alter the terms and conditions upon which the employee was employed. However, **protected terms and conditions may be altered under certain circumstances**. Variations may be formalised through a new or revised enterprise agreement, which would meet the requirements of section 354D(2). Further, clause 41 of the Award enables councils and employees to enter into a Council Agreement that has the effect of varying arrangements by agreement. The types of arrangements that may be varied are limited to the following Award provisions:

- Clause 9 - Performance Evaluation and Reward;
- Clause 11 - Payment of Employees;
- Clause 15 - Travelling and Camping Out Allowances;
- Clause 18 - Hours of Work;
- Clause 19 - Overtime;
- Clause 20 - Public Holidays;
- Clause 26 - Part Time Employment; and
- Clause 27 - Job Share Employment.

Buy-Outs

As noted earlier, it is not uncommon to find that a former council has deliberately or inadvertently (through custom and practice over an extended period) established terms and conditions for some employees that are no longer appropriate and cannot or should not be addressed through COO arrangements or adjustments to the preferred salary structure and position descriptions.

In circumstances such as these, 'buying-out' protected conditions of employment can be an effective tool to move forward during the Establishment and Protection Phase. The need may arise to deal with some matters expeditiously so as to avoid the potential for disputes, promote a positive environment, and to achieve operational efficiencies.

When considering a 'buy-out' of an unwanted workplace practice or some longstanding workplace arrangement it is essential that it be justified financially and well documented. Handled properly, the cost of 'buy-outs' can often be recouped over quite a short period – a year or less – and in such cases they may prove an attractive proposition to all concerned.

Vacant positions

Section 354D applies to the 'person' not the 'position'. Therefore, the Act does not prevent the new council from offering vacant positions on new and/or altered terms and conditions. If a transferred employee applies and is selected for a vacant position during the three-year protection period, a council does not need to offer the vacant position to the transferred employee on the same terms and conditions as were applicable to the transferred employee's previous position. However, in such a situation, the transferred employee's service would be continuous and further, the transferred employee remains protected from forced redundancy for the remainder of the three-year period.

The new council maintains the freedom to design and revalue vacant positions where necessary based on operational needs. When exercising this discretion it is important to ensure that the methodology is transparent and undertaken in accordance with approved processes and procedures as communicated to the Consultative Committee.

Also, the new council should ensure that where positions are advertised with altered terms and conditions, those alterations are made clear and fully explained to affected employees at the time of offer.

3.2.2 Redundancies

During the Proposal Period and Establishment and Protection Phase, any redundancies of non-senior staff must be voluntary. However, this does not mean that councils can depart from what is usually accepted as proper practice for implementing redundancies. As discussed above, clauses 39 and 40 of the Award set out the procedures involved and highlight the importance of careful planning, early consultation and sensitivity to the personal needs and circumstances of the individuals involved. Any employee whose position may be in doubt deserves to hear first in private, and to be given as much information about the situation and the likely outcome as possible.

No forced redundancy of non-senior staff members for three years after transfer

An important consideration here is the application of section 354F as it relates to contracted non-senior staff on fixed term appointments.

A fixed term employment contract that comes to its natural conclusion is not protected by the 3-year moratorium on redundancies. If an existing contract expires, then subject to any conditions it might include regarding renewal, the new council is normally free to decide whether to renew it or not. The terms of section 354F do not apply as there is no issue of the position being made redundant.

However, if the new council wished to terminate a transferred staff member on a fixed term employment contract before that contract expires, or contrary to a right of renewal under that contract, then the employee would be duly protected under section 354F. Therefore, termination of the employment relationship could not be effected until 3 years after the transfer day or upon complete expiration of the contract, whichever occurs first.

Senior Staff Terminations treated as Redundancies

Recent amendments to the Regulations are contained in *Local Government (General) Amendment (Staff) Regulation 2016* by way of insertion of regulations 406C and 406D. The amendments confirm that the employment of a transferred designated senior staff is to continue on the same terms and conditions as applied to the staff member prior to the transfer. The amendments further confirm that the transfer of a designated senior staff member has no impact on any accrued rights the staff member had immediately prior to the transfer.

Regulation 406C(7) provides that where a designated senior staff member was a staff member immediately prior to the amalgamation date, yet is not transferred to a new council, or is transferred but ceases to be a staff member of the new council as a consequence of the amalgamation, the termination of the senior staff member's employment is taken to be a redundancy for taxation purposes.

3.2.3 Recruitment

Where a council at the day of amalgamation was undertaking recruitment activities, which were at the advertising or selection stage, all such recruitment activities must cease. Upon the Proclamation, the new council can either laterally transfer staff into positions (section 354G of the Act), or internally recruit where there is a suitably qualified person(s) rather than externally recruit (section 354H of the Act).

All candidates should be informed that the amalgamation has occurred and that statutory provisions prevent the new council from continuing with the recruitment. If a council had made a formal offer of employment and no verbal or written acceptance received prior to the Proclamation, the new council should immediately advise in writing that the offer is withdrawn. Where a council has recruited, there has been an offer and acceptance completed but the start date is post amalgamation day, the employee is an employee of the new council, on the terms and conditions that were offered by the former council (see sections 354D of the Act).

3.2.4 Lateral transfers and prohibition of external advertising

Under sections 354G(1) and (2), if:

- a staff transfer occurs in connection with a boundary alteration or amalgamation, *and*
- within 3 years after the transfer day, the new council proposes to make an appointment to a position within the organisation structure (other than a designated senior staff position), *and*
- a staff member (other than a designated senior staff member) of one of the former councils was, immediately before the transfer day, performing substantially the same duties as are required to be performed in the position to be filled,

then the new council must notify its staff members of the position and give them a reasonable opportunity to apply for the position, and must not externally advertise the position.

Moreover, the staff member who was performing substantially the same duties must be considered for appointment to the position in preference to any other applicant. If there is more than one such staff member who is eligible for appointment to the position, then the appointment must be made on merit, determined in accordance with section 349(2) and (3) of the Act.

A new council proposing to make one or more appointments on the basis of being satisfied that a transferred staff member was 'performing substantially the same duties' for their former council, needs to ensure that it applies methodology and procedures that are transparent and consistent.

Care needs to be taken in interpreting the phrase '*substantially* the same duties'. Consistent criteria should be applied to different positions e.g. precisely what duties (and hence knowledge, skills, competencies etc.) are involved in the previous and new positions; what proportion of the duties of the new position are the same as or different from the previous position held by the transferred employee; what difference is there between the salary grades of the two positions?

In addition to the provisions of section 354G, section 354H requires that the new council must also consider whether one or more of its transferred staff (other than designated senior staff) may be suitably qualified for a vacant position within the organisation structure. If that is the case, then the council must again notify staff members of the position and afford them a reasonable opportunity to apply, and must not externally advertise the position.

The important distinction between section 354G and section 354H is that employees need not have performed substantially the same duties for the former council, and under section 354H the council is not obliged to give preference to any particular applicant – it can choose from all those transferred staff who are ‘suitably qualified for the position’ regardless of their previous duties.

However, making a determination as to the exact meaning of ‘suitably qualified for the position’ can be problematic. It requires careful consideration of both the nature and background of the position, and the skills and qualifications possessed by the transferred employees.

Consideration of the position involves an analysis of the skills required to properly carry out the duties required, and to that end the six skill descriptors set out in the Award provide a useful guide. Those descriptors, which cover the four bands and 12 levels, are:

1. The required authority and accountability.
2. The required judgement and problem solving skills.
3. The specialist knowledge (both in breadth and depth) and skills acceptable for performance of the position.
4. The required management skills.
5. The required interpersonal skills required for negotiating, influencing and gaining co-operation from others.
6. The required qualifications, education, training and experience to perform in the position.

Turning to the attributes of the relevant members of staff, consideration should be given to:

- Their formal qualifications.
- Their current position descriptions.
- Recent performance assessments.

Once again, it is very important to ensure that in applying section 354H of the Act, decisions are guided by a consistent and transparent set of criteria, and that there has been adequate discussion about the process with the Consultative Committee. Care also needs to be exercised to ensure that there is no discrimination against staff members in a manner prohibited by any relevant legislation.

As an example of how to handle these issues, Attachment F presents the lateral transfer protocol and checklist adopted by Clarence Valley Council (amalgamated in 2004).

3.2.5 Limitations on transfer of work base of non-senior staff

Under section 354I, a new council may change the work base of a transferred staff member provided the staff member gives their written consent to the change, **or** such a requirement would not cause the staff member to suffer ‘unreasonable hardship’ because of the distance required to travel to the proposed work base.

Problems can arise in the interpretation of ‘not cause the staff member to suffer unreasonable hardship’. On most occasions the question must be answered on a case-by-case basis, taking into account all relevant factors. Again, consistency of process and criteria used, as well as discussions with the Consultative Committee, are vital.

The application of this provision will be highly dependent on the geographical circumstances of the situation. Metropolitan local government areas will encounter very different scenarios to rural locations – it is quite normal in large cities for people to accept lengthy commuting as inevitable, and to move from one home or place of work to another on a regular basis.

One option in rural areas when a change of workplace results in significant additional costs on an employee would be to negotiate a travel allowance. However, the agreed sum should be calculated and documented carefully, and should take into account the fact that a modest increase in commuting costs may well not be unreasonable. Nor should payment of the allowance be open-ended: the justification and amount of the payment should be reviewed from time to time, particularly if the employee concerned elects to change their place of residence.

LGNSW sought and obtained legal advice from Legal Counsel in relation to a series of questions relating to the interpretation of a number of the legislative provisions found in Chapter 11 of Part 6 of the *Local Government Act 1993* (NSW).

Reproduced in full at **Attachment D** the advice considers:

- What is encompassed in the expression “same terms and conditions that applied to the staff member immediately before the transfer day” in section 354D of the Act;
- Whether the protection in section 354F of “no forced termination of employment of non-senior on the ground of redundancy for 3 years after transfer” applies to all possible redundancies;
- If the protection in section 354F of “no forced termination of employment of non-senior staff on the ground of redundancy for 3 years after transfer” applies to the position or the person;
- If a lateral transfer into a role “performing substantially the same duties” occurs where section 354G of the Act has been applied, and does the employee retain entitlements afforded by section 354D of the Act; and
- If an appointment into a role occurs where section 354H of the Act has been applied, does the employee retain the preservation of entitlements afforded by section 354D of the Act.

3.3 Rural Centres

As noted earlier, section 218CA of the Act requires that the number of ‘regular staff’ employed at a ‘rural centre’ is, *as far as is reasonably practicable*, maintained at the same level as were employed immediately prior to the amalgamation or boundary change. This

provision applies not only during the Establishment and Protection Phase, but also to the ongoing operations of the new council.

It is evident from the wording of this provision that the statutory imperative to maintain regular staff numbers does not over-ride the need for the new council to make practical decisions. This means that if it is impractical to maintain a particular position in a rural centre then the council may properly decide to remove that position. Therefore, it follows from this application that the actual number of regular staff employed at a rural centre will rise and fall according to practical considerations resulting from changing external environmental factors.

Examples of Legitimate Reductions in Rural Centre Staffing

1. Voluntary Transfers

For a variety of personal and professional reasons, staff based in a rural centre prior to the amalgamation may request a transfer to another workplace. Such voluntary transfers should not be perceived as a problem or a practice to be discouraged. Council should place a high priority on providing flexibility to staff in the workplace and displaying a positive attitude towards the benefits of amalgamation by welcoming new opportunities for staff to achieve improved job satisfaction and career opportunities.

It follows that employees should not be restricted from transferring to another workplace simply because that would reduce the number of regular staff working at a particular rural centre. This type of restriction would not be placed on other staff and would be unreasonable.

2. Impact of Boundary Changes

When a significant part of a local government area comprising a rural centre is transferred to another council, regular staff numbers will need to be adjusted to reflect the new revenue base and operational requirements. It is simply not practicable to maintain the full complement of regular staff at the rural centre of the former council when the income generated is reduced and the previous scope of work at the centre is no longer required. A simple formula may be applied to determine the necessary reduction in regular staff numbers, according to criteria such as rates revenue, land area, or total road and bridge length.

3. Staff Employed in Specialised Facilities

Some staff of a former council may have been employed at a special facility (such as an aged care centre) located in a defined rural centre. In these cases there may be alternative options for the future operation of the facility involving outsourcing or transfer of ownership to the non-profit or private sectors. If this occurs, then it may not be practical for the new council to maintain regular staff numbers at their previous level.

Under the IP&R framework, it is requirement of councils to undertake workforce management planning. A council's workforce plan should consider the people, skills, experience and expertise required for the workforce to meet changing priorities, utilise new technologies and adapt to the needs of the community in the wake of local government reform. It is through work force planning that a council can ensure that the right people are in the right places (including rural centres) to implement the council's community strategic plans.

At the same time, however, the council should at all times be seen to comply with the principles of good governance and ensure that decisions on staffing are justifiable and transparent. Ongoing consultation with staff is essential. In addition, the council should be conscious of the need to ensure that the information required to make decisions is readily available to the local communities affected to the maximum extent permitted by law and sound industrial relations. To achieve this goal, a decision not to replace a regular staff position at a rural centre should be supported by written documentation stating the reasons for the decision. These documents could be placed in a public register (subject to any restriction imposed by law). Also, council's annual report can provide regular updates on the actual number of regular staff employed at designated rural centres.

3.3.1 Defining a ‘rural centre’

Although the Act defines a ‘rural centre’ as one with a population of 5,000 people or fewer, a problem can arise in determining the boundary within which that population is to be counted. For example, is it an area defined by the ABS for census purposes? Sometimes the ABS definition may exclude a rural area immediately adjacent to a town even though the two are inextricably linked. Although the Act makes provision for prescribing ‘rural centres’ by regulation this provision is yet to be used. As a result, a new council may well find itself needing to negotiate a suitable local definition of the area involved. This could involve a discussion with the local community as well as consultations with the employees and relevant industry union(s).

3.3.2 Counting ‘regular staff’

In accordance with the definition provided in section 218CA, the following employees can be classified as ‘regular staff’ for the purpose of determining the total number employed at a rural centre immediately prior to an amalgamation:

- Permanent full-time staff employed as at transfer day.
- Permanent part-time staff employed as at transfer day.
- Casual staff as at transfer day employed on a regular and systematic basis during a period of at least 6 months ending on transfer day, and who have a reasonable expectation of continuing employment.

Also in accordance with the definition the following staff can be excluded from the number of ‘regular staff’:

- Designated senior staff as at transfer day.
- Temporary staff as at transfer day.
- Casual staff who commenced employment less than 6 months prior to transfer day.
- Casual staff who did not work on a regular or systematic basis or who did not have a reasonable expectation of continuing employment.
- Any positions that were not within the organisation structure.
- Any positions in the organisation structure that were vacant as at transfer day.

It is recommended that on transfer day the new council undertake the following actions:

1. Formally record the actual number of regular staff (as defined above) employed at rural centres located within the former councils’ areas immediately prior to transfer day.
2. Record the factors expected to influence the number of staff employed at rural centres.
3. Outline council’s strategies for the application of section 218CA including ongoing public reporting of changes in staff numbers and the reason those changes have occurred.

Future movements in staff numbers at 'rural centres' may occur for a number of reasons:

- Some staff may volunteer to transfer to 'head office' for personal reasons.
- There may be legitimate changes to operational needs that make it impractical and unreasonable for the council to maintain numbers at the 'rural centre'.
- On the other hand, there may be opportunities to transfer some existing operations to a 'rural centre', or to establish a new function there.
- Functions being undertaken at a 'rural centre' may be outsourced – by agreement during the Establishment and Protection Phase, or later by way of a reasonable operational decision in consultation with affected employees (see the Greater Hume Shire Council example below).

To apply the intent of section 218CA in an ordered and consistent manner, the council will need to establish and implement a standard process when a staff member departs a rural centre. If the number of regular staff employed at a rural centre falls significantly below the number employed at transfer day, then the council should investigate possible strategies whereby other regular staff positions may be reasonably and practically based there.

