

Submission to the Local Government Act Review

By The Chief Executive Officers of:

Town of Bassendean
City of Bayswater
City of Belmont
City of Kalamunda
Shire of Mundaring
City of Swan



Background

At the CEOAC informal meeting in July 2017, member Council CEOs discussed the upcoming review of the Local Government Act 1995 recently announced by the Minister for Local Government.

The member Council CEOs have agreed to put together a joint submission from **themselves** as opposed to an official Council endorsed submission.

To progress this, the CEOs have suggested that the respective Governance/Compliance Managers from each of the member Councils get together to discuss and agree on the required amendments and prepare the submission for consideration by the CEOs and have requested the EMRC facilitate this process.

Their intention is for this to be a two stage process:

1. to have the submission ready to be lodged at latest by mid December 2017; and
2. prepare a response to the consultation call which is expected to be made by the Minister around February/March 2018.

This submission has been prepared following meetings organised with officer representatives from the six member Councils of the EMRC. This final submission has been reviewed and agreed by the Chief Executive Officers of the local governments of Bassendean, Bayswater, Belmont, Kalamunda, Mundaring and Swan. Again, this is a submission from the CEO's of the Six Councils not official submissions by the elected Councils of those local governments.

1 Ratings Exemptions – Charitable Purposes

Recommendation

The *Local Government Act 1995* should allow the local government the authority to make the decision on providing concessions to charitable organisations where appropriate.

Discussion points

The Local Government Act 1995 (LGA) should be amended to clarify those circumstances where rating exemptions for charitable purposes are waived under contractual arrangements with local governments. The LGA should be reviewed to delete s.6.26(g) to remove the exclusion of rateable land in the district for charitable purposes.

2 Annual Electors' General Meeting

Recommendation

Section 5.27 of the *Local Government Act 1995* should be amended so that the Electors' Annual General Meeting is not required.

Discussion points

The Annual General Meeting is a concept enshrined within s.250N of the Corporations Act 2001 for public companies. However, local governments are not bound by the Corporations Act 2001.

Additionally, there are sufficient provisions within the LGA for the public (including rate payers) to participate in local government matters and access information. This is achieved by attending meetings, participating public question time, lodging petitions and requesting special electors' meetings.

3 Stand Down Proposal

Recommendation

The *Local Government Act 1995* be amended to allow for the stand down of an elected member from his or her duties while under investigation, have been charged or when his or her continued presence prevents the local government to properly discharge its functions or affects the reputation of the local government

Discussion Points

Under Part 8 of the LGA, the Minister may suspend the whole council of local government (s.8.15B, s.8.15C). The Governor may, by order made on the recommendation of the Minister under section 8.24(3), dismiss a council (s.8.25).

However, under the existing LGA, the application the section is to the whole council and not an individual elected member. As such it may be appropriate that a proposal for an elected member to be stood down from his / her duties while they are under investigation, have been charged, or when his / her continued presence prevents the local government to properly discharge its functions or affects the reputation of the local government.

4 Penalties under the Act

Recommendation

That the penalties allowed under the *Local Government Act 1995* be increased to a sufficient amount to discourage breaches.

Discussion points

In 2013, the Supreme Court of Western Australia considered the powers of local governments to issue notices under section 3.25 of the LGA, in the case of *Saliba v Town of Bassendean [2013] WASC 93*.

Under section 3.25 of the LGA, a local government may issue a notice to an owner or occupier of land, requiring specified works or actions to be carried out. Where a local government issues a notice under section 3.25 of the LGA to an owner of land, failure to comply with that notice will constitute an offence which carries a maximum penalty of \$5,000 and a maximum daily penalty of \$500 for each day during which the offence continues.

Under section 3.10 of the LGA, local laws made under the Act is limited to a maximum penalty of \$5,000 and a maximum daily penalty of \$500 for each day during which the offence continues.

Similarly under section 9.14 of the LGA, the penalty for offence when otherwise specified is also limited to a fine of \$5,000 and further fine of \$500 for each day during which the offence continues.

Penalties are imposed to discourage breaches and reflect the severity of those breaches. The penalties allowed under the LGA are set too low at \$5,000 to achieve their intended purposes. Additionally, the value of the \$5,000 established in 1995 has since eroded due to inflation and general living standards.

5 Role of Councillors

Recommendation

Section 2.10 of the *Local Government Act 1995* should be amended to reflect the contemporary expectations of the role of Councillors.

