

**Submission to the Office of Local Government
on the draft *Local Government (General)
Amendment (Regional Joint Organisations)
Regulation 2018***

March 2018

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and associate members including related entities such as special-purpose county councils. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW thanks the Office of Local Government (OLG) for the opportunity to review and comment on the draft *Local Government (General) Amendment (Regional Joint Organisations) Regulation 2018* (the Regulation).

Purpose

This submission is in response to the OLG's invitation for submissions on the Regulation made via Circular 18-02 dated 16 February 2018.

Background

LGNSW and the local government sector have long supported the concept of Joint Organisations (JOs). Working together on a regional basis has the potential to strengthen councils significantly and augment the outcomes they are able to deliver for their communities.

Councils already collaborate in a wide range of ways, and there are many stories from within the sector about the success of these collaborations. The opportunity to pilot the JOs was particularly well received, and has provided valuable feedback about both the challenges and opportunities of the model.

The sector is particularly appreciative that the Government decided to release the draft Regulation prior to councils needing to decide whether they would join a JO. Understanding the details of how the JOs will work is critical to councils before they decide.

The accompanying guide to the Regulation was also very clear and easy to read, which assisted in understanding the Regulation and how it fits with the Act requirements.

LGNSW has consulted with the sector about the Regulation in preparing this submission, and included the feedback provided. The submission identifies the key issues associated with the Regulation and is divided into general and specific comments. Overall, however, LGNSW supports the draft Regulation.

Key points of the submission are:

- Councils wishing to establish JOs quickly should be supported to do so, but the Government should be flexible with those councils needing additional time.
- The Government should make a public commitment in writing that councils who choose not to join a JO will not be disadvantaged in terms of access to State Government agencies and opportunities.
- The Regulation should contain heads of consideration that the Minister must take into account in determining whether to amend the constitution of or dissolve a JO, and the reasons for such a determination must be made public in writing.

- A portion of the funding remaining from the local government reform process should be quarantined so that it can be provided to JOs on an ongoing annual basis, and also be used to support individual projects run by JOs.
- The application of the Act and the Regulation to the JO should be made clearer, as it is currently very confusing.
- The timeframe for finalising the first Statement of Strategic Regional Priorities (SSRP) should be extended by three months.
- The timeframes provided in the Regulation for preparation of subsequent SSRPs are acceptable, but a provision should be included which allows for an extension of time in certain circumstances.
- The draft Model Code of Meeting practice should be amended to enable JO meeting participation to occur remotely, as envisaged in the Regulation.
- Existing clause 413A of the Regulation, which places a duty upon general managers to advise the elected officials of a council of specific information related to legal proceedings, should also apply to Executive Officers of JOs.
- Clause 406A of the Regulation should be updated to reflect the terms of the new award.
- The existing provisions of clause 406B relating to the taking of long service leave at half or double pay should be made available to staff of a JO.

General Comments

Timing

Much of the sector is enthusiastic about the establishment of JOs and keen to move forward. These councils should be supported and facilitated in their desire to get a JO up and running quickly.

However, this is not the case for all councils or regions, and care needs to be taken to ensure that councils who are less certain are given the time to establish the necessary relationships with each other and with the State Government. LGNSW is very keen for JOs to succeed, and believes that taking a little more time and communicating more fully with uncertain councils would be worthwhile and is more likely to ensure success.

LGNSW recommends flexibility on the Government's part for those councils that would like additional time.

The Government's decision to rush the Act amendments through after a significant delay and then pressure councils to sign up quickly without having released the draft Regulation has resulted in a loss of trust on the part of some councils. There are also concerns among some councils that the JOs could create a fourth tier of government, which would be undesirable and must be avoided.

Self-Determination

A key consideration of LGNSW's support for JOs has been that they should be able to determine for themselves how they are comprised and how they operate. The draft Regulation goes a long way towards this. Councils cannot be forced to join a JO, and JOs are able to determine their own operating arrangements, financial contributions, etc.

OLG has made it clear that the State Government intends to use JOs as a vehicle for engagement with the sector at a regional level. LGNSW supports this and acknowledges the advantages for both spheres of government with this approach.

However, it is important to ensure that the "voluntary" aspect of JOs remains truly voluntary.

It has been implied that councils who choose not to join a JO will be less able to access State Government resources and relationships. This is unacceptable. **LGNSW seeks a public written commitment from the Government through the Minister that councils who choose not to join a JO will not be disadvantaged in terms of such access.**

Leaving a JO

The Act prescribes the way in which JOs are formed and can be amended or dissolved (i.e. through proclamation).