Attachment G presents a draft policy on staffing in rural centres that covers a number of the issues addressed above.

Case Study: Greater Hume Shire Council

Following the amalgamation and boundary changes in 2004, the new Greater Hume Shire Council contained three towns (Culcairn, Holbrook and Jindera) that met the definition of a rural centre under section 354B. Given the absence of a definition in the *Local Government Act 1993* (NSW) of a 'centre of population', the council adopted boundaries used for rating purposes.

Greater Hume Shire Council is committed to meeting the requirements of section 218CA – Maintenance of staff numbers in rural centres, as far as is reasonably practicable in order to:

- ensure staff confidence is maintained;
- avoid unnecessary industrial disputes;
- meet the expectations of elected members, and
- maintain the support of rural communities across the Shire.

The former Hume Shire Council had an administrative office in Albury and following the amalgamation some of the administrative staff there were transferred to offices in Culcairn and Holbrook. Maintaining regular staff numbers in those rural centres has therefore been relatively easy.

However, the Hume Shire works depot, together with a family day care centre and council-owned aged care hostel were located in Jindera, and maintenance of staff numbers in this township has been more problematic. In particular, following a review of operations the new council decided to sell the hostel to a not-for-profit organisation, and as a result the number of council employees in Jindera fell below the level recorded prior to amalgamation. Council took the view at the time that under the circumstances it was not reasonably practicable to maintain the previous number of regular staff, but in the spirit of the legislation it has subsequently made every effort to locate other positions in Jindera where it has been reasonable to do so.

3.4 Training Plans

An amalgamation and all the associated workplace changes require all concerned to recognise that ensuring the efficiency and productivity of the new organisation, and the wellbeing of its employees, demands a renewed and ongoing commitment to education, training and skills development.

At the outset, a useful strategy is to guarantee that all the former councils' adopted Training Plans will continue to be implemented for at least twelve months. This offers continuity and certainty for employees, and allows time to develop the new organisational structure, process staff transfers, and construct a new Training Plan in consultation with the Consultative Committee and employees.

A Training Plan should represent the agreed, documented outcome of a systematic planning process that identifies the council's current and future needs for skilled staff, and how those needs can be met. The quality of the Training Plan is therefore linked to the quality of that planning. As the planning takes place at different levels within council the Training Plan (or plans, as it needs to cascade logically from the organisational to individual level) needs to document the training effort and activities required at each level. In fact at many councils, Training Plans may need to be developed at three or even four levels – the council as a whole, departments and units, and individual members of staff.

As noted in section 2.3.3 the Award indicates that Training Plans should be matched by a suitable budget. Councils differ in their methods of constructing and allocating training budgets, but as a general rule it is essential that:

- On the one hand, development of the Training Plan is aligned to reasonable expectations of the budget that can be made available;
- On the other, the budget is sufficient to support a Training Plan that is robust and adequate to meet the council's (and community's) needs for skilled staff, as well as employees' reasonable expectations for skills development.

Higher-level Training Plans for departments or the council organisation as a whole should be closely aligned with – or form part of – the broader Workforce Management Strategy required under IP&R guidelines. Those guidelines suggest that the following questions might be addressed:

- How effective are the council's current employee development programs in equipping employees to meet its strategic objectives?
- What are the critical skills areas the council needs to address in 4 and 8 years' time? Is there a strategy in place to provide existing employees with the opportunity to develop these skills?
- Is the council's employee performance management system linked to its learning and development system? How effective is this?
- Do the council's business succession planning strategies provide opportunities to all employees to develop and attain individual career objectives?

There is often an important link between Training Plans and salary structures, particularly when a council uses a skills-based progression method in determining appropriate salaries. An employee's competency or performance is often reviewed against agreed criteria in order

to progress through the salary system, and the gap in skills possessed and skills required can then form the basis of an individual Training Plan.

For individuals, a Training Plan typically includes information such as:

- Current competencies held;
- Competencies needing to be developed;
- Timeframes and resources;
- Assessment methods; and
- Career development opportunities.

As with many other fundamental management processes, ensuring a meaningful and useful approach to the development of Training Plans will need time and sufficient attention from the senior management team. In order to meet the specific training needs of an amalgamating council there are some particular kinds of training that the council might wish to consider. The following programs offered by LGNSW Learning Solutions may be useful to promote positive workplace relations in times of change:

- Applying for jobs and performing in interviews.
- Building wellbeing and resilience.
- Constructive workplace communication.
- Making Consultative Committees more effective.
- Managing people: personality and performance.
- Managing the stages of change.

For more information on each of these programs see Attachment A.

4. PLANNING AND MANAGING CHANGE

4.1 Building a new organisation

The essential starting point for planning and managing workplace change is a realisation that the task at hand is to build a 'brand new' organisation that will best serve the interests of the communities involved. Successful implementation of an amalgamation can easily be thrown off course by a view on the one hand that Council A is 'taking over' Council B, with all the resentment that will entail; or on the other hand that the aim should be to cobble together the previous organisations with the minimum disruption to established ways of doing things and their old identities.

Neither of those approaches is likely to yield a successful outcome. Planning for workplace change as part of an amalgamation needs to adopt a similar approach to IP&R:

- Begin by considering the characteristics, needs and aspirations of the new local government area, its communities and key stakeholders; seek agreement on desired outcomes (**Community Strategic Plan**);

- Identify preconditions for success; then design an organisation structure and staff profile that will best deliver the desired outcomes over the initial planning period (**Delivery Program**);
- Then establish and implement detailed arrangements and programs (**Operational Plan**).

An amalgamation can offer a unique opportunity for all concerned to implement in partnership with the community a new and exciting modernising agenda. The early years after the merger are a time for the 'brand new' organisation to establish its own reputation and create its own destiny. The council can set goals that look with a fresh and courageous mind into the future to establish new agendas for community wellbeing and prosperity, and those goals need to be reflected in the organisation structure and workforce arrangements.

There will be some who believe the amalgamation will fail: those who wish to succeed need to seize the opportunities on offer and work hard to achieve outcomes that exceed earlier expectations.

4.1.1 Cultural change

If the goal is to build a 'brand new' organisation, then a central challenge will be to achieve cultural change. This will involve several key elements:

- Leadership along the lines discussed above;
- An effective Consultative Committee;
- Continuous communication amongst all those involved, commencing as soon as an amalgamation proposal becomes clear;
- Recognising and celebrating the achievements of the former councils, and identifying features that should be preserved;
- An understanding of the cultures of the previous organisations, their strengths and weaknesses, and the underlying dynamics;
- A holistic view of the new organisation, highlighting the need for a collective effort across councillors, senior management and staff;
- Establishing shared goals, values and principles to underpin future operations and working relations;
- A focus on longer term results as well as short-term change;
- Development of specific individual and team-building strategies as well as organisation-wide efforts;
- Availability of support mechanisms to address staff concerns and build their confidence to contribute rather than oppose, including a full explanation of the 'safety net' offered by the legislation and Award;
- Honesty, openness, accountability and commitment on the part of all concerned.

An early start should be made in bringing together key elements of the strategic plans and policies of the former councils, and then preparing a Community Strategic Plan for the new local government area, and a workforce plan for the organisation. This will focus attention on

future needs and how the new council can best organise itself to support its expanded community.

In such an environment, all concerned will be better able to let go of the past, focus on fresh opportunities, and see where individual contributions can be made towards a successful outcome.

4.1.2 Leadership

The weeks and months before and after the creation of a new council are a time like no other. There is a huge challenge for the leadership team to celebrate the history and achievements of the former councils, whilst at the same time taking positive steps to establish the image and presence of the new organisation. This can only be done by first confronting the reality of change that has occurred, then setting high aspirations for the future and winning the support of all concerned for that vision, and finally putting in place the plans, policies and structures to make the required journey.

At the same time, the council will be under intense pressure to get organised and to start producing results. The State government and the community will have high expectations for improved service delivery and better value for ratepayers' money to justify the amalgamation and/or boundary change. The leadership team must cope with the immediate complexity and demands of an enormous range of issues through thoughtful planning, effective communication, encouragement and persuasion, skilful organising and smart problem solving.

The leadership attributes required are special. This is almost certainly not the time for 'management text book' or 'crash through' styles of leadership. Careful consideration needs to be given to assembling the right mix of skills and personalities to create a leadership team appropriate to the challenge.

Managing the mood

This is a time when relationships are disrupted, friends are stressed and some will resign, jobs disappear and uncertainty abounds. In such an environment, managing the mood of the organisation is an essential leadership skill.

The leadership team must pay close attention to employees' emotions and work hard to maintain a receptive climate for the many changes that need to occur. Employees need to be nurtured to believe that the merger is a positive change, that past and present accomplishments are valued and that the future holds new career promises. But they also need to be reminded that complacency is not an option.

So the leadership team needs to find the right balance of optimism and realism and carefully calibrate the timing, tone and positioning of their actions and communication. The mood of the organisation must be one where the majority of employees are receptive, on board and feeling optimistic – even excited – about the future.

Cultural differences

Managing the cultural issues associated with an amalgamation is essential to achieve effective integration of the former councils' staff. Cultural differences between the former councils will be seen in espoused values, in systems and processes, and also in unwritten and unsaid assumptions about what matters and how things should be done. A balance has

to be struck – one that is seen to be fair and sensible, and that represents a step forward for the majority of those concerned.

A significant risk that often has to be managed is the perception that one of the councils has ‘taken over’ the other/s. There is a need for consistent communication to reiterate the key message that it is a ‘brand new’ organisation with its own unique destiny.

Establishing credibility

The leadership team must quickly establish its credibility, and this will generally emanate from two sources – demonstrated expertise and productive relationships.

Credibility and respect can be gained at the outset by showing that the leadership team is knowledgeable about the reasons for the change and the issues involved, and well-informed about the process of mergers, the short-term goals that must be achieved, and how best to proceed. Frank exchanges of views with other councils and with colleagues who have experienced amalgamations before will be extremely valuable in this regard (see section 4.1.3 below).

In terms of relationships, the leadership team must demonstrate at every opportunity that they can be trusted to listen and will always work in the best interests of the council, staff and community. This requires being open, consistent, supportive and fair in decision-making, and always acting with integrity.

Persuasive leadership

In an environment of change, ‘persuasive leadership’ is essential. This is not a matter of ‘selling’ change, but rather being a ‘first among equals’, making the journey with everyone else – albeit in the front row – and learning, discussing and negotiating on the way. People need to be drawn together through a belief in a brighter future, by agreeing on shared goals, and by having a genuine say in how to get there.

Persuasive leadership is governed by some basic practices:

- Model the behaviours you want to see, like mutual respect and a spirit of cooperation.
- Connect emotionally by showing openly your personal dedication and commitment.
- Have a strong and accurate sense of the emotional state of employees and adjust the tone and style of communication accordingly.
- Favour the rational, the orderly and a common sense approach.
- Use similarities to create bonds with employees, thus creating a presumption of goodwill and trustworthiness.
- Deliver reassuring, consistent and sensible messages.
- Face up frankly and honestly to the hard truths of situations and set step-by-step goals.
- Give praise by crediting good work and offering positive feedback.
- Communicate even when there is nothing new to say.
- Enlist champions that share and understand the vision and support the initiatives – peer power provides influence and promotes learning horizontally rather than vertically.

- Always be willing to compromise and give-and-take where it is necessary to respond to staff and community concerns – but retain a clear view of the ‘long game’ and the sustainable solutions that need to be put in place.
- Be patient: it is seldom possible to reach shared solutions in a single step, so listen to employees, test and model positions, develop new positions that incorporate ideas from others, then test again – eventual outcomes will more than justify the effort.

On the other hand, avoid the ‘hard sell’. Beginning the post-amalgamation process with definite positions and precise targets will rarely achieve a good result. This is an environment of immense workplace uncertainty and volatility. Setting out seemingly rigid positions may simply provide those who still oppose change with something to fight against and an excuse to ‘maintain the rage’.

4.1.3 Collective intelligence

Amalgamations and boundary changes are nothing new. Moreover, they usually occur in batches involving a substantial number of councils. This creates numerous opportunities to learn from the experience of others, and to work through the change process in partnership with colleagues handling the same issues and problems that have presented themselves. Building collective intelligence is the smart way for councils in similar circumstances and like-minded individuals to learn from each other in ‘real time’, to provide mutual support, to discover fresh opportunities and solutions to problems, and to achieve outcomes they might not be able to reach separately – and often more quickly.

4.2 A staged approach

There are many issues to consider in managing the change process and it will not be possible to do everything at once – a staged approach is essential and this can be based on the four phases described in Figure 1 (section 2.1). Of course, issues and tasks may not be strictly limited to one phase or another, and there will be a significant degree of crossover.

Figure 2 below summarises how activities may be placed in a logical sequence. It identifies the earliest point at which a given activity might be expected to occur or – in the case of those activities through two or more phases – when they should be initiated. However, no one model will suit all councils, so the range of activities and sequencing suggested in Figure 2 will need to be tailored to local circumstances.

As noted in section 2.1, the Pre-Proposal Phase offers an invaluable opportunity to consider a range of workforce and workplace issues that may be involved if an amalgamation or boundary change is subsequently pursued, either voluntarily or by the Minister. Steps that should be taken are listed in Figure 2. Attachment I provides an example of the transition model adopted by two metropolitan councils preparing for a voluntary merger: a similar approach could be taken to explore the likely consequences of a potential forced amalgamation or boundary change.

Also as discussed in section 2.1, having a Transition Phase is conditional upon the Proclamation of the new council allowing a period of several months before it commences operations and staff transfer. If there is no Transition Phase as per the current amalgamations, then the activities assigned in Figure 2 will need to be re-allocated to either the Proposal Period or the Establishment and Protection Phase.

As a general rule, it would be preferable for as much preparatory work as possible to be completed during the Proposal Period (see Attachment H for an example of how this might be handled). Understandably, existing councils will often be reluctant to do this, either because they doubt that the proposal will come to fruition, or because they are strongly opposed to the proposal and wish to demonstrate their resistance. Councils should, however, consider the community interest and understand that much of what needs to be done to prepare for possible boundary adjustments and/or amalgamations is also sound practice in itself and will be of benefit whether changes actually take place or not.