Discussion points

The role of the Councillors should be updated under the LGA. Recent State Planning Commission deliberations have indicated that the role of Councillors is not only to uphold the views of the ratepayers but also uphold other legislations such as the Town Planning Act and the Health Act.

6 Conflicts of Interest

Recommendation

That section 5.60 of the *Local Government Act 1995* be updated to include impartiality interests and allow section 5.67 to disqualify the members, having disclosed the impartiality interests, from participating in the meeting.

Discussion points

Sections 5.65 and 5.67 of the LGA stipulates that a Councillor or Committee member has a s.5.60 financial interest in a matter before the Council, they must disclose the nature of the interest, depart the meeting room and not participate in the decision-making process.

On the other hand, members that do have an impartiality interest within the scope of reg.11 of the Local Government (Rules of Conduct) Regulations 2007 (WA) having disclosed the interest affecting impartiality continue to remain at the meeting and vote on the matter. This appears to be conflict with the well-established common law rule against bias.

The Department of Local Government and Communities Operational Guideline No. 01 - January 2011 which is provided to local government elected members in WA makes the DGLC's understanding of the obligation to vote clear in the following terms (OG s.3) -

'There are very different outcomes resulting from disclosing an interest affecting impartiality compared to that of a financial interest.

For example, with the declaration of a financial interest an elected member leaves the room and does not vote (unless permitted to do so by the meeting or the Minister).

With the declaration of an impartiality interest, the elected member stays in the room, participates in the debate and votes. In effect then, following disclosure of an interest affecting impartiality, the member's involvement in the meeting continues as if no interest existed.'

Under common law, a decision by a body such as a local government Council is liable to be set aside as invalid if one of the Council members was disqualified for bias, actual or apprehended (see *Dickason v Edwards* (1910) 10 CLR 243 at 259; *1W v City of Perth* (1997) 71 ALJR 943 at 969; and *Irwin v Meander Valley Council* [2007] TASSC 79 at [37]). A Council member who considers that he/she has an interest in a matter before the Council which is sufficiently significant to justify a disclosure of the interest as affecting impartiality, runs a clear risk of being considered to have an actual or apprehended bias, and on the principle mentioned above, that bias in the absence of statutory provisions to the contrary, could result in the Council decision on judicial review being set aside as invalid, and other related consequences.

7 Tender Threshold

Recommendation

That value of the tender threshold limit for each local government be established having regard to the respective size of local government in accordance with the SAT banding subject to a upper limit threshold.

Discussion points

The recent amendments to the *Local Government (Functions and General) Regulations 1996* took effect on 1 October 2015 where the increase in tender threshold has been increased from \$100,000 to \$150,000. However, establishing a fixed threshold is a one size fits all and may not be appropriate for smaller sized local governments and inadequate for the large local governments.

Similar to the State Administrative Tribunal (SAT) that establishes Councillor fees and CEO remuneration for local governments, it is considered appropriate to utilise the banding to correlate the tender threshold (subject to an upper limit) to the local government's banding. The SAT utilises a four band classification model that provides for a range of factors to be taken into account including:

- major growth and development;
- strategic planning, including risk management;
- infrastructure development and asset management;
- significant social/economic/environmental issues;
- significant demand to service and support non-resident needs;
- diversity of services;
- community involvement and advocacy;
- state or national negotiations;
- operational and managerial requirements;
- capacity to pay;
- total expenditure;
- population; and
- FTEs.

8 Restriction on Borrowings

Recommendation

That section 6.21 of the *Local Government Act 1995* be amended to allow Local Governments to use freehold land, in addition to its general fund, as security when borrowing.

Discussion points

Section 6.21 of the LGA limits the security of the borrowing to general funds. This restricts the borrowing capacity and reduces the scale of borrowing that can be undertaken. Within the balance sheet of Local Governments are freehold land that could be utilised as collateral and security for borrowings.

9 Related Party Disclosures

Recommendation

That the *Local Government Act 1995* mandates and enforces the lodgement of Related Party Disclosures returns.

Discussion points

As a result of changes to the accounting standards, from 1 July 2017, all local governments are required to disclose the nature of related party relationships when preparing general purpose financial reports in compliance with AASB 124 Related Party Disclosures. AASB 124 will only impact on disclosure in financial statements and will not impact on financial position or performance. Local governments are required to disclose when a related party transaction has occurred in the reporting year

However, the implementation of the AASB124 extending to key management personnel is dependent on the key management personnel making the disclosure. There is little or no enforceability to the same degree as primary/annual returns.