While there is a clear articulated process for joining a JO, there is no clear process for a council leaving a JO. Ideally, the JOs will be a success and councils will not wish to leave. However, if the circumstances of a council change or the relationships within the JO become dysfunctional then councils may wish to leave.

It is important for the sector to understand how this can be achieved, and the matters that the Minister must consider in making a decision. Although it is voluntary to join a JO, the decision to leave a JO does not rest with councils and there is a concern within the sector that councils could become trapped with a financial commitment they are unable to sustain. Although there are safeguards in place (such as the ability for JOs to decide via the Charter to only have consensus decision-making, for example), councils would still feel more confident about joining a JO if the process for leaving a JO was clearly articulated.

LGNSW therefore advocates that the Regulation must contain heads of consideration that the Minister must take into account in determining whether to amend or dissolve a JO, and that the reasons for the Minister's determination must be made public in writing.

This would not bind the Minister to a particular decision but would make the process transparent, particularly in terms of the issues that an applicant for amendment or dissolution would need to address.

Funding

LGNSW acknowledges and supports the seed funding that is being provided to assist the JOs to establish themselves.

Given the range of financial stresses upon councils brought about through rate capping, cost shifting and other pressures, and the very real benefits that having JOs will provide to the State Government, LGNSW suggests that the Government could do more to support the JOs

financially, in an ongoing way. Money remaining from the local government reform process, which had been ear-marked for local government, should be retained within the sector. **It is recommended that some of this funding be quarantined so that it can be provided to JOs on an ongoing annual basis, and also be used to support individual projects run by JOs.**

Specific Comments

Application of the Regulation to JOs (cl 397A (4) and Note)

Sub-clause (4) of clause 397A provides that unless specified elsewhere, nothing in clause 397A has the effect of applying a provision of the Regulation to a joint organisation if the provision in question is made for the purposes of a provision of the Act that does not apply to a joint organisation.

This wording is convoluted and confusing, and will not assist JOs in understanding their legislative responsibilities.

The clause is followed by a legislative note to outline the provisions of the Regulation that apply to a JO. This is also confusing.

It is recommended that the legislative note may be more conveniently represented by way of a table, such as the one contained in Appendix A to this submission.

In addition, it would be helpful if guidance material could be prepared for JOs that clearly outlines in plain English the provisions of the Act and Regulation that apply to JOs.

A second legislative note below clause 397A provides that additional provisions of the Regulation may apply to a JO where the JO is undertaking a function under delegation from the council. **It is recommended that this be included in clause 397A to ensure legal clarity and certainty.** Legislative notes have no legal force (s 35(2)(c) of the *Interpretation Act 1987*) and should not be relied upon in this manner.

Alternates of voting representatives (cl 397E)

The Regulation refers to “representatives” on the board of the JO, some of whom have voting rights and are known as “voting representatives”. **It is recommended that the use of these terms in clause 397E, which deals with the alternates of voting representatives, is reviewed.** Specifically:

- The Explanatory Note at the beginning of the Regulation indicates that the object of the Regulation is ... “(d) to provide for the appointment of alternates for representatives”, whereas the Regulation only does this in relation to voting representatives (which is appropriate, as the JO can determine whether to allow alternates for the non-voting representatives). For consistency the Explanatory Note should be amended to reference voting representatives.
- Clause 397E refers to “voting representatives” throughout except for sub-clause (5), which says that “While acting in the place of a voting representative on the board, a

person has all the functions of a representative and is taken to be a representative”. This should be amended either to read “functions of the representative and is taken to be the representative” so that it properly references the voting representative mentioned earlier in the sub-clause, or to read “functions of a voting representative and is taken to be a voting representative”.

Electronic Meetings (cl 397F)

LGNSW and the sector strongly support the option for JO meetings to be held using phone or other electronic means of communication.

The draft Model Code of Meeting Practice that is currently on consultation expressly prohibits a councillor from participating in a meeting of the council or of a committee of the council unless personally present at the meeting. This would conflict with the Regulation if the JO decided to adopt the Model Code. **It is recommended that the Model Code be amended to enable JO meeting participation as envisaged in the Regulation.**

Statement of Strategic Regional Priorities (cl 397G)

The Statement of Strategic Regional Priorities (SSRP) is supported by the sector and should neatly define the intersection between the aspirations of local communities and those of the State. Some councils have indicated to LGNSW that they have already moved/are moving towards a combined Community Strategic Plan between several councils, with the plan containing sub-regional parts.