Figure 2: Key Activities and Sequencing

Pre-Proposal Phase (before Minister makes a formal proposal)

- Consider possible change scenarios and their implications
- Hold discussions with other affected councils and, if agreed, undertake preliminary joint investigations and planning
- Review existing workforce plans and identify any outstanding issues
- Preliminary consultation with staff and unions
- Ensure all existing staff employment terms and conditions are documented, including informal arrangements that are not entrenched by way of custom and practice
- Audit existing term contracts, casual and temporary positions
- Quantify which casual positions are undertaken by real casuals
- Undertake an audit of senior staff contracts and the expiration of those contracts
- Ensure all staff position descriptions accurately reflect current roles and that all staff policies are current and relevant and formally approved

Proposal Period (from the day a proposal is formally made until it is determined or a Proclamation is issued)

- Establish a change management team and commence change management training
- Initiate (or continue) joint investigations and preliminary planning with other affected councils
- Undertake an audit of all positions (tasks, status, skills, tenure, vacancies, contractors etc.)
- Finalise detailed documentation of all staff terms and conditions, and current position descriptions
- Audit the relevant salary systems, job evaluation systems and performance appraisal processes of the amalgamating entities
- Ensure staff policies, EEO Plan and Training Plans are up-to-date
- Review delegations and authorisations and update register
- Respond consistently and effectively to staff concerns and offer support required
- Develop strategies to minimise stress and manage Worker's Compensation claims
- Ensure there is an adequate Employee Assistance Program

Transition Phase (from date of Proclamation until staff transfer to new council)

- Recruit a new General Manager (Administrator and Interim GM may be appointed by Proclamation)
- Review role and composition of change management team
- Commence formal consultations under the Award through Consultative Committee/s
- Establish a combined change management team with broad membership from all affected councils, and expand training
- Prepare and implement a communications plan (ensure consistency of information and process)
- Review existing services and assess likely service delivery programs and priorities for the new council (CSPs and Delivery Programs)
- Identify likely locations of offices, depots and other workplaces
- Consider options for a new organisation structure
- Consider potential acting senior staff positions, assess legal obligations and the possible termination of some senior staff contracts
- Develop a preliminary change management strategy
- Allocate responsibilities for coordinating and implementing the transition

Establishment and Protection Phase (for 3 years from the date staff transfer)

- Recruit a new General Manager (Administrator and Interim GM may be appointed by Proclamation)
- Review role and composition of change management team
- Establish new Consultative Committee and Work Health and Safety Committee
- Continue consultations, communications and staff support
- After first election, engage fully with councillors and address their needs for additional information, guidance and professional development
- Recognise and celebrate achievements of the previous councils
- Agree upon a new statement of corporate values, goals and priorities
- Formulate and adopt 'interim' CSP and Delivery Program to guide workplace change in accordance with requirements as described in the Proclamation
- Determine new organisation structure and prepare new Workforce Plan (staff numbers, skills needed, status and tenure of positions, other employment conditions, training and development programs, cultural change etc.)
- Appoint new senior staff
- Determine the termination arrangements for former senior staff
- Agree strategy for workplace change (including cultural change, team building, staff policies, specifying continuing/new positions, amended roles/status/tenure, potential redundancies or redeployment, future workplace locations, timetable for action)
- Consolidate previous enterprise/council agreements
- Adopt new grading/salary structure and performance appraisals (and identify COO positions)
- Determine delegations and authorisations
- Consolidate all HR functions/processes and ensure they meet organisation and staff needs (change management and longer term)
- Prepare new EEO Plan
- Adopt updated Code of Conduct
- Determine circumstances, processes and incentives for voluntary redundancies
- Develop complementary redeployment and retraining initiatives
- Identify and manage situations where members of staff teams have different conditions
- Ensure all outstanding grievances are settled
- Establish long-term programs for training, staff development and continuous improvement
- Maintain staff numbers in Rural Centres as far as is practicable and report progress in the Annual Report

Ongoing Operations (beyond 3 years from the Proclamation)

- Review progress achieved during Establishment and Protection Phase and issues arising
- Address any outstanding matters
- Prepare updated CSP, Delivery Program, organisation structure and Workforce Plan in accordance with the Act (may be required during Transition Phase)
- Identify needs for new or amended positions and recruit as necessary
- Implement further redundancies if required and in accordance with due process (voluntary and/or forced)
- Determine and meet ongoing needs for redeployment and re-training
- Regularly update programs for training, staff development and continuous improvement
- Maintain staff numbers in Rural Centres as far as is practicable and report progress in the Annual Report

4.3 Managing risk

Sound risk management is essential. Any structural reform process will increase the chances of conflict and upset in the workplace. Whilst managing and minimising this risk can generally be accomplished by giving consideration to issues discussed in Parts 2 and 3 above and seeking appropriate advice and/or assistance, there are several critical aspects that warrant further emphasis.

4.3.1 Change and stress

It is well documented that Worker's Compensation claims based on stress arise during periods of major workplace change. Of course stress can be both positive and negative, but it is the negative effects of stress on both an individual's wellbeing and an organisation's productivity that can be very costly.

As indicated in Figure 2, important steps to be taken as early as possible in the reform process include:

- Establishing a change management team no later than during the Proposal Period.
- Providing change management training – LGNSW Learning Solutions provides a range of courses dealing with the change procedures, as outlined in Attachment A.
- Developing strategies to minimise stress and manage potential Worker's Compensation claims – councils should contact **StateCover** or their own Worker's Compensation insurance providers to ensure any potential claims, particularly for stress or injuries with gradual onset, are managed properly.
- Establish an Employee Assistance Program (EAP) or, if necessary, update and expand an existing EAP – council's provider can provide professional support and counselling to employees undergoing stress or encountering other problems arising in the workplace or in their private lives. The Employee Assistance Professionals

Association and StateCover can be contacted for general advice on EAP providers, especially in country areas.

4.3.2 Industrial risks

Individual conditions of employment

As mentioned in section 3.2.1, there may be longstanding arrangements established with individual employees that may or may not have been conferred by written agreement. These are typically over-award payments and/or entitlements that were established to satisfy a particular circumstance in the previous council, and may in some cases be interpreted as binding terms and conditions of the employee's employment contract created through custom and practice.

These situations can easily become the subject of disputes in the new council if not dealt with properly at an early stage. Councils should be proactive by initially conducting an audit of all such arrangements across all line managers and documenting the results. Councils should also not hesitate to contact the LGNSW Industrial Relations Unit for advice and assistance when seeking to discuss and/or negotiate these matters with employees.

Delaying the implementation of workplace change, such as confirming the placement of positions in new organisation structures and the introduction of a new salary system, raises the potential of additional disputes occurring at the conclusion of the 3-year Establishment and Protection Phase.

Anti-discrimination

During the change process councils will have to make decisions on staff transfers, selecting transferred employees for new roles, provision of training, recruitment and, perhaps, redundancy.

Unless these decisions are handled carefully, councils may be exposed to claims of unlawfully discriminating against one employee with a particular attribute in favour of another with a different attribute.

State and federal legislation prohibits councils from discriminating in employment matters on the grounds of age, race, gender, sexual preference, pregnancy, marital status, religion, HIV, disability or carer's responsibility.

Suggested risk management strategies in this regard are:

- Ensure that managers fully understand their obligations under the *Anti-Discrimination Act 1977* (NSW); the *Industrial Relations Act 1996* (NSW) and Pt 6-4 of Chapter 6 of the *Fair Work Act 2009* (Cth).
- Establish fair, equitable, relevant and objective selection criteria for processes such as internal recruitment, transfer of positions and/or employees, training opportunities and redundancies. Involve employees and unions in the development of these criteria, and the Consultative Committee is an ideal forum for this purpose.
- Document thoroughly and communicate to employees not only the process (what?) but the rationale behind the process (why?). Well-informed and involved employees will be less likely to feel they have been discriminated against than those who feel that they have been left in the dark and disenfranchised. Whilst the council may have established fair and equitable criteria in its processes, there will inevitably be some

employees who will allege unfair treatment if they are not selected for a position, or feel that they may potentially suffer some form of detriment in their employment. Even though a council may be able to account for its actions, there may still be potential exposure to a claim if any employee can substantiate that they were not adequately informed and involved.

The LGNSW Industrial Relations Unit can be contacted for assistance on anti-discrimination matters.

Redundancy

Generally, employees (other than senior staff) affected by either an amalgamation or boundary change proposal cannot be terminated on the grounds of redundancy without their agreement during both the Proposal Period and the 3-year Establishment and Protection Phase. Councils are therefore only able to offer voluntary redundancies until the Ongoing Operations phase.

A small risk may arise if a voluntary redundancy occurs during the change process and the employee concerned later claims that the redundancy was in reality 'forced'. This can lead to time-consuming and costly claims for unfair or constructive dismissal.

As a precaution, councils are advised to ensure they have a defensible process for both voluntary and, after the Establishment and Protection Phase, forced redundancies. This should include:

- Consultation in accordance with Award requirements.
- Fair and equitable procedures for selection.
- Development of objective criteria.
- Clear and thorough documentation.

Clause 40 of the Award encourages the consideration of arrangements that would mitigate against the effects of termination. Good human resources management practice would also dictate that councils terminating employees on the grounds of redundancy should offer assistance in the form of professional out-placement (career transition) and financial advisory services.

5. BEYOND THE TRANSFORMATION

5.1 Consolidating Change

As indicated in Figure 2, the period immediately following the Establishment and Protection Phase will be characterised by a need to handle inevitable 'loose-ends'. A detailed review of progress achieved during the Establishment and Protection Phase and issues arising should be conducted as a matter of some urgency. In particular, outstanding matters may well include:

- Finalising some redundancies where protected positions are no longer required and there is no alternative position suitable for the employee concerned.
- Bringing to a conclusion some or all COO arrangements.

- Updating position descriptions.
- Further re-deployment and re-training as necessary.
- Recruiting for new or amended positions where they were deferred pending other staffing adjustments.
- Completing full implementation of the new salary structure and salary policies.
- Efforts to maintain staff numbers in Rural Centres at the highest practicable level.

As always, these matters should be handled sensitively, having regard to all the relevant provisions of the Act and Award, and through discussion with the Consultative Committee.

Successfully consolidating change will also require careful ongoing attention to the various matters covered in sections 3 and 4, particularly effective communication and leadership, as well as maximising the value of the Consultative Committee and other arrangements for two-way consultation with staff. Cultural change and establishing the council's new brand and image will also undoubtedly need further attention.

5.2 Ongoing Planning and Improvement

During the Establishment and Protection Phase, the new council needs to turn its attention to putting in place the plans and policies that will underpin its long-term operations and promote continuous improvement. In one sense, this is largely a matter of meeting requirements under the Act and Award, but the creation of a new council and – hopefully – the emergence of a new culture offers an opportunity to approach the tasks involved with a renewed sense of purpose and vigour.

In the context of workplace management, two dimensions of ongoing planning and policy development stand out:

- The IP&R process, especially the preparation of a workforce management plan; and
- Establishing and successfully implementing longer-term programs for training, staff development and continuous improvement, including the Training Plan required under the Award.

5.2.1 IP&R and the workforce management plan

The IP&R system is established under sections 402-406 of the *Act*. In particular, section 403 of the Act requires councils to prepare a Resourcing Strategy that includes 'workforce management planning'. This has to be carried out in accordance with guidelines mandated under section 406.

A Workforce Plan is a four-year strategy to address the human resources required to achieve the objectives identified in the Community Strategic Plan (section 402). According to the current guidelines issued by the OLG it should address a range of issues related to training including:

- Learning and development.
- Succession planning.
- Opportunities to create and retain positions for local young people.
- Incentives and other programs to make the council 'an employer of choice'.

- Performance management.

Ideally workforce planning is an ongoing process aimed at progressively re-shaping the workforce to achieve current and future organisational objectives. It should not be seen as simply the periodic preparation and implementation of a 'plan'. Also, rather than being an activity largely confined to the council's HR unit, it should be a function of all managers including senior management to ensure that the organisation has the right skills at the right time in the right place.

Workforce Plans need to include data on workforce profiles and capabilities, and should also contain clear strategies and targets that are regularly reported and updated to guide future activities. Depending on the needs identified within the workforce planning process, data might be used to monitor and track the following trends:

- Separation rates
- Mobility within the agency
- Turnover rates
- Retention rates
- Vacancy patterns
- Retirement patterns
- Promotion patterns
- Workload patterns
- Leave patterns — sick leave, long service, family, and parental leave
- Time taken to recruit
- Skills shortages and oversupply
- Achievement of EEO targets
- Wages and salary costs
- Turnover costs

Case Study: Port Stephens Council

Workforce planning is conducted annually at Port Stephens Council and involves a comprehensive process that provides managers with a framework for making staffing decisions to address short, medium and long-term business needs. It includes the following steps:

- Understanding the organisation's strategic direction and its impact on the workforce.
- Analysing current and future workforce needs and competencies.
- Analysing the gap between current and future needs.
- Developing strategies to address workforce gaps.
- Implementing strategies to align the workforce with future business needs.
- Evaluating the success of the workforce planning strategies in meeting objectives.

An important component of Council's workforce planning and succession processes is the identification of each position by workforce segment, and which positions are most critical e.g. those which present the most significant risk to service delivery and where there is potential for a substantial gap between future demand for services and supply of labour.

Succession planning can be broadly defined as identifying future potential staff to fill key positions. Generally, one or more successors are identified and development activities are planned for them. Under the Council's Talent Management Strategy, all positions in the organisation are ranked according to the potential risk of losing the person and the consequence for the organisation:

- High – critical workforce position and/or employee may leave in the next 6-12 months.

- Medium – may leave in the next 12-24 months.
- Low – no immediate risk.

Positions rated as high risk receive priority in the training budget. Potential successors are provided with development opportunities that form part of their learning and development (L&D) plan.

Direct managers have responsibility for developing appropriate L&D plans for staff in accordance with the talent sector training options matrix. This ensures that all staff have the skills required to perform the duties of their position. Education assistance is also available to assist staff to achieve recognised qualifications relevant to their current role or identified through succession planning.

Each year, the L&D team facilitate discussions with managers to identify the training requirements for staff for the forthcoming year. This will inform the Individual Work and Development Plan process conducted in June/July. Learning and development needs will be identified through:

- Performance review process.
- Annual workforce planning process.
- Internal audit process.
- Legislative requirements.
- Identified areas of extreme risk.

Individual Work and Development Plans have been in place for a number of years and provide a clear line of sight to the achievement of the objectives in the Community Strategic Plan. Council wants employees to be accountable. The Plans help employees to know what is expected by Council, and apply in conjunction with the individual position description.

Reference: Port Stephens Council Workforce Strategy 2013-2017

5.2.2 Training, staff development and continuous improvement

The nature and preparation of Training Plans was discussed at some length in section 3.4. Having a suitable plan and budget for its implementation is an ongoing requirement under the Award, but anecdotal evidence suggests that this is an area that is often somewhat neglected in the face of competing demands for staff time and councils' limited resources.

The 2013 report of the NSW Independent Local Government Review Panel highlighted a broader need for councils to enhance their performance and productivity. It proposed amongst other things:

- A sector-wide program to identify and promote innovation and best practice.
- That councils should undertake regular, structured reviews of their services.
- New arrangements for performance monitoring and benchmarking.

Sound workplace management and constructive industrial relations are critical for those or similar initiatives to succeed. Much of the material presented in earlier sections of this Kit is therefore relevant to ensuring ongoing improvement in councils' performance.

Programs for continuous improvement are a longstanding feature in many councils across NSW, but are by no means universal and rarely implemented in a consistent, concerted fashion over extended periods of time.

Continuous improvement and good practice

Within the first year, the new council should introduce a structured program to ensure staff are accountable for their roles in the change process and ongoing reform initiatives, and to create the momentum for a culture of continuous improvement and good practice.

Continuous improvement and good practice needs to cover a broad range of issues:

- Strategic planning and management.
- Financial sustainability.
- Efficient and effective operations and service delivery.
- Human resources management.
- Quality governance and ethical conduct.

The OLG *Promoting Better Practice* program provides councils with a range of tools, practice notes and self-assessment checklists that offers a useful starting point. Regular reviews along those lines act as a 'health check' to focus attention on key concerns and priorities, and to give both the council and its community confidence about what is being done.

Similarly, business excellence models (such as the Australian Business Excellence Framework) also provide a holistic framework for coordinating and managing a program of continuous improvement. Such models are typically structured around a range of key components against which councils can assess and measure their performance, target areas for improvement and embed good practice.

A useful approach involves identifying two key groups of factors: enablers and results.

Enablers may include:

- Leadership – how the behaviour and actions of the leadership team and other leaders, inspire, support and promote continuous organisational improvements.
- People Management – how the organisation is seizing opportunities to access and release the full potential of its people to continuously improve all operational areas.
- Policy and Strategy – how the organisation develops, implements and reviews policy and strategy and turns it into real meaningful plans and actions.
- Resources – how the organisation continuously improves through the maximum utilisation and maintenance of its resources.
- Processes – how the organisation adds value, and how processes are identified, reviewed, and, if necessary, revised to ensure continuous improvement of the organisation's operations.

Results may include:

- People Satisfaction – how employees feel about the organisation and importantly how well they think their needs and aspirations are being managed and met.

- Customer (Ratepayer) Satisfaction – external perceptions of an organisation’s services /products and how well customer needs and expectations are being managed and met.
- Societal Impact – perceptions of the organisation amongst the wider community (including regionally), and how well those broader needs and expectations are being met.
- Business and Non-Financial Results –what the organisation is achieving in relation to its planned objectives, needs and expectations.