For primary and annual returns, there are penalties in the LGA for failing to comply including failure to lodge a return (s.5.75, s.5.76) and failure to disclose information in a return (s.5.78). The CEO also has the legal duty and responsibility to report any breaches under Part 5, Division 6 of the LGA in accordance with s.28 of the *Corruption and Crime Commission Act 2003*. Additionally, it is also an offence to give false or misleading information (s.5.89).

10 Privacy Policy

Recommendation

That the *Local Government Act 1995* be amended to provide support for the open and transparent management of personal information in compliance with the Australian Privacy Principle or such a code.

Discussion Points:

The Australian Privacy Principles (APPs) do not apply to local governments or state or territory governments. Section 6C of the Privacy Act 1988 states that entities which are state or territory authorities or prescribed instrumentalities of a state or territory (including local governments) are not classified as organisations. As these entities are not organisations they are exempt from the coverage of the APPs.

Some states have privacy laws that cover state and local government bodies. For more information on what laws apply in the states and territories, please visit the [Other privacy jurisdictions page](#).

The state public sector in Western Australia does not currently have a legislative privacy regime. Various confidentiality provisions cover government agencies and some of the privacy principles are provided for in the Freedom of Information Act 1992 (WA) overseen by the Office of the Information Commissioner (WA).

Local governments have access to significant amount of information including rate payers database. To ensure legislative support, it is considered imperative that the LGA supports the efforts of local governments to manage personal information in an open and transparent way.

11 Elections

Recommendation 11

That the voting in local government elections be compulsory and that the voting may be done electronically.

Discussion points

Under the Commonwealth Electoral Act and the related state laws, voting is compulsory in Commonwealth, state and territory elections. Voting is also compulsory in local government elections, except in Western Australia, South Australia and Tasmania.

Under compulsory voting, the percentage of eligible voters who actually vote on election day is higher than voluntary voting. Compulsory voting increases the legitimacy of elected representatives. Candidates winning seats in local government will mean that they represent the majority of the people's votes. In countries like the United States, where the turnout can be low, candidates can win with much less than a majority of the eligible vote.

Compulsory voting increases the political education of the people. They will tend to pay more attention to politics if they know they have to vote. Compulsory voting does not force a choice. People can always lodge a blank or spoiled ballot paper. Compulsory voting means that candidates have to address the needs of all the voters. If voting were voluntary, the experience of countries like the United States is that poorer and less educated people would tend not to vote. This would skew the political system (further) toward the well off and well educated. Additionally, compulsory voting keeps the Australian political system responsive to the community.

With the progress of computerisation in society, electronic voting represents a modernisation of the voting process making it more readily accessible and convenient. There would be a minimum change in the voting culture as electors could still attend a polling place on an election day. The level of informal voting could be minimised as the application could be designed to warn an elector if their vote was going to be informal. The system would provide for instantaneous calculation of results at the close of voting

and there would be accurate scrutiny of the ballots. There would be less human intervention in the counting process and thus minimise the risk of errors.

12 Vexatious and Frivolous Complaints

Recommendation

That the *Local Government Act 1995* be amended to allow for a person to be declared vexatious or frivolous by the local government.

Discussion points

A frivolous claim or complaint is one that has no serious purpose or value. Often a "frivolous" claim is one about a matter so trivial or one so meritless on its face that investigation would be disproportionate in terms of time and cost. The implication is that the claim has not been brought in good faith because it is obvious that it has no reasonable prospect of success and/or it is not a reasonable thing to spend time complaining about.

A vexatious complaint is one (or a series of many) that is specifically being pursued to simply harass, annoy or cause financial cost to their recipient. A vexatious complaint is a form of abuse. A vexatious complaint has the power to hurt and disrupt another person's life in such a way that their career can be torn to shreds and may result in psychological injury. Relevant workplace legislations in Australia have already been legislated to protect against vexatious complaints and their consequences of workplace bullying.

Section 5.110(3a) of the LGA allows for "... a standards panel can at any stage of its proceedings refuse to deal with a complaint if the standards panel is satisfied that the complaint is *frivolous*, trivial, *vexatious*, misconceived or without substance."

13 Local and Statewide Public Notice

Recommendation

That sections 1.7 and 1.8 of *Local Government Act 1995* be amended to remove the requirement for publication in a newspaper to any medium that would provide circulation sufficient to inform the people of the district and the State.