LGNSW has had mixed feedback from councils about the timeframes for establishing the first SSRP. Councils who are already part of a ROC with established relationships and regional priorities are comfortable with the timeframe (and indeed keen to commence).

Other councils are concerned that only having six months to prepare the first SSRP is too short. In that time, they will need to start the JO from scratch, form new relationships with the other member councils, establish the charter (which could be subject to debate), appoint an executive officer and undertake the myriad other administrative requirements necessary to establish the JO.

Some councils have also noted that they have not necessarily consulted their communities about regional priorities when preparing their Community Strategic Plans (which are focused on the local government area) and therefore additional consultation will be required before regional priorities can be identified.

Going forward, this consultation can be incorporated into the Community Strategic Plan consultation, but for the first plan this cannot be relied upon.

It is therefore recommended that the time period for finalising the first SSRP be extended by three months. This would not prevent JOs who were keen to move quickly from doing so, but would ensure the greatest chance of success for the JOs who need the additional time.

It is further recommended that a provision be included which allows for an extension of time in certain circumstances in the future (for subsequent SSRPs). An extension could be required for a range of reasons, such as where the regional boundary of the JO is amended (either through a council leaving or joining), or through something like a natural disaster, which could either delay the JO's ability to finalise the SSRP, or could result in a dramatic change to the regional priorities.

Flexibility to deal with these situations is important and LGNSW recommends that an extension provision be included.

Portability of Sick and Long Service Leave Entitlements (cl 397M)

Clause 397M enables staff transferring between JOs and councils to transfer their accrued sick leave and long service leave entitlements, by ensuring the application of existing clause 406A of the Regulation to JOs. The note at the bottom of clause 406A purports to reflect the terms of the *Local Government (State) Award*. Unfortunately, the note does not reflect changes in the wording of the *Local Government (State) Award* since 2005.

It is recommended that the OLG use the opportunity in making the JO Regulation to update clause 406A to reflect the terms of clauses 21A(viii), 21E(iv), 21E(vi)-(ix) and 42(v) of the *Local Government (State) Award 2017*.

Application of Existing Clause 406B to JOs

It is unclear why the provisions of existing clause 406B are not similarly invoked, so that staff of a JO can take long service leave at half or double pay. **It is recommended that clause 406B also be applied to JOs.**

Functions of the Executive Officer (cl 413A – functions of the GM)

Clause 413A of the Regulation places a duty upon general managers to advise the elected officials of a council of specific information related to legal proceedings.

This clause does not apply to the executive officers of JOs, but LGNSW recommends that it should.

Appendix A: Table re Application of the Regulation to JOs

Provisions of the Reg that apply to JOs	Provisions of the Reg that do not apply to JOs
Part 1 Preliminary provisions such as the name of the Regulation, the Commencement and the Definitions	Clause 4
	Part 2 Approvals
	Part 3 Orders
	Part 4 Community Land
Clause 133 Sale of land to recover overdue rates or charges	Part 5 Rates and charges
	Part 5A Environmental upgrade agreements
Part 6 Water Services	
Part 7 Tendering	
Part 8 Honesty and disclosure of interests	
Part 9 Management and accountability	Clause 201 Relating to the annual statement of council's revenue policy Division 7 Annual Reports Division 8 County Councils
Part 10 Meetings	Clause 235 Presence at council meetings Clause 236 Councillor to be elected to preside at certain meetings
	Part 11 Elections
Part 11A Joint organisations	
Part 12 Penalty notices	
Part 13 Miscellaneous	Division 3 Surveys and Polls relating to council amalgamations or boundary changes (section 218F) Division 4 Payments to councillors (except for clause 403 which will apply to JOs) Division 6 Winding up of Cudgegong (Abattoir) County Council Division 11 Functions of the general manager
	Part 14 Savings and transitional provisions
	Schedule 1 Standards relating to approvals
	Schedule 2 Standards enforceable by orders
Schedule 3 Form of return - disclosure of interests	
Schedule 3A Form of special disclosure of pecuniary interest	
	Schedule 4 Counting of votes under optional preferential system
	Schedule 5 Counting of votes under proportional system
	Schedule 6 (Repealed)
	Schedule 7 Election of mayor by councillors

	Schedule 8	Election of chairpersons of county councils
Schedule 7A	Election of chairpersons of joint organisations	
	Schedule 9	Election of members of county councils
	Schedule 10	Constitutional referendums and council polls
	Schedule 11	Forms
Schedule 12	Penalty notice offences	