6. RESOURCES

Local Government NSW (LGNSW)

www.lgnsw.org.au

- for information on Local Government reform (media releases, discussion papers etc.) at the LGNSW home page, click on Key Initiatives and then Reform – Fit for the Future
- for workplace/employment related advice and services (Industrial Relations, Management Solutions, Learning Solutions) at the LGNSW home page, click on Member Services and then on the appropriate area (e.g. Industrial Relations)
- Industrial Relations Unit, phone: 9242 4142, fax: 9242 4188, email: member.services@lgnsw.org.au
- Management Solutions, phone: 9242 4161, fax: 9242 4188, email: lgms@lgnsw.org.au
- LGNSW Learning Solutions, phone: 9242 4081, fax: 9242 4188, email: learning@lgnsw.org.au

Local Government Procurement (LGP)

<http://www.lgp.org.au/>

Phone: 02 8270 8700, fax: 02 8270 8711, email: info@lgp.org.au

Office of Local Government

www.olg.nsw.gov.au

- for information on mergers and boundary change proposals: at the OLG home page, click on Boundaries Commission and then on Mergers and Boundary Alteration Proposals
- for information on Proclamations: at the OLG home page, click on Boundaries Commission and then on New Councils

‘Fit for the Future’

<http://www.fitforthefuture.nsw.gov.au/>

Local Government Professionals Australia, NSW

www.lgprofessionals.com.au

- a collaborative professional association dedicated to strengthening the professional capability of its members

Local Government Unions

New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union (the United Services Union)

www.usu.org.au

- the USU represents a little under 30,000 local government employees throughout NSW

Professionals Australia Local Government Engineers' Association (LGEA)

www.professionalsaustralia.org.au/lgea

- The LGEA is a specialist group within Professionals Australia that advocates the vital role engineers have in local government.

The Development and Environmental Professionals' Association (depa)

www.depa.net.au

- depa is an industrial organisation representing professional employees working in NSW local government in a variety of jobs in the fields of environmental health, public health, building and development control and planning.

NSW Electoral Commission

www.elections.nsw.gov.au

- for information on Local Government elections

StateCover

www.statecover.com.au

- for general advice on StateCover Services, Workforce Health and Safety contact Diane Blake, Jo Powell or Wendy Ablott on 8270 6000 or email: whs@statecover.com.au

Employee Assistance Professional Association

www.eapaa.org.au

- for advice on EAP providers

ATTACHMENT A: WHERE TO GET HELP WITH WORKPLACE REFORM

Local Government NSW (LGNSW) coordinates a range of high quality, cost-effective workplace services to support councils in NSW undergoing reform and change. LGNSW works with councils, groups of councils, ROCs, pilot JOs, accredited training providers and expert consultants to offer support services, advice, training programs, workshops, seminars and courses which are:

- Tailored to local government.
- Delivered by staff and consultants experienced in working with councils.
- Invaluable in supporting both elected members and staff.

Industrial Relations

LGNSW is a registered industrial organisation of employers that represents member councils in both the state and federal industrial jurisdictions in a wide variety of matters. LGNSW is the employer party to the major industry award covering Local Government employees, the *Local Government (State) Award 2017*.

The Industrial Relations Unit services member councils by providing:

- Advice about employment related issues such as performance management, employee discipline, discrimination, workers compensation and work, health and safety;
- Assistance in resolving workplace disputes and grievances;
- Advice about changes to legislation and developments in recent case law;
- Assistance in negotiating, processing and varying awards and enterprise agreements;
- Representation when dealing with unions;
- Advocacy before the Industrial Relations Commission of New South Wales, the Industrial Court of New South Wales, the Fair Work Commission, the Chief Industrial Magistrates Court, the Anti-Discrimination Board, the New South Wales Civil and Administrative Tribunal and the Human Rights and Equal Opportunity Commission.

LGNSW HR Advance

HR Advance is a multi-award winning website offering customisable HR, IR & Safety documents all with online storage. LGNSW HR Advance is a comprehensive library 'local government' customised HR, IR and Safety documents including contracts, policies, forms, communications and checklists. All documents come with extensive notes on their use and application. LGNSW works with Australian Business Lawyers & Advisors to ensure that all documents are both compliant with the latest legislation and legally sound.

Management Solutions

Local Government Management Solutions provides a professional and cost effective service to the industry. The Unit's procedures have been designed with the needs and concerns of the Local Government industry in mind. Management Solutions' services include:

- General manager and executive recruitment;
- Placement of locum general managers and senior staff;
- Performance management to ensure that councils observe their annual senior management performance management obligations and maintain an effective relationship with their general managers and senior staff;
- Organisation reviews;
- HR Benchmarking survey;
- Annual remuneration survey and tailored comparison report for NSW councils comparing the remuneration for general managers, directors and managers;
- The NSW Local Government Reform Impact Study which is a climate survey designed to provide a 'pulse-check' on employee engagement, change optimism and the impact of reform.

Services under development include outplacement service for senior staff displaced due to amalgamations.

Learning Solutions

LGNSW Learning Solutions is the training arm of LGNSW and coordinates a range of high quality, cost-effective professional development options for councils across NSW. Learning Solutions works with councils, groups of councils, ROCs, accredited training providers and expert training consultants to offer training programs, workshops, seminars and courses in areas of need for member councils. The following workshops can be provided in-house for councils or groups of councils, and are designed to support councils undergoing workplace change:

1. Applying for Jobs and Performing in Interviews

This one-day workshop will help participants learn the art of applying for roles and performing effectively in interviews.

2. Building Well-being and Resilience

The overall aim of the workshop is to prepare and empower supervisors to give individuals in the workplace the opportunity to consider ways to deal with workplace stressors at work, both physical and psychological.

3. Constructive Workplace Communication

This program will improve communication knowledge and outcomes and reduce unproductive communication to your internal and external customers. It will assist participants to develop the personal insights and skills to enable them to reduce their interpersonal conflict. It will also assist employers to maintain a standard of workplace communication that demonstrates safety, respect and inclusion.

4. Making Consultative Committees More Effective

This one-day workshop will provide participants with an understanding of the roles and responsibilities of Consultative Committees in the Local Government context. The course is based on regulations required under the Local Government Act, the Local Government (State) Award and internationally accepted meeting procedures.

5. Managing People – Personality and Performance

This one-day program will help participants learn the art of managing people. The focus is on communicating with different personality types and performance management communication.

6. Managing the Stages of Change

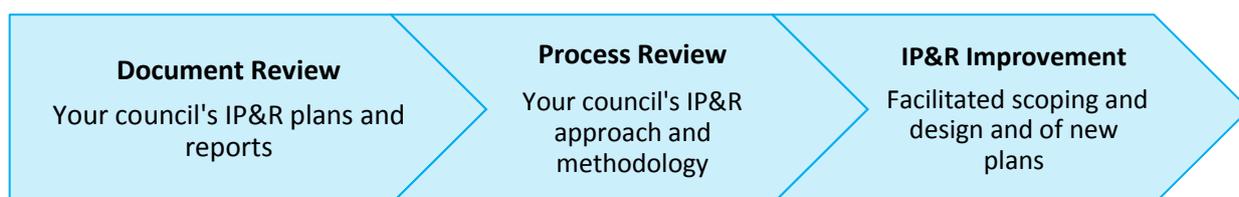
This one-day program will assist participants to better understand their role in implementing or managing change in the workplace. There are significant drivers for change today in local government, including drivers for reform and discussions about amalgamations.

All managers are expected to assist staff both embrace these changes and then implement them in a constructive manner. Many change initiatives are either not successful or result in significant and time-consuming resistance.

IP&R and Workforce Planning

Councils across NSW have been operating under Integrated Planning and Reporting (IP&R) legislation since 2009. Over the next 12-18 months councils will need to review their IP&R frameworks and processes in preparation for the next local government elections and as part of the 'Fit for the Future' reform process.

To assist councils with progressing their IP&R frameworks, LGNSW has established an IP&R Review and Capacity Building Program:



The introduction of IP&R has provided councils with structured opportunities and pathways to enhance their strategic capacity; engage with their communities and develop a clear vision for the future. IP&R has provided strong foundations for councils to manage their service planning and delivery according to a clear long-term outlook, stronger alignment with community expectations and heightened awareness of resourcing opportunities and constraints.

LGNSW will work with the Council's Executive team to identify the improvements that are needed and develop an IP&R Improvement Plan.

This program includes a focus on Workforce Planning, and can offer a review of the Workforce Plan to assess its coverage of the council's short and long-term workforce needs in reference to the CSP and Delivery Program.

LGNSW Advocacy

LGNSW represents, advises, lobbies and advocates on behalf of members across all levels of government, on major issues that include but are not limited to:

- local government finances such as the freeze on Financial Assistance Grant indexation;
- local natural and built environments and environment sustainability;
- the pursuit of social justice through submissions and other input on federal and NSW Government funding for ageing and disability positions;
- the Commonwealth Home Support program;
- National Aboriginal Constitutional recognition;
- asbestos; and
- waste.

ATTACHMENT B: EXAMPLE OF BOUNDARIES COMMISSION REPORT – DUBBO CITY COUNCIL AND WELLINGTON COUNCIL

1. Summary of Local Government Boundaries Commission comments

The Boundaries Commission has reviewed the Delegate’s Report on the proposed merger of Dubbo City Council and Wellington Council to determine whether it shows the legislative process has been followed and the Delegate has taken into account all the factors required under the *Local Government Act 1993* (the Act).

The Commission has assessed that:

- the Delegate’s Report shows that the Delegate has undertaken all the processes required by section 263 of the Act,
- the Delegate’s Report shows that the Delegate has adequately considered all the factors required by section 263(3) of the Act, with the exception of the factor required by subsection 263(3)(e5) (diverse communities), and
- the Delegate’s recommendation in relation to the proposed merger is supported by the Delegate’s assessment of the factors.

2. Summary of merger proposal

On 6 January 2016, the Minister for Local Government referred a proposal to merge the local government areas of Dubbo City Council and Wellington Council to the Acting Chief Executive of the Office of Local Government for examination and report under the Act. The following map shows the proposed new council area (shaded in green).

The proposal would have the following impacts on population across the two councils.

Council	2016	2031
Dubbo City Council	41,950	46,500
Wellington Council	8,750	8,100
Merged Entity	50,700	54,600

Source: NSW Department of Planning & Environment, 2014 NSW Projections (Population, Household and Dwellings).

The Acting Chief Executive delegated the function of examining and reporting on each of the proposals to a number of people, known as ‘Delegates’. Delegates were required to examine and report upon each merger proposal rigorously and fairly. The examination process included Delegates calling for submissions and holding a public inquiry on each proposed council merger. Delegates prepared a report on the proposal and provided that report to the Local Government Boundaries Commission.

3. Role of the Local Government Boundaries Commission

The Local Government Boundaries Commission is an independent statutory authority constituted under section 260 of the Act. The Boundaries Commission examines and reports on any matter referred to it by the Minister in relation to the boundaries of local government areas and the areas of operation of county councils.

The Boundaries Commission has several functions under the Act. In the current context (where the Minister has elected to refer the proposal to the Office of Local Government, rather than the Boundaries Commission, for examination), the most relevant Commission functions are set out in section 218F(6) of the Act. This section requires:

- the Chief Executive to furnish the report on the examination of the merger proposal to the Boundaries Commission for review and comment, and
- the Boundaries Commission to review the report and send its comments to the Minister.

The Commission's role does not involve re-examining the advantages and disadvantages of the proposed mergers, accepting submissions or holding public inquiries.

4. Delegate's recommendations

The Delegate's key recommendation is:

"That the Dubbo City Council and Wellington Council merger proposal proceed."

The Delegate also recommended that:

- *"the provisions of 218CA of the Act be applied to the Wellington rural centre, given its near compliance with the 5,000 population threshold and so that existing local employee positions could be preserved as much as possible.*
- *there remain a substantial, continuing staff presence in the Wellington administration office as well as continuity of local outdoor staff employment as occurs at present in the Wellington LGA."*

The Delegate also stated in the chapter related to "Other Issues":

- *"Should this merger proceed, it would be recommended that careful consideration be given to altering the merger boundary and transferring the southern villages of Stuart Town and Euchareena to Cabonne Council."*

5. The Commission's detailed comments

5.1 Review of the process followed by the Delegate

Under the Act, the Delegate is required to undertake certain processes in examining a merger proposal. These processes include holding an inquiry, allowing members of the public to attend meetings as part of the inquiry and calling for submissions. As part of its review of the Delegate's Report, the Commission has looked at whether these processes were followed.

In total the Delegate considered 415 written and verbal submissions from the public, community and other organisations and councils.

The Delegate held two public inquiries on 4 February 2016 at the Wellington Soldiers Club and Club Dubbo.

The Commission's view is that the Delegate has met the relevant requirements.

5.2 Review of the Delegate's consideration of the factors specified in the Act

Under section 263(3) of the Act, the Delegate is required to have regard to a range of factors when considering a merger proposal.

Overall, the Commission's view is that the Report shows the Delegate adequately considered all the factors with the exception of diverse communities.

The Commission has formed this view based on its review of the discussion presented in the Delegate's Report. The Commission specifically considered whether the extent of that discussion adequately canvassed the range of issues raised in the written submissions made to the Delegate, the views expressed at the public hearings and other information that would have been available to the Delegate.

5.2.1 Financial factors

Section 263(3)(a) of the Act requires the Delegate to have regard to:

"the financial advantages or disadvantages (including the economies or diseconomies of scale) of any relevant proposal to the residents and ratepayers of the areas concerned".

The Delegate stated that:

"... if one accepts the KPMG financial assumptions as outlined in the merger proposal document, and recognising that a 9.5 per cent nominal discount rate, or "safety factor", was applied to financial projections, the estimated merger savings are expected to be \$17 million over 20 years, with the analysis showing the proposed merger was expected to generate an average of around \$1.5 million in savings annually from 2020. This is considered a sufficient reason for the merger to proceed, being of significant benefit to the communities."

The Delegate then considered the infrastructure backlog of the two Councils, noting the IPART assessment that each Council satisfied the criteria of infrastructure and service management, as well as other financial criteria for sustainability and efficiency. The Report concludes from this that the merger should not give rise to any negative factors in this respect. With regard to rates, the Delegate noted that "a merged council would have the ability to establish differential rates to militate against excessive rate increases or decreases in the various rating catchments. Emphasis of rating could then be amended over time in light of service delivery and facilities audit outcomes."

The Delegate considered that a merged council would have the necessary capacity to provide an acceptable level of service with regards to road construction and maintenance. The Delegate concluded:

"In financial terms, the merging of the councils provides a better long term solution for the communities than to maintain the status quo. The financial advantages of the proposal outweigh perceived disadvantages as has been suggested in the foregoing discussion and which became evidence in the examination process. ... A new merged, larger council is considered a better and more optimal solution. While there may be some short term challenges, a new council will have financial strength and capacity to benefit the broad communities it would represent."

The Commission's view is that the Delegate adequately considered the issues under this factor, while noting the limited analysis of issues raised by submissions.

5.2.2 Communities of interest

Section 263(3)(b) of the Act requires the Delegate to have regard to:

“the community of interest and geographic cohesion in the existing areas and in any proposed new area”.

The Report stated that the community of interest and geographic cohesion of the LGAs is underscored by the reliance of Wellington Council residents on Dubbo, which is a major service centre. The Delegate noted that public inquiry presenters and some submissions acknowledged significant sporting, social and cultural linkages in addition to the economic connectivity of each area.

With regard to the geographic cohesion of the region, the Delegate considered that:

“The geographical size of the Wellington LGA and the location of some villages mean that outlying villages and some farmland areas have varying communities of interest. For example, the village of Geurie is 29 kilometres from Dubbo whereas Euchareena village is 103 kilometres from Dubbo, but only 43 kilometres from Orange”.