Discussion points

The LGA require newspaper notices to inform the public. Newspapers have long been deemed the best outlets for these notices because they are widely accessible, relatively inexpensive, have a documented list of subscribers and are easily preserved for records.

Local newspapers are no longer distributed as extensively as before with some papers only available in shopping centres and stands. Due to the reduction in reach, the original intent is not consistent with the intended distribution envisaged in the LGA.

With the proliferation of online websites and a declining readership to printed newspapers, posting public notices on websites can save ratepayers money. Because of those changing patterns of readership, the proposal to move public notices to online will save local governments significant expenditure.

14 Elected Member Training

Recommendation

That *Local Government Act 1995* mandate compulsory training for elected members.

Discussion points

Being elected to Local Government is a privilege given by the members of the community. It comes with it significant amount of responsibilities and duties to uphold the expectations of the role.

To assist with this, a mandated training will provide all elected members a minimum level of skills, expertise and understanding of their legislative, legal and financial obligations to discharge their duties.

A mandated training is designed to assist elected members both new and returning to gain the required set of skills to function well as a cohesive team. The training will provide an understanding of the legal responsibilities of elected members including their duties under the LGA and related legislation.

15 Business Planning

Recommendation

That requirement for a business plan under the *Local Government Act 1995* be amended for complex land transactions.

Discussion points

Many local governments are now entering into larger and increasingly more complex land transactions to achieve positive development outcomes in their districts. These transactions can involve long, complex arrangements including buying land, amalgamating it, subdividing it, developing it, building facilities etc. There may be multiple agreements to achieve these purposes. These transactions will become increasingly common as Perth seeks to complete infill development. The land transaction / business planning provisions do not realistically allow for this to occur as they are drafted for smaller, one-off transaction. The legislation currently provides a very narrow path of compliance. Some thought needs to be given to a set of provisions that will enable local governments to proceed with these larger more complex developments and still provide the necessary accountability, public input and reporting.

A land transaction can be caught up in the requirement to prepare a business plan if it is “preparatory to” a major land transaction. It is possible for a local government to acquire a property (enter into a contract to purchase the property) at which point it becomes preparatory to a major land transaction (which might be down the track when the local government acquires another property or enters into a development agreement). This could trigger the business plan requirement. Having done so, it is then impossible to complete the acquisition as you must do the business plan before you enter into the transaction. However, the requirement to do the business plan is not triggered until the contract to purchase is entered into.

Section 3.59 of the LGA provides that before the local government enters into a major land transaction, or a land transaction that is preparatory to a major land transaction, the

local government must prepare a business plan. Under the regulations, the threshold of a major land transaction is currently \$10 million.

An agreement to acquire or dispose of land can be preparatory to a major land transaction if it will form part a defined project which includes multiple agreements to acquire, dispose of or develop land that exceeds the threshold.

Ordinarily the business plan would be prepared before the local government enters into the first land transaction that is preparatory to a major land transaction.

A business plan must be prepared before the local government commences a major trading undertaking. The regulations prescribe the threshold of a major trading undertaking as one that involves expenditure of more than \$5 million in the last or current financial year.

The business plan must include an overall assessment of the major land transaction or major trading undertaking. It is to address the elements referred to in section 3.59(3). It must be advertised in accordance with 3.59(4) and made available for public inspection, following which the local government may resolve by absolute majority to proceed with the business plan.

16 Related Party Disclosures

Recommendation

That the requirement for submitting the Annual Return and the Related Party Disclosures be consolidated as a single return.

Discussion points

There has been an increasing number of returns required to be submitted each year.

A relevant person must lodge an annual return in the prescribed form by 31 August of that year per Section 5.76 of the LGA, The section also imposes a financial penalty or imprisonment for non-compliance.

From 1 July 2016, local governments must disclose related party relationships and related party transactions of Key Management Personnel together with information associated with those transactions in its annual financial statements in accordance with Australian Accounting Standard AASB 124 Related Party Disclosures. Typically Key Management Personnel would include Councillors, CEO, Directors etc. The objective is to ensure that local government financial statements contain the disclosures necessary to draw attention to the possibility that its financial position may have been affected by the existence of related parties and by transactions and outstanding balances, including commitments, with such parties.

Pursuant to Section 4 of *the Local Government (Financial Management) Regulations 1996*, a local government's general purpose financial statements must be prepared in compliance with the prescribed accounting standards published by the Australian Accounting Standards Board (AASB). However, there is no penalties prescribed in the LGA for non-compliance.