The Report stated that the geographic cohesion between the two LGAs has been interwoven by history and time into a present day general acceptance that the region of Orana is inclusive of Wellington Council and Dubbo Council. One submission considered in the Report argued that a benefit of a merger would be the consolidation of utilities already used jointly by the councils through mutual understandings, agreements and joint operational alliances.

The Delegate concluded that *“Due to the relatively close proximity of the two LGAs, the ease of access and extensive existing areas of connectivity, the positive community of interest and geographic cohesion is conducive to ensuring the merger proposal, if implemented, would be successful.”*

The Commission’s view is that the Delegate adequately considered the issues under this factor.

5.2.3 Historical and traditional values

Section 263(3)(c) of the Act requires the Delegate to have regard to:

“the existing historical and traditional values in the existing areas and the impact of change on them”.

The Delegate stated that a small number of presenters and submissions addressed this factor, and then provides a brief history of the two council areas, noting that:

“The WC submission acknowledged that Wellington and Dubbo had a shared history through agriculture while recognising that farms in Wellington LGA, particularly to the east and south, also utilised Orange city as a supply base.”

The Delegate also noted Dubbo City Council’s submission.

The Delegate concluded that each local government area had strong past agricultural linkages, and linkages to the Aboriginal Wiradjuri nation. Given this shared history as expressed by the Delegate, the Report stated *“similarities in history and tradition are self-evident”.*

The Commission’s view is that the Delegate adequately considered the issues under this factor.

5.2.4 Attitudes of residents and ratepayers

Section 263(3)(d) of the Act requires the Delegate to have regard to:

“the attitude of the residents and ratepayers of the areas concerned”.

The Delegate noted that the dominant attitude of those engaging in the examination process was that each council should continue to stand alone. This view was evidenced by claims that Dubbo City was in a sound financial position and Wellington was only assessed as not fit for the future on the basis of not fulfilling the scale and capacity criterion. As stated in the Report, “Dubbo based submissions revealed a perception and conveyed a prevalent attitude that its ratepayers should not be required to ‘prop up’ or subsidise the Wellington LGA”.

The Report noted that Dubbo undertook a survey to gauge public opinion on the proposal, which attracted 1,526 responses and gave results of 79 per cent against the proposal and 21 per cent in favour. However, the Delegate stated that the survey was a self-selected survey rather than a random sample and could have been completed by persons not residing in the LGA.

The Delegate concluded:

“There were views both for and against the proposal with a variety of attitudes being primarily emotive, and expressing concerns about perceived possible negative outcomes if the merger proposal was implemented. The alternative and also reasonably well supported view was that it was time for the two councils to merge to enhance the likelihood of a stronger council and region better able to provide a reasonable level of services and facilities, and to meet future rural and regional challenges.”

The Commission’s view is that the Delegate adequately considered the issues under this factor, while noting the limited analysis of issues raised by submissions.

5.2.5 Elected representation

Section 263(3)(e) of the Act requires the Delegate to have regard to:

“the requirements of the area concerned in relation to elected representation for residents and ratepayers at the local level, the desirable and appropriate relationship between elected representatives and ratepayers and residents and such other matters as it considers relevant in relation to the past and future patterns of elected representation for that area”.

It was noted in the Report that Dubbo Council has 11 elected councillors and population per councillor of 3,725, which is less than its council group average of 4,097. WC has nine councillors with 995 electors per councillor, marginally more than its council group average of 840. The merger proposal suggests a merged council comprising 11 councillors which would equate to a ratio of 4,602 residents per councillor.

The Delegate further stated that concern was expressed in submissions about the number of representatives from Wellington on a merged council and that these councillors would “... therefore have very little input into future decisions impacting Wellington and its district”. The Delegate further noted that projected population declines in the Wellington area and projected population increases in the Dubbo area could further impact upon future elected representation.

The Delegate concluded that a substantial majority of elected representatives should come from the Dubbo area given that in excess of 80 per cent of electors of a merged council would be former Dubbo City electors. The Report stated that:

“The proportional representation system of voting which provides for a quota system and enables election of minority populations and groups should however provide some representation for the Wellington area presuming that voters supported local candidates

... It is considered that an undivided area with a council comprising nine elected representatives would provide optimal representation for a merged council.”

The Commission’s view is that the Delegate adequately considered the issues under this factor, while noting the limited analysis of issues raised by submissions.

5.2.6 Service delivery and facilities

Section 263(3)(e1) of the Act requires the Delegate to have regard to:

“the impact of any relevant proposal on the ability of the councils of the areas concerned to provide adequate, equitable and appropriate services and facilities”.

The Delegate noted that “there was general acceptance amongst the written and verbal submissions that each LGA was providing adequate, equitable and appropriate services. There was also a view among some Wellington people that WC, because of its perceived financial situation, was providing a less than adequate service, particularly from rural ratepayers’ perspectives, in terms of rural roads maintenance.”

The Report noted that Wellington Council submitted that it has embarked on a process to identify improvement opportunities to fund required assets renewal and maintenance as part of its IPART Fit for the Future submission. The Delegate noted:

“... council would reduce service levels with strategies including reducing services in horticulture, ranger services, major community events, community donations and library and heritage advisory services. The total cost of these reductions according to the F4F submission, is \$272,000 over three financial years.”

The Report noted that Dubbo City Council “indicated that there would be a potential extra financial burden in this respect (providing services and facilities) given that WC was not fit”. The Delegate concluded that:

“It is considered that there would not be significant impacts on a merged entity providing adequate, equitable and appropriate services and facilities. Acknowledging the financial strength of DCC, and that WC was taking steps to improve its financial sustainability, a potential merger benefit is that the proposed specific WC service level reductions, amounting to only \$272,000 over three fiscal years, could be avoided.”

The Commission’s view is that the Delegate adequately considered the issues under this factor.

5.2.7 Employment impacts on staff

Section 263(3)(e2) of the Act requires the Delegate to have regard to:

“the impact of any relevant proposal on the employment of the staff by the councils of the areas concerned”.

The Report noted that Dubbo City Council has a full time equivalent staff of 330 while Wellington Council has 111 employees. The Delegate stated some submissions expressed concern about the potential for job losses, especially in the Wellington area, some also arguing that a direct loss of

employee positions would have an economic multiplier effect that would damage the broader Wellington economy.

The Delegate considered the legislative protections against job losses, noting that the provisions of section 218CA of the Act do not apply to Wellington Council because the Wellington rural centre has marginally in excess of 5,000.

The Delegate made two recommendations with respect to this factor:

“It is recommended that the provisions of 218CA be applied to the Wellington rural centre, given its near fit with the 5,000 population threshold and so that employees’ positions can be preserved as much as possible. It is further recommended that in the event of a merger, there be a continuing substantial staff presence in the Wellington administration office as well as continuity of local Wellington LGA outdoor staff employment.”

The Commission’s view is that the Delegate adequately considered the issues under this factor.

5.2.8 Rural impacts

Section 263(3)(e3) of the Act requires the Delegate to have regard to:

“the impact of any relevant proposal on rural communities in the areas concerned”.

The Report’s chapter on rural impacts focused on the Wellington area, noting that Wellington Council argued that the merger is likely to create negative impacts on its rural communities. Council submitted that projected growth in Dubbo City could occur at the expense of the rural lifestyle and environment in Wellington. Reduction in employment was viewed by Wellington Council as a potential impact on the rural communities, with job losses resulting in a corresponding loss of further employment in the current Wellington LGA.

The Report noted that Dubbo City Council raised the matter of farmland rating inequality and the ability of communities to afford council rates. The Delegate noted that *“given that differential rating does not exist for farmland and one farmland rate is applied to a whole merged council, equalising of farmland rates would provide a challenge to a merged entity”.*

The Delegate concluded:

“These and other potential merger impacts on rural communities can be effectively addressed with well-considered and inclusive strategies, and communication mechanisms. It is not considered that these acknowledged potential impacts would amount to major issues or impediments for a merged council.”

The Commission’s view is that the Delegate adequately considered the issues under this factor, while noting the limited analysis of issues raised by submissions.

5.2.9 Wards

Section 263(3)(e4) of the Act requires the Delegate to have regard to:

“in the case of a proposal for the amalgamation of two or more areas, the desirability (or otherwise) of dividing the resulting area or areas into wards”.

The Delegate noted that both council areas are undivided and considered the councils’ submissions as follows:

“WC expressed the view that without the establishment of wards, there was a risk that WC residents would not have representation given the major differences in population of each LGA. DCC contended that provision of wards, however, would attract parochialism with potential candidates standing for election only on the basis of special interests in ward matters with no interest in wider council activities.”

The Delegate concluded that an undivided area for electoral representation is preferred to a ward system.

The Commission’s view is that the Delegate adequately considered the issues under this factor.

5.2.10 Opinions of diverse communities

Section 263(3)(e5) of the Act requires the Delegate to have regard to:

“in the case of a proposal for the amalgamation of two or more areas, the need to ensure that the opinions of each of the diverse communities of the resulting area or areas are effectively represented”.

The Delegate focused on the impacts of the Aboriginal population, with Wellington Council stating that its “LGA was the seventh most disadvantaged in NSW with a very high aboriginal population and dispersed rural community”.

The Report noted that some submissions raised concerns a perceived lack of aboriginal community consultation during the merger examination process, and that the recommended NSW standards for Aboriginal consultation had not been followed. These submissions argued that there were significant differences between the Wiradjuri people of the two areas, with each having different customs and practices.

The Delegate concluded that:

“The communities in each existing LGA could be effectively represented and provided adequate services and facilities in a merged council. Development and implementation of sound community engagement activities, with a particular focus on Aboriginal communities, given their substantial resident populations in each LGA, would be an important component to successful representation of those communities.”

The Commission’s view is that the Delegate did not adequately consider the issues under this factor.

5.2.11 Other issues

Section 263(3)(f) of the Act requires the Delegate to have regard to:

“such other factors as it considers relevant to the provision of efficient and effective local government in the existing and proposed new areas”.

The Report focused discussed a number of boundary adjustments suggested in submissions. The Delegate considered one suggested adjustment to be reasonable and stated that:

“A number of submissions sought a boundary adjustment between the merged council and Cabonne Council to transfer the villages of Stuart Town and Euchareena to Cabonne Council, Given that residents in those localities obtain services from Orange in preference to Dubbo due to their much

closer proximity to Orange City. Should this merger proposal proceed, there would be merit, in the future, of this boundary adjustment being considered.”

The Commission’s view is that the Delegate adequately considered the issues under this factor.

The Commission notes that the recommended boundary adjustment is a matter for the Minister.

ATTACHMENT C: INSTRUMENT OF DELEGATION

INSTRUMENT OF DELEGATION

Pursuant to s. 745(1) of the *Local Government Act 1993* (the "LG Act"), I, Tim Hurst, Acting Chief Executive, Office of Local Government, delegate to the persons listed in Part A in respect of the proposals listed opposite in Part B the following functions conferred on me by the LG Act:

1. Examination of and report on one or more proposals referred by the Minister under s. 218F of the *LG Act*; and
2. Any function that is incidental to the function of examining of and reporting on proposals under s. 218F of the *LG Act*.

Signed:  Date: 6/1/16

A/Chief Executive
Office of Local Government

Part A	Part B
Greg Wright	Armidale Dumaresq and Guyra Shire
Cheryl Thomas	Ashfield, Leichhardt Municipal and Marrickville
Michael Bullen	Auburn City, Holroyd City and Parramatta City (part)
John Roseth	Bankstown City and Canterbury City
Renata Brooks	Bathurst Regional and Oberon
Tim Stubbs	Berrigan Shire and Jerilderie Shire (part)
Richard Pearson	Blayney Shire, Cabonne and Orange City
Renata Brooks	Bombala, Cooma-Monaro Shire and Snowy River Shire
Amanda Chadwick	Boorowa, Harden Shire and Young Shire
Rod Nockles	City of Botany Bay and Rockdale City
Richard Colley	Burwood, City of Canada Bay and Strathfield Municipal
Mike Eden	Conargo Shire and Deniliquin
John Turner	Cootamundra Shire and Gundagai Shire
Mike Eden	Corowa Shire, Lockhart Shire and Urana Shire
Ian Tiley	Dubbo City and Wellington
Ian Tiley	Dungog Shire and Gloucester Shire
John Rayner	Gosford City and Wyong Shire
John Rayner	Goulburn Mulwaree and Palerang (part)
Garry West	Hawkesbury City and The Hills Shire (part)
Garry West	Hornsby Shire (part) and Ku-ring-gai
Rob Lang	Hunter's Hill, Lane Cove and City of Ryde

Part A	Part B
Mike Allen	Hurstville City and Kogarah City
Greg Wright	Kiama Municipal and Shoalhaven City
Michael Bullen	Manly, Mosman Municipal and Warringah (part)
Cheryl Thomas	Murray Shire and Wakool Shire
Tim Stubbs	Jerilderie Shire (part) and Murrumbidgee Shire
Ian Reynolds	Newcastle City and Port Stephens
Ian Reynolds	North Sydney and Willoughby City
Richard Colley	Parramatta City (part), Auburn City (part), The Hills Shire (part) and Hornsby Shire (part)
Richard Pearson	Pittwater and Warringah (part)
John Turner	Palerang (part) and Queanbeyan City
Rob Lang	Randwick City, Waverly and Woollahra Municipal
Mike Allen	Shellharbour City and Wollongong City
Amanda Chadwick	Tamworth Regional and Walcha
Rod Nockles	Tumbarumba Shire and Tumut Shire

M 6/1/18

ATTACHMENT D: LEGAL ADVICE ON EMPLOYMENT PROTECTIONS

OPINION

IN THE MATTER OF THE LOCAL GOVERNMENT ACT 1993, EMPLOYMENT PROTECTION AND LGNSW

1. I have been asked by the Local Government and Shires Association of New South Wales (“LGNSW”) the following question in the context of amalgamations of Councils and Chapter 11 Part 6 of the *Local Government Act 1993* (the “Act”):
 - (a) What is encompassed in the expression “*same terms and conditions that applied to the staff member immediately before the transfer day*” in s354D of the Act;
 - (b) Does the protection in s354F of “*no forced termination of employment of non-senior staff on the ground of redundancy for 3 years after transfer*” apply to all possible redundancies;
 - (c) Does the protection in s354F of “*no forced termination of employment of non-senior staff on the ground of redundancy for 3 years after transfer*” apply to the position or the person;
 - (d) What is the definition of a “lateral transfer” for the purposes of s354G of the Act;
 - (e) If a lateral transfer into a role “performing substantially the same duties” occurs where s354G of the Act has been applied, does the employee retain entitlements afforded by s354D of the Act; and
 - (f) If an appointment into a role occurs where s354H of the Act has been applied, does the employee retain the preservation of entitlements afforded by s354D of the Act?
2. I have been instructed that, on 12 May 2016, 19 new councils were formed as a result of the amalgamation of 42 former councils under the *Local Government (Council Amalgamations) Proclamation 2016* and the *Local Government (City of Parramatta and Cumberland) Proclamation 2016*.
3. Arising from the amalgamations, LGNSW has been receiving numerous inquiries from councils in relation to the employment protections at sections 354D, 354F, 354G and 354H of the Act. Part of the difficulty for LGNSW in providing advice on these sections is that they at times use inconsistent terminology. Additionally, stakeholders (including the NSW State Government, local government unions and LGNSW) have adopted interpretations which appear to be influenced by their understanding of the intention of the sections and/or which are based on their industrial experience/expectations on how the sections would be viewed in the context of industrial dispute proceedings before the Industrial Relations Commission of New South Wales where possibly the strict letter of the law does not necessarily reflect how the law would be applied.
4. I have been provided with the following documents:
 - (a) USU email 2 June 2016; and
 - (b) Premier and Cabinet “Managing Change: Guidance for Key Staff” booklet.

Principles of Statutory Construction

5. The principles of statutory construction were applicable to the construction of legislation and delegated legislation such as Chapter 11 Part 6 of the Act. These principles were considered by the

New South Wales Court of Appeal in *Public Service Association and Professional Officers' Associated Amalgamated Union of New South Wales* [2014] NSWCA 116 at [44] to [48] and can be summarised as follows:

- (a) The principles governing the construction of delegated legislation are those applicable to Acts of Parliament generally;
 - (b) Construction must begin with a consideration of the text itself and while the language employed is the surest guide to legislative intention, the meaning of the text may require consideration of the context which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy;
 - (c) Determination of the purpose of a particular provision may be based not only on an express statement of purpose in the statute itself but also by inference from its text and structure and where appropriate by reference to extrinsic material but such process does not involve a search for what those who presented and passed the legislation had in mind;
 - (d) Extrinsic material cannot be used to construe a legislative provision unless a construction of the provision suggested by the material is reasonably open;
 - (e) A court is not to construct its own idea of a desirable policy, impute it to the legislature and then characterise it as a statutory purpose; and
 - (f) Where a regulation is open to two constructions, one within the power conferred by the enabling Act and the other outside of such power, the former construction should be adopted.
6. In addition, the provisions Chapter 11 Part 6 of the Act are clearly beneficial provisions. The rules governing the construction of the beneficial legislation are more liberal than the traditional canons of construction at common law (see *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 & 335; *Walker v Wilson* (1991) 172 CLR 195 at 199 and 204 and *Grant v Gunnedah Shire Council* (1996) 57 IR 243 at 259). The true meaning of a term should not be strained or exceeded, but it should be construed so as to give the fullest relief which the fair reasoning of the language will allow: (see *Bull v Attorney-General (NSW)*(1913) 17 CLR 370 at 384 per Isaacs J). The approach to the interpretation of remedial or beneficial legislation should be "restrained within the confines of the actual language employed and what is fairly open on the words used: (see *Khoury (Mes) v GIO of NSW* (1984) 58 ALJR 5092 at 508). Such provisions should be construed by the Court beneficially and in light of the purpose of these parts of the Act (see *State Rail Authority Firefighters Award 2001, Re* [2002] NSWIRComm 159 at [20] and [28]).
7. In answering the questions below I have assumed that the relevant employees are not senior employees and that the relevant employees are "transferred staff members" as defined in s354B of the Act or "remaining staff member" or "existing staff member" as defined in s354B of the Act.

Statutory Provisions

8. The relevant provisions with my highlight are 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 staff member, continues on the same terms and conditions that applied to the staff member immediately before the transfer day, subject to section 354E.

(2) *Subsection (1) applies until other provision is duly made under any Act or law.*

(3) *Neither the contract of employment nor the period of employment of a transferred staff member is taken to have been broken by the transfer for the purposes of any law, award or agreement relating to the employment of that staff member.*

(4) *A transferred staff member is not entitled to receive any payment or other benefit merely because the staff member ceases to be a staff member of the former council.*

(5) *The transfer of a transferred staff member does not affect any accrued rights the staff member had immediately before the transfer, including in relation to recreation leave, sick leave, long service leave and superannuation, but does not entitle the staff member to claim dual benefits of the same kind for the same period of service.*

1. 354F No forced redundancy of non-senior staff members for 3 years after transfer

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 staff member, must not be terminated, without the staff member's agreement, within 3 years after the transfer day on the ground of redundancy arising from the staff transfer.

2. 354G Lateral transfer of non-senior staff members

(1) *This section applies if either:*

(a) *the following subparagraphs apply:*

(i) *a staff transfer occurs in connection with the constitution of a new area, whether as a result of the amalgamation of two or more areas or otherwise, and*

(ii) *within 3 years after the transfer day, the general manager proposes to make an appointment to a position within the organisational structure of the council ("the council"), other than a senior staff position, and*

(iii) *a transferred staff member (other than a senior staff member) was, immediately before the transfer day, performing substantially the same duties for the staff member's former council as are required to be performed in the position to be filled, or*

(b) *the following subparagraphs apply:*

(i) *a staff transfer occurs in connection with a boundary alteration, and*

(ii) *within 3 years after the transfer day, the general manager of a council ("the council") affected by the boundary alteration proposes to make an appointment to a position within the organisational structure of the council, other than a senior staff position, and*

(iii) a staff member (other than a senior staff member) of the council was, immediately before the transfer day, performing substantially the same duties for either or any of the affected councils as are required to be performed in the position to be filled.

(2) The council:

- (a) must notify its staff members of the position and give its staff members a reasonable opportunity to apply for the position, and
- (b) must not externally advertise the position.

(3) A person who:

- (a) applies for appointment to a position referred to in this section, and
- (b) is employed by the council at the time of making the application, and
- (c) is a person referred to in subsection (1) (a) (iii) or (b) (iii), as the case requires, must be considered for appointment to the position in preference to any other applicant for the position who is not such a person.

(4) If there is more than one person referred to in subsection (3) who is eligible for appointment to a position, the applicant who has the greatest merit, determined in accordance with section 349 (2) and (3), is to be selected.

(5) Subject to subsection (4), sections 348 and 349 do not apply to an appointment to a position referred to in this section and the Council may not decide, under section 350 (b), that those sections apply to the appointment.

3. 354H External advertising not required in certain circumstances

(1) This section applies if either:

(a) the following subparagraphs apply:

- (i) a staff transfer occurs in connection with the constitution of a new area, whether as a result of the amalgamation of two or more areas or otherwise, and
- (ii) within 3 years after the transfer day, the general manager proposes to make an appointment to a position within the organisational structure of the council ("the council"), other than a senior staff position, and
- (iii) the general manager is satisfied that one or more of the transferred staff members (other than a senior staff member) are suitably qualified for the position, and
- (iv) section 354G does not apply with respect to the position, or

(b) the following subparagraphs apply:

- (i) a staff transfer occurs in connection with a boundary alteration, and
- (ii) within 3 years after the transfer day, the general manager of a council ("the council") affected by the boundary alteration proposes to make an appointment to a position within the organisational structure of the council, other than a senior staff position, and
- (iii) the general manager is satisfied that one or more of the staff members (other than a senior staff member) of the council who were, immediately before the transfer day, members of the staff of either or any of the affected councils are suitably qualified for the position, and

(iv) *section 354G does not apply with respect to the position.*

(2) *The council:*

(a) *must notify its staff members of the position and give its staff members a reasonable opportunity to apply for the position, and*

(b) *must not externally advertise the position.*

(3) *Section 348 does not apply to an appointment to a position referred to in this section.*

General Comments

9. As far as I can ascertain based upon electronic searches a Court or Commission has never been called upon to consider the meaning of the provisions in Chapter 11 Part 6 of the Act. This by itself renders my answers to the above questions less certain than may otherwise be the case.
10. The provisions found in Chapter 11 Part 6 of the Act are not the first time provisions concerning employment protections on amalgamation have existed in respect to council employees. However, the earlier provisions in Chapter 11 Part 6 of the Act differ in significant respects from the earlier provisions and a consideration of such provisions will be of little assistance.
11. There is an assumption in my instructions at [3] (above), that any testing of these provisions will occur in the context of an industrial dispute. Whilst I consider this is likely to be the case, there is also some risk that the provisions may also be tested in an application seeking declarations, orders and injunctions against a Council alleging a breach of the provisions in Chapter 11 Part 6 of the Act in the Supreme Court to restrain such conduct; and/or an application under s674 of the Act in the Land and Environment Court.

Question (a)

12. The effect of s354D is that the employment of a relevant person continues on the same terms and conditions that applied to the staff member immediately before the transfer day, subject to s354D(2) or s354E.
13. The first observation concerning s354D is, that unlike some of the other “protections” in Chapter 11 Part 6 of the Act, it is not time limited and, subject to the exceptions in s354D(2), freezes terms and conditions that applied to the staff member immediately before the transfer day forever (including whether such changes are beneficial to the employee). Secondly, unlike some of the “protections” in Chapter 11 Part 6 of the Act, the “protection” applies generally and not just to changes to “terms and conditions” arising from the staff transfer.
14. These observations, in my opinion, lend support for a broader interpretation of the exclusion in s354D.
15. In my opinion, the expression “terms and conditions” that applied to the staff member immediately before the transfer day is also a very broad expression. The expression may convey different meanings depending upon the context in which it is used. This is illustrated by the various approaches discussed below.
16. There appears to be a general judicial acceptance that the expression “terms and conditions” is wide enough to encompass all statutory¹ and contractual terms of appointments or obligations of a

¹ Such statutory matters would include the Local Government (State) Award. However the Award would continue to apply given it would be binding on any new Council or continue to apply to a Council whose boundaries have altered even if s354D did not exist.

Council towards the employee in the employment or an entitlement of the employee in the employment with the Council. It will also arise where the obligation is derived from the terms of the contract, whether such terms are express or implied, by law or fact or custom and usage, or imported into the contract by force of some other document independent of the intention of the parties (see *Public Service Association of South Australia v State of South Australia & Ors* [2012] SASCFC 66 at [58]-[60]; *T C Whittle Pty Ltd v T & G Mutual Life Society Ltd* (1978) 52 ALJR 173 at 177 and *Re Corrections Health Service Nurses (State) Award* (1999) 90 IR 235 at 244).

17. The issue is whether the expression “terms and conditions” also has a broader meaning than strict statutory and contractual terms. The cases cited above were considering expressions such as “conditions of service” or “conditions of employment”. The expression “terms and conditions” in s354D is not so limited but applies to “terms and conditions that applied to the staff member”.
18. In *Australian Tramway Employees Association v Prahran and Malvern Tramway Trust* (1913) 17 CLR 680, at p 693, in a passage cited by Dixon CJ in *R v Findlay; Ex parte Commonwealth Steamship Owners' Association* (1953) 90 CLR 621, at p 630, Isaacs and Rich JJ. said:

"The 'terms' of employment are the stipulations agreed to or otherwise existing on both sides upon which the service is performed. The 'conditions' of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment." (my emphasis)
19. In *R v Booth; ex parte Administrative and Clerical Officers' Association* (1978) 141 CLR 257 the High Court approved the above passage from the judgment of Isaacs and Rich JJ which had been adopted earlier by Dixon CJ in *R v Findlay; ex parte Commonwealth Steam Ship Owners' Association*. In *Booth* the High Court said of the dictum above at 263:

No doubt this extensive meaning should be attributed to the word “conditions” in the definition. The “other terms or conditions of service or employment” cannot be limited to those which are ejusdem generis with salaries, wages and rates of pay. A condition relating to seniority would come within the definition. The fact that an employee has, or has not, a right of appeal against the appointment of an outsider to a position the filling of which would affect his seniority is a circumstance affecting his employment. (my emphasis)
20. Of course, it is necessary to bear in mind that the High Court in the above cases was concerned with the meaning of that expression as found in the *Conciliation and Arbitration Act*. Further, a number of more recent decisions have been unwilling to give such a broad meaning to “conditions of employment” based upon what the High Court was actually considering in the above cases (see *Public Service Association of South Australia v State of South Australia & Ors* [2012] SASCFC 66 at [57] where the term did not extend to working conditions or privileges).
21. It is clear from the above authorities that the expression "conditions of employment" is not an expression with a single fixed meaning. It is an ambiguous expression and is capable of more than one meaning. In many circumstances, the expression "conditions of employment" is used with a narrow meaning and refers to the benefits and entitlements affirmatively conferred on employees by their contract of employment or any applicable award or collective agreement. The expression “*same terms and conditions that applied to the staff member*” is even more ambiguous.
22. In my opinion, given the beneficial nature of Chapter 11 Part 6 of the Act, the discussion of the above authorities above and the phrasing of s354D *terms and conditions that applied to the staff member* rather than “terms and conditions” of employment or service or some similar provision, a Court or Commission would favour a broader rather than narrow expression of the phrase.

23. In my opinion a term or condition may apply to a person without it being a purely statutory or contractual obligation.
24. In the local government sector I believe it would encompass terms and conditions found in existing enterprise agreements made pursuant to Part 2 of the *Industrial Relations Act 1996*, salary systems made pursuant to the *Local Government (State) Award*, Council Agreements made pursuant to the *Local Government (State) Award* and other local policies and agreements.
25. However, even without considering the exclusions in s354D(2) where a Council had the right to change a term or condition that applied to a transferred staff member either pursuant to the Award or contract or one of the matters identified in [24] (above), that right for a council remains because it is part of the “*terms and conditions that applied to the staff member*”.²
26. As set out above given the potential effect of s354D, I believe the exclusion in s354D(2) would be given a broad interpretation. It clearly encompasses changes arising as a result of a change in the *Local Government Award 2014*³ or pursuant to a clause in the *Local Government Award 2014*⁴. It would also apply to any changes in terms and conditions that applied to a transferred staff member arising as a result of transfers pursuant to s354G and s354H. Such a transfer being duly made under the Act. All such changes would, for the purpose of s354D(2), be provisions duly made under any Act.
27. The exclusion, in addition to excluding changes to terms and conditions duly made under any Act, also applies to changes in provisions “duly made under law”.
28. There is some authority, in other legal contexts, for the view that the term ‘law’ includes the common law. In *Oates v Williams* (1998) 84 FCR 348, at 353, the Full Federal Court held that the phrase ‘despite anything in any other law’ in a statute under consideration was ‘a reference to any law, whether common law or statute’. This statement was later adopted by the High Court in *Attorney-General of the Commonwealth v Oates* (1999) 198 CLR 162 at 169⁵.
29. In my opinion, the expression in s354D(2) “duly made under law” would include changes in terms and conditions which are duly made at common law. This would include agreed variations to contracts of employment that impact on terms and conditions or an employee agreeing to a new contract of employment with Council⁶. In short, the agreed variation to an existing contract or the acceptance of a new contract by an employee which contains different terms and condition is another provision duly made under law, i.e. common law.
30. A contrary interpretation to “duly made under law” would amount to the absurd result that an employee could not be promoted or afforded better terms and conditions where such matters are agreed.

² Obviously if relevant change required some procedural steps to be undertaken prior to such a change occurring those steps would need to be undertaken prior to any change.

³ Such change would be duly made under any Act

⁴ This would also apply to changes in salary systems and Council Agreements to the extent they are allowed under the Award or enterprise agreements to the extent they are allowed under the *Industrial Relations Act 1996* (NSW).

⁵ See also *Re L'Annee Kane International Pty Ltd & Australian Trade Commission* (1998) 50 ALD 279 at 288 and *Director General, Department of Education and Training v MT* (GD) [2005] NSWADTAP 77

⁶ This view would appear to be consistent with the USU’s view as set out in its email of 2 June 2016 in respect at least to accepting a new position with Council.

31. I have not addressed the provisions found in s354E which could impact on the “protection” in very particular circumstances.
32. I would also note that *Local Government (Council Amalgamations) Proclamation 2016* has not impacted upon s354D.

Question (b)

33. In my opinion the answer to this question is no.
34. There would be a very limited number of potential redundancies that could still occur despite s354F. They are redundancies that do not arise due to the staff transfer. They would include redundancies that would have arisen irrespective of the amalgamation or boundary alteration. Examples include the forced closure of a pool for safety reasons, the closure of an airport due to it being unsuitable or decisions made by airlines to no longer utilise its services⁷.
35. I understand there is a view that the effect of s354F is that there can be no redundancies where Councils have been amalgamated or boundaries altered for a period of three years where such redundancies arise for any reason.
36. In my opinion, this view ignores the terms of s354F and in particular the qualifying expression “*arising from the staff transfer*”. If the legislature had intended there to be no redundancies in an impacted Council for a period of 3 years there would have been no need to include these words and the clause would have read “*must not be terminated, without the staff member’s agreement, within 3 years after the transfer day on the ground of redundancy*”.
37. It seems clear, prima facie the expression *arising from the staff transfer* must have some work to do. If it was the intention of the legislature that there is a general protection preventing redundancy within 3 years for any reason there would be no need to include this phrase.
38. The purpose of legislation or a legislative provision can be gleaned (but not necessarily determined) by considering a range of extrinsic material including the Explanatory Memorandum and Second Reading Speech⁸.
39. A restriction of the provision to only operate to termination of employment on the grounds of redundancy arising from the staff transfer is consistent with the Explanatory Memorandum to *Local Government Amendment (Employment Protection) Act 2003* and the second reading speech to the *Local Government Amendment (Employment Protection) Act 2003* although less so in the second reading speech to the *Local Government Amendment (Council and Employee Security) Act 2004*.
40. The Explanatory Memorandum to the *Local Government Amendment (Employment Protection) Bill 2003* provided in part:

Proposed section 354F provides that there can be no forced redundancies of non-senior transferred staff members (arising from the constitution, amalgamation or alteration of council areas) within 3 years after the transfer of those staff members to the new council. Proposed section 354C makes similar provision for affected council employees during the period that the proposal to constitute, amalgamate or alter council areas is being considered.