As the related party disclosures and the annual returns aim to identify conflicts of interests, there is merit to consolidate these two returns into one to reduce the amount of administrative overheads and reporting requirements.

17 Local Government Rating system

Recommendation

That there is greater discretion and flexibility in choosing land valuation methodology from which to calculate council rates

Discussion points

Council rates are a type of land tax based on the value of land within the council's municipal district.

In general, Australia property valuation methodologies are based on the value of land or a market value approach. A market value approach is either based on the 'Capital Improved Value' or an annual rental value (with different methods used to calculate this rental amount such as WA's Gross Rental Value method).

The 'Capital Improved Value' (CIV) is based on the expected sum of money that might be realised if the land and any existing dwelling or improvements were offered for sale at a particular time. The advantage of the CIV system (or a method based on the rental value of the property) is that there is an assessment of the total value of the property, so the wealth of the owner is more transparent. CIV is generally more consistent with Australian taxation rules.

Currently under the LGA:

- The Minister determines the method of valuation of land to be used by a local government as the basis for a rate.
- In determining the method of valuation of land to be used by a local government the Minister is to have regard to the general principle that the basis for a rate on any land is to be —
 - o where the land is used predominantly for rural purposes, the unimproved value of the land; and
 - o where the land is used predominantly for non rural purposes, the gross rental value of the land.

Gross Rental Value (GRV) is defined under the Valuation of Land Act 1978. The prescribed method for calculating the GRV, in theory, should represent the yearly income a property would expect to generate if rented to tenants.

The GRV value of each property is set by the Valuer-General's Office. Every three to five years Landgate values all properties in the state to complete what is known as a general valuation. To calculate a property owner's general rate for the year, the GRV is multiplied by the 'rate in the dollar' set by each council annually when it decides on its annual budget.

'Unimproved value' generally means what the land might reasonably be expected to be sold for without buildings or other improvements. In WA, the Valuation of Land Act 1978 also has a specific definition of how the unimproved value of land should be calculated.

In Queensland, NSW and Western Australia, local governments are not able to choose the valuation method used in their district.

In Victoria, South Australia and Tasmania, local governments can choose between prescribed valuation methods. For example under the Victorian legislation local governments can choose from the following -

- Capital Improved Value

- Net Annual Value: This valuation is based on the current value of a property's net annual rent. Under Victorian legislation the Net Annual Value must be at least 5% of the Capital Improved Value for commercial property and exactly 5% of Capital Improved Value for residential property.

- Site Value: This valuation is based on the market value of the land only. Site value includes any work undertaken, or materials used, to improve the physical nature of the land, such as filling, grading or levelling or improving soil fertility or drainage.

It is worth noting that there are different methods for calculating the value of land. For instance Queensland differentiates between 'site value' which includes any work

undertaken to develop the land and 'land in its natural state.' In WA under the Valuation of Land Act 1978 the 'value of the land' in some circumstances should be calculated on the assumption that the future work needed to ready the land for sale has been completed.

18 Local Laws

Recommendation

That s.3.12(7) of the LGA be amended such that the approval of the Explanatory Memoranda be given prior to the Gazettal Notice requirement of s.3.12(5).

Discussion points

Following public consultation and consideration of the submissions, the making of the Local Law requires the local government to publish it in the WA Government Gazette per s.3.12(5) of the LGA.

S.3.12(6) of the LGA stipulates that after the Local Law has been published in the Gazette, the local government is to give local public notice stating the title of the Local Law; summarising the purpose and effect of the Local Law (specifying the day on which it comes into operation); and advising that copies of the Local Law may be inspected or obtained.

Additionally, per s.3.12(7) of the LGA, following Gazettal, the local government is to provide an Explanatory Memoranda to the Government (WA Parliamentary Joint Standing Committee on Delegated Legislation (JSCDL)) for its review

Due to the sequence of events, there is a possibility that following the review by the Joint Standing Committee, the Local Law may be amended or disallowed despite the Local Law having been gazetted. The WA Government Gazette should be relied upon as the definitive version.

It is thus proposed that the Joint Standing Committee should review the Local Laws before the final version is gazetted.

19 Amendment to exemption to Co-operative Bulk Handling

Recommendation

That the LGA be amended by deleting section 6.26(2)(i) and (3), so that there is no longer an exemption for rates afforded to Co-operative Bulk Handling Limited (CBH), or otherwise, section 6.26(3) be amended such that CBH be required to engage an independent third party assessor