⁷ Each of these types of redundancies would turn on their own facts and circumstances. Where such redundancies are contemplated it would be best for a Council to obtain specific advice

⁸ See s34 (2) of the *Interpretation Act 1987*

41. The Minister's Second Reading Speech to the *Local Government Amendment (Employment Protection) Bill 2003* stated in part:

This bill amends the Local Government Act 1993 in relation to the transfer of staff from one council to another where local councils are constituted or amalgamated, or where local council boundaries are altered...

Under the old Local Government Act 1919 provision was made for the transfer of employees where a new local council area was constituted or the boundaries of a local council area were altered. The old Act provided that council staff were to be transferred from the old council to the new, and that their terms of employment were to be maintained. Further, such employees were not to have their services terminated within three years of such a transfer, on the ground of redundancy arising from such a constitution or boundary alteration... This bill reintroduces some of those provisions into the Local Government Act 1993. Rather than the Minister for Local Government directing the allocation of resources, including employees, following a boundary alteration, amalgamation or constitution of local government areas, the Local Government Act will ensure this is done as a matter of course...

This Bill also prohibits forced redundancies within 3 years of the proclamation of a council restructure due to amalgamation, boundary alteration or constitution of a council.

42. The Minister's Second Reading speech to the *Local Government Amendment (Council and Employee Security) Bill 2004* stated in part:

As I stated earlier, the bill extends employment protection provisions to all non-senior staff at councils affected by structural reform by way of amalgamation, boundary alteration or constitution of new area... In addition, there will be no forced redundancy of any affected non-senior staff member for three years after transfer.⁹

43. In my opinion based upon the text of s354F, its purpose and the relevant extrinsic purpose it does not prevent all redundancies. But given the breadth of the expression "arising from" it would prevent an employee from being made redundant where the staff transfer was a significant reason for the redundancy.

Question (c)

44. In light of my response to question (b) this issue may be irrelevant.
45. However, the effect of s354F applies to the person. It prevents the person being terminated by reason of redundancy. It is the position which becomes redundant. The section does not prevent positions from being redundant but the termination of employees for that reason.

Question (d)

46. Section 354G strictly speaking does not define a "lateral transfer". The section applies to transfers that satisfy s354G(1)(a) or (b).
47. To be caught by s354G(1)(a) the following need to be satisfied:

- (i) a staff transfer in connection with the constitution of a new area, whether as a result of the amalgamation (easy to satisfy or show);

⁹ It is of course possible to read this aspect of the Minister's speech two ways either as a general prohibition of redundancies for 3 years or whether the use of the word "affected" restricted the prohibition to persons who are made redundant as a result of the amalgamation, boundary alteration or constitution of new area

- (ii) within 3 years after the transfer day, the general manager proposes to make an appointment to a position within the organisational structure of the council other than a senior staff position (easy to satisfy or show) (the position needs to be in the organisation structure and the proposal is to fill the position i.e. not an incumbent in that position);
- (iii) a staff member (other than a senior staff member) was, immediately before the transfer day, performing substantially the same duties for either or any of the affected councils as are required to be performed in the position to be filled.
48. To be caught by s354G(1)(b) the conditions are the same as above but the reason is a boundary alteration rather than an amalgamation.
49. Whether the staff member was, immediately before the transfer day, performing substantially the same duties will be a question of fact. In order to ascertain whether a person is performing substantially the same duties requires a comparison of the duties in the old and new position. Such duties do not need to be exactly same but they must be “to great or significant extent” the same or the main or greater part the same (see *Secretary, DSS v Wetter* (1993) 112 ALR 151 at [159] and *Re Commissioner of Superannuation v Scott* [1987] FCA 79).
50. In assessing the comparison of duties consistent criteria should be applied to the different positions e.g. precisely what duties (and hence knowledge, skills, competencies etc.) are involved in the previous and new positions; what proportion of the duties of the new position are the same as or different from the previous position held by the transferred employee; what difference is there between the salary grades of the two positions and the importance of the duties to each position.
51. In my opinion a lateral transfer is a transfer that satisfies the conditions in s354G(1)(a) or (b).

Question (e)

52. In my opinion the answer to this question is no to the extent that the employer has offered and the employee has accepted different conditions of employment on such a transfer pursuant to s354G(1)(a) or (b). As such an employee does not necessarily retain the preservation of entitlements afforded by s354D of the Act because of the exception in s354D(2).
53. When the employee accepts the transfer to the new position they are agreeing to a variation of his/her contract of employment or the creation of a new employment contract. Depending upon the specific terms of the variation or new contract, the terms that were “protected” by s345D(1) may be duly varied at common law on the agreement of the employee. This falls within the exclusion “other provision duly made by law” in s354D(2) for the reasons given above at [26]-[30](above).
54. In addition, the acceptance of new position with a new contract of employment or a varied contract of employment with different terms and conditions is also caught by “other provision duly made under Act” in s354D(2). The appointment is duly made under s354G of the Act.
55. Additionally, I would observe that an appointment under s354G cannot be made unless the employee satisfies s354G(3)(a) which requires the employee to take the step of applying for the position on the terms and conditions offered by the council. If the employee does not apply for appointment then an appointment under s354G cannot be made and the protections of s354D remain.
56. However, if there is merely a change of duties and the parties have not sought to vary any other terms or conditions then the other terms and conditions (all but duties) will continue to be protected by s354D(1).

Question (f)

57. For the reasons given in response to question (e) (above), the answer to this question is no to the extent that the employer has offered and the employee has accepted different conditions of employment on such appointment pursuant to s354H(1)(a) or (b). An employee does not necessarily retain the preservation of entitlements afforded by s354D of the Act because of the exception in s354D(2).
58. However, if the parties do not agree to changes in terms and conditions on appointment to the new position, then the existing terms and conditions continue to be preserved by s354D(1) because there has been no provision for other terms and conditions duly made under any Act or law.

Anthony Britt

Sir Owen Dixon Chambers

Sydney

14 June 2016

ATTACHMENT E: LOCAL GOVERNMENT (GENERAL) AMENDMENT (STAFF) REGULATION 2016



New South Wales

Local Government (General) Amendment (Staff) Regulation 2016

under the

Local Government Act 1993

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Local Government Act 1993*.

PAUL TOOLE, MP
Minister for Local Government

Explanatory note

The object of this Regulation is to amend the *Local Government (General) Regulation 2005* as follows:

- (a) to preserve the leave and other entitlements of a senior staff member of a council affected by an amalgamation or a council boundary alteration,
- (b) to provide that a termination of employment of senior staff members of a council affected by an amalgamation or boundary alteration is, in specified circumstances, taken to be a redundancy.

This Regulation is made under the *Local Government Act 1993*, including section 748 (the general regulation-making power) and item 15 of Schedule 6.

Local Government (General) Amendment (Staff) Regulation 2016

under the

Local Government Act 1993

1 Name of Regulation

This Regulation is the *Local Government (General) Amendment (Staff) Regulation 2016*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

**Schedule 1 Amendment of Local Government (General)
Regulation 2005****Clauses 406C and 406D**

Insert after clause 406B:

- 406C Entitlements of senior staff on transfer following amalgamation or boundary alteration**
- (1) This clause applies to senior staff members of a council.
 - (2) If a staff transfer occurs, the employment of a transferred staff member continues on the same terms and conditions that applied to the staff member immediately before the transfer day.
 - (3) Subclause (2) applies until other provision is duly made under any Act or law.
 - (4) Neither the contract of employment nor the period of employment of a transferred staff member is taken to have been broken by the transfer for the purposes of any law or contract relating to the employment of the staff member.
 - (5) A transferred staff member is not entitled to receive any payment or other benefit merely because the staff member ceases to be a staff member of the former council.
 - (6) The transfer of a transferred staff member does not affect any accrued rights the staff member had immediately before the transfer, including in relation to recreation leave, sick leave, long service leave and superannuation, but does not entitle the staff member to claim dual benefits of the same kind for the same period of service.
 - (7) If a staff member of a former council who was a staff member of that council immediately before the former council ceases to exist:
 - (a) is not transferred to any other council by or under the operation of a proclamation under Chapter 9 of the Act, or
 - (b) is transferred, but ceases to be a staff member of the new council as a consequence of the amalgamation before the first election for the new council,the termination of the staff member's employment with the former council or the new council is taken to be a redundancy.
 - (8) A contract of employment of a staff member has no effect to the extent to which it is inconsistent with this clause.
 - (9) This clause is subject to the provisions of any applicable proclamation under Chapter 9 of the Act.
 - (10) Words and expressions used in this clause have the same meaning as in Part 6 of Chapter 11 of the Act.
- 406D Entitlements of senior staff not transferred on boundary alterations**
- (1) This clause applies to senior staff members of a council.
 - (2) If a staff transfer occurs as a consequence of a boundary alteration, the employment of a remaining staff member of the transferor council and an existing staff member of the transferee council continues on the same terms and conditions that applied to the staff member immediately before the transfer day.

- (3) Subclause (2) applies until other provision is duly made under any Act or law.
- (4) A contract of employment of a staff member has no effect to the extent to which it is inconsistent with this clause.
- (5) This clause is subject to the provisions of any applicable proclamation under Chapter 9 of the Act.
- (6) Words and expressions used in this clause have the same meaning as in Part 6 of Chapter 11 of the Act.

ATTACHMENT F: CLARENCE VALLEY COUNCIL LATERAL TRANSFER PROTOCOL

1. Purpose

This Protocol sets out the process for the lateral transfer of employees within Council as a result of the creation of Clarence Valley Council on 25 February 2004.

Its purpose is to provide a lateral transfer process that is fair and equitable, and facilitates movement of staff to the new organisation structure with minimal disruption.

2. Background/Legislative Requirements

In particular the following legislation is relevant to this process as a result of amalgamation:

- The Local Government Amendment (Council and Employee Security) Bill 2004
- The Local Government (General) Amendment (Employee Protection) Regulation 2004
- The Local Government Amendment (Employee Protection) Act 2003
- The NSW Local Government Act 1993
- The NSW Local Government (State) Award 2001
- Proclamation of Councils - Gazettal Number 46.

The Employees Lateral Transfer (Amalgamation) Protocol is to be carried out with reference to the following Protocols and Guidelines:

- Recruitment and Selection
- Equal Employment Opportunity
- Lateral Transfer Guidelines.

3. Protocol Statement

Clarence Valley Council is committed to providing the simplest, least stressful processes in transferring its employees into the new structure. To achieve this Council will develop guidelines to ensure the equitable and consistent process for determining eligibility for lateral transfer in accordance with the requirements set out below.

4. Procedures

4.1. Notice of vacancy

- All employees will be notified of positions that have been identified for lateral transfer.
- Specific employees identified as eligible for lateral transfer to an identified position will be notified by letter (refer to 5. Identified lateral transfers).
- Any employee who feels they should also be considered for lateral transfer to an identified position will be given reasonable opportunity to request consideration for lateral transfer.

- Any positions identified for lateral transfer will be initially notified via staff notice boards, intranet and newsletters.

4.2. Eligibility for Lateral Transfer under Section 354(G)

Employees must satisfy all the eligibility criteria in order to gain preferential status and be eligible for lateral transfer to positions under the provisions of Sec 354(G) of the Local Government Act.

4.2.1. Eligibility criteria

- a. On 24 February 2004 the employee must have been employed by either Clarence River County Council, Copmanhurst Shire Council, Grafton City Council, Maclean Shire Council, North Coast Water, or Pristine Waters Council; and
- b. Immediately prior to the amalgamation the employee must have been performing substantially the same duties as the available position; and
- c. The employee must be a current employee of Clarence Valley Council.

4.3. Lateral Transfers under Section 350 of the Local Government Act

Any employee who has taken up a permanent position with Council after the amalgamation date shall be considered for lateral transfer to a position which requires the performance of substantially the same duties as those of the position the employee currently holds. Such consideration shall be given at the time the new position is to be filled.

4.4. General

- a. Positions for which Council is unable to clearly identify an eligible employee or group of employees for lateral transfer shall be, in the first instance, open to application for lateral transfer by employees who consider themselves eligible and who submit a form in accordance with clause 4.5.
- b. Employees wishing to submit an application for consideration for lateral transfer should also concurrently submit their application for internal recruitment, if they wish to be considered for the position should their lateral transfer application be deemed ineligible.
- c. Employees on temporary leave, e.g. maternity leave, who meet the eligibility criteria as described above, will be eligible for lateral transfer during their period of leave.
- d. An employee filling a position on a temporary or casual basis in the absence of an incumbent who holds a right of return to the position with Council, e.g. in the case of maternity leave, will not be eligible to apply for lateral transfer.

4.5. Applications for lateral transfer

An employee, who believes that they are eligible to, and wishes to, apply for a lateral transfer must complete an 'Application for consideration for lateral transfer' form, and if required supply a copy of their position description.

4.6. Selection processes and decision points

- An employee's claim to eligibility for lateral transfer will be determined on the basis of agreed guidelines (see attached flow chart).

- If there are more eligible applicants than there are positions to be filled, then the applicant(s) who has the greatest merit will be selected through a competitive process in accordance with Council's Recruitment and Selection Protocol. Additional information may be called for in these instances.
- If a position remains unfilled then Council's Recruitment and Selection Protocol will apply and internal applicants will be considered.
- Should there be no suitable internal applicants the position will be reviewed prior to advertising externally to the organisation.
- Where a decision is made to implement a competitive process, the selection panel will be as outlined in Council's Recruitment and Selection Protocol with the additional requirement that the members of the panel are to be drawn from separate work locations.

5. Identified lateral transfers

Where possible, Council will identify positions and appropriate employees or groups of employees that will be eligible for lateral transfer. In these instances employees will receive a letter from Council advising that they have been identified for lateral transfer and the position and the location to which the lateral transfer applies.

These employees will receive a "Confirmation of interest for involvement in the lateral transfer process" form through which they must indicate their interest as to whether they wish to continue with the lateral transfer process.

All employees will be advised of the vacancy as described in 4.1 of this Protocol, and any staff member not targeted may claim their eligibility for consideration through the lodgement of an "Application for Lateral Transfer" form.

6. Terms and conditions

When an employee accepts lateral transfer, their existing salary, terms and conditions will initially be maintained, until a new agreement is established.

The full wording of the Clause 354D of the Local Government Act, Part 6 Arrangements for Council Staff Affected by the Constitution Amalgamation or Alteration of Council Areas reads as follows:

354D Preservation of entitlements of transferred 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 – a remaining staff member of the transferor council and an existing staff member of the transferee council,
 - c. other than a senior staff member, continues on the same terms and conditions that applied to the staff member immediately before the transfer day, subject to section 354E (Certain increases or decreases in staff entitlements during Proposal Period not binding on new council without approval).
2. Subsection (1) applies until other provision is duly made under any Act or law.
3. Neither the contract of employment nor the period of employment of a transferred staff member is taken to have been broken by the transfer for the purposes of any law, award or agreement relating to the employment of that staff member.
4. A transferred staff member is not entitled to receive any payment or other benefit merely because the staff member ceases to be a staff member of the former council.
5. The transfer of a transferred staff member does not affect any accrued rights the staff had immediately before the transfer, including in relation to recreation leave, sick leave, long service leave and superannuation, but does not entitle the staff member to claim dual benefits of the same kind for the same period of service.”

7. Appeals

Disputes or grievances over determinations made in accordance with this Protocol will be handled by the Lateral Transfer Panel in the first instance.

The Lateral Transfer Panel will consist of the following members and must have representation from both genders:

- Manager Human Resources and / or their delegate
- Director of the Department and / or their delegate
- Supervisor of the position under discussion, and
- An independent representative from the Human Resource Department.

The Lateral Transfer Appeals Panel will consist of:

- At least one member of the original Panel, plus
- Manager Human Resources
- An independent representative from the Human Resource Department; and
- The Director of the Department.

Employees wishing to appeal a lateral transfer determination should submit their appeal in writing within five working days of the date of notification of the determination.

Council will apply its best endeavours to resolve lodged appeals within 10 working days.
Further appeals will be handled in accordance with the Grievance Protocol.

8. Termination of Protocol

This Protocol will terminate 24 February 2007.

Lateral Transfer Checklist		
Action	Responsible officer	Date
Final position description	HR Coord (P & C)	
Position number allocated (lateral transfer database updated)	Admin	
Determination of eligibility completed	Admin	
Confirmation of interest letters prepared	Admin	
Preparation of advert	HR Coord (Recruit) Admin	
Advertised intranet/newsletters/noticeboards	HR Coord (P & C) Admin	
Advertised internally (recorded on lateral transfer database)	HR Coord (P & C) Admin	
Confirmation of interest received & collated (lateral transfer database updated)	Admin	
Letter of offer sent (Lateral transfer/employee database updated)	HR Coord (Recruit) Admin	
Acceptance received (Lateral transfer/Employee database update)	HR Coord (Recruit) Admin	
Advise supervisor/IT/customer service new employee commencement date	Admin	
Employee update sent to payroll	Admin	
Send documents to records for registration	Admin	
New employee package to records – create new personnel file	Admin	

ATTACHMENT G: DRAFT POLICY AND ANNUAL REPORT FOR RURAL CENTRES

1. Introduction

Council (name) was constituted on (date) by a Proclamation of the Governor of NSW pursuant to the terms of the Local Government Act 1993 (the Act). The Council is an amalgamation of the former Councils of (names).

The Act provides that when an amalgamation of council areas occurs, the number of 'regular' council staff employed in rural centres prior to the amalgamation should be maintained as far as practicable.

The purpose of this policy is:

- to formally record the number of regular staff employed at rural centres located within Council as at 30 June annually compared to the staff numbers employed at rural centres as at date of Proclamation;
- to record a number of factors which will influence the number of staff employed at the rural centres (at least over the short term);
- to explain Council's strategy for applying s218CA of the Act.

2. Legislative requirements

Section 218CA of the Local Government Act introduced a new statutory consideration which Council must take into account when making staffing decisions which impact upon the number of regular staff at a rural centre.

The Act provides that Council is to 'ensure that the number of regular staff of the council employed at the rural centre is, as far as is reasonably practicable, maintained at not less than the same level of regular staff as were employed by the previous council at the centre immediately before the amalgamation or alteration of boundaries took effect'.

3. Rural Centres within the local government area

The Act defines a 'rural centre' as a centre of population of 5,000 people or fewer, and includes a geographical area that is prescribed, or is of a kind prescribed, by regulations in force for the purposes of this definition as being a rural centre. However, there is no relevant regulation currently in force.

For the purposes of this policy, the following rural centres have been identified (list names) as workplaces where 'regular staff' were employed by the former councils of (list names).

4. How is the 'regular staff' number determined?

The Act defines 'regular staff' to mean:

- staff appointed to a position within the organisational structure of the council, otherwise than on a temporary basis, and
- casual staff who are engaged by the council on a regular and systematic basis for a sequence of periods of employment during a period of at least 6 months and who have a reasonable expectation of continuing employment with the Council;

but designated Senior Staff are not included.

In accordance with this definition, the following staff are included for the purpose of determining the total number of regular staff employed at rural centres within what is now the new local government area immediately prior to the amalgamation:

- Permanent full-time staff employed as at the date of Proclamation
- Permanent part-time staff employed as at the date of Proclamation
- Casual staff employed on a regular and systematic basis during a period of at least 6 months ending on the date of Proclamation and who have a reasonable expectation of continuing employment with the Council.

The following staff and positions are not included:

- Senior Staff employed as at the date of Proclamation
- Designated temporary staff employed as at date of Proclamation
- Casual staff who commenced employment less than 6 months prior to the date of Proclamation
- Casual staff who did not work on a regular or systematic basis or who did not have a reasonable expectation of continuing employment with the council
- Any positions which were not within the approved organisational structures of the relevant councils
- Any positions in the approved organisational structures which were vacant as at the date of Proclamation.

5. Record of staff numbers

For reference, Table 1 shows the total staff complement of each amalgamated council as at Proclamation day.

Table 1: Total Staff at Proclamation Day

	Council 'A'	Council 'B'	Council 'C'
Senior Staff			
Permanent Full-Time			
Permanent Part-time			
Casual Staff employed >6 months			
Casual Staff employed <6 months			
Temporary Staff *			
TOTAL			

* includes trainees, apprentices, staff on fixed term contracts etc.

Table 2 shows the number of staff deemed to be ‘regular’ staff at each rural centre, based on the definitions contained in the Act. The table records the number as at Proclamation Day and at the most recent reporting date (30 June in the latest financial year).

Table 2: Regular Staff Numbers at Each Rural Centre

	Staff at Proclamation		Staff at 30 June XXXX	
	People	EFT	People	EFT
Rural Centre ‘A’				
Permanent Full-Time				
Permanent Part-Time				
Casual Staff employed >6 months				
Vacant Positions				
Positions in approved structure but impractical to fill				
Total Regular Staff at Centre ‘A’				
Rural Centre ‘B’				
Permanent Full-Time				
Permanent Part-Time				
Casual Staff employed >6 months				
Vacant Positions				
Positions in approved structure but impractical to fill				
Total Regular Staff at Centre ‘B’				
Rural Centre ‘C’				
Permanent Full-Time				
Permanent Part-Time				
Casual Staff employed >6 months				
Vacant Positions				
Positions in approved structure but impractical to fill				
Total Regular Staff at Centre ‘C’				

6. Policy on the application of section 218CA

It is clear from the wording of section 218CA that the statutory imperative to maintain regular staff numbers does not override the need for Council to make practical operational decisions. This means that if it is impractical to maintain a particular position in a rural centre then the Council may properly decide to dissolve that position or transfer it to another workplace. It follows from this observation that the actual number of regular staff employed at a rural centre will rise and fall according to practical and operational considerations resulting from Council policies and varying external environmental factors.

However, if the number of regular staff employed at a rural centre falls below the number employed at that centre as at Proclamation Day, then the Council will turn its corporate mind to investigating whether alternative regular staff positions could reasonably and practically be based at the rural centre. This recognises the distinction made in section 218CA between rural centres and other Council workplaces.

Factors occurring since the amalgamation will be particularly important in relation to maintaining previous staffing levels at rural centres. Two examples of such considerations are shown below.

Examples of Legitimate Reductions in Rural Centre Staffing

1. Voluntary Transfers

For a variety of personal and professional reasons, staff based in a rural centre prior to the amalgamation may from time to time request a transfer to another workplace. Such voluntary transfers should not be perceived as a problem or a practice to be discouraged. Council should place a high priority on providing flexibility to staff in the workplace and displaying a positive attitude towards the benefits of amalgamation by welcoming new opportunities for staff to achieve improved job satisfaction and career opportunities.

It follows that employees should not be restricted from transferring to another workplace simply because that would reduce the number of regular staff working at a particular rural centre. This type of restriction would not be placed on other staff and would be unreasonable.

2. Impact of Boundary Changes

When a significant part of a local government area comprising a rural centre is transferred to another council, regular staff numbers will need to be adjusted to reflect the new revenue base and operational requirements. It is not practicable to maintain the full complement of regular staff at the rural centre of the former council when the income generated is reduced and the previous scope of work at the centre is no longer required.

3. Staff Employed in Specialised Facilities

Some staff of a former council may have been employed at a special facility (such as an aged care centre) located in a defined rural centre. In these cases there may be alternative options for the future operation of the facility involving outsourcing or transfer of ownership to the non-profit or private sectors. If this occurs, then it would not be practical for Council to maintain regular staff numbers at their previous level.

Process to be applied

It follows that section 218CA of the Act does not mean that a rural centre will always employ a specified number of regular staff at any given time. Regular staff numbers will fluctuate in accordance with the ordinary trends of any workplace.

However, in accordance with the spirit and intent of the Act, decisions concerning the employment of staff at rural centres will be subject to special considerations in addition to those which are taken into account at any Council workplace. This approach should secure a positive outcome for both Council and the communities of each rural centre.

When a regular staff position based at a rural centre is vacated or transferred for any reason, the operational need for that position at the rural centre will be reviewed:

- If Council considers that an operational need for the position remains at the rural centre, then it will be filled.
- If Council determines that there is no operational need for the position to be replaced, then the number of regular staff positions at the rural centre will be reduced by one.

If the number of regular staff employed at a rural centre falls below the number employed at that centre as at Proclamation Day, the Council will actively consider strategies to achieve a regular staffing level at the rural centre which is at least consistent with the pre-amalgamation number. Initially, this investigation will be co-ordinated by the General Manager. S/he may establish an ad hoc committee to look at the specific staffing issues involved, and to make appropriate recommendations to address those issues.

Council is conscious of the need to ensure that the information required to review the implementation of s218CA of the Act is readily available to the public to the extent permitted by law. To achieve this goal, a decision not to replace a regular staff position at a rural centre will be supported by a written document stating the reasons for the decision. These documents are to be compiled in a public register.

Additionally, the statutory Annual Report of the Council will report the actual number of regular staff employed at each of the rural centres in the manner shown in Table 2.

Consultation

Council will discuss its definition of rural centres with the Consultative Committee and local communities.

Throughout the process detailed above, Council will keep affected members of staff fully informed, seek feedback and provide support as required. Personal issues will be discussed privately. Council will also seek input from the Consultative Committee and will comply with the provisions of the Award, including clause 39 where workforce changes at rural centres are considered to have 'significant effects' and/or redundancies may be involved.

7. Appendix

Include an Appendix with this Policy that provides a full employee listing for each former council as at Proclamation Day, showing:

- Employee position number
- Employee position title
- Date employed
- Employee status.

ATTACHMENT H: TRANSITION PLANNING FOR TWO METROPOLITAN COUNCILS INVOLVED IN A VOLUNTARY AMALGAMATION

On [a date] Council A and Council B lodged a joint submission to the NSW state government proposing they be merged.

This brief paper sets out in broad terms a framework to move forward with this proposal. It is in five parts:

1. Purpose and needs
2. Role of the Transition Committee (TC) and guiding principles
3. The four pillars of change
4. Transition framework
5. Transition governance structure.

1. Purpose and Needs

The purpose is to transition the two Councils to create a single council by [a date].

The main needs of the parties are:

- That we are treated as equitable partners
- That the Mayors and General Managers of the councils are involved in shaping the future
- There is limited disruption to decision-making
- Costs associated with preparation for amalgamation are reimbursed
- The community does not lose a voice
- The process is seen as fair.

2. Responsibilities of the Transition Committee and Guiding Principles

The Transition Committee is responsible for overseeing the planning and implementation of reform prior to the new council being established. The TC is also responsible for reporting progress to the State government and communities of Council A and Council B. Meetings are to be held monthly and will be chaired by an independent chairperson, and will function on a consensus model. Other key responsibilities include:

- Represent the interests of residents in undertaking the amalgamation program
- Act as a conduit to Council A and Council B

- Consider and endorse a change management strategy that addresses the major organisational and strategic risks
- Review and endorse an organisation and governance structure for the reform process as well as for the new entity
- Ensure the delivery of key strategic deliverables is on track
- Provide guidance and, where required, take decisions and resolve disputes.

The guiding principles for the Committee are to:

- Embrace the opportunity to create a new local government business model
- Make it easy to do business with local government
- Engage the community
- Deliver open and transparent communication
- Increase local government sustainability.

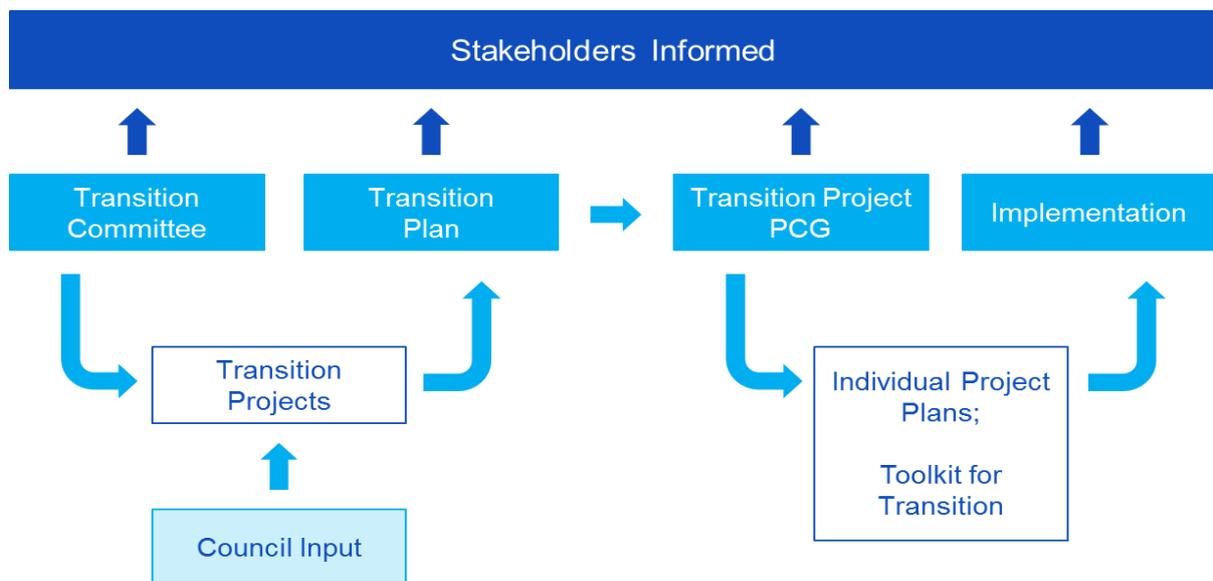
3. Four Pillars of Change

The transition to a new entity is supported by early joint work on four main pillars:

1. A new entity Strategic Plan
2. Cultural alignment
3. Caring for staff
4. Services offered by the joined up entity.

4. Transition Framework

The diagram below sets out the major areas of action required to get to the stage of execution of the merger.



Transition Governance Structure

A **Leadership Team (LT)** will report progress to the Transition Committee (TC) and relay TC directions to the Reform Program Office, Program Managers and Project Leaders.

Key responsibilities include:

- Ensure appropriate management of the Transition Program
- Ensure appropriate resources are engaged to deliver the program
- Ensure a system is developed to effectively monitor the progress of implementation and that reform status reports are prepared and provided to the TC
- Provide guidance and support to the Program Managers and Project Leaders and, where required, take decisions and resolve disputes.

The Transition Project Team (TPT) will facilitate project management processes, procedures and outcomes throughout the Transition Program.

Key responsibilities include:

- Implement the systems, processes and resources required to deliver the transition to the new entity
- Manage governance arrangements, reporting structures and cost reporting systems
- Provide for consistent planning, delivery and reporting across all projects
- Coordinate all aspects of the overall reform process to ensure individual projects are delivered within approved time, scope, risk and budget parameters
- Support the governance and administration of the TC and LT
- Provide guidance and support to the Project Managers
- Ensure relevant stakeholders are identified and appropriately engaged throughout the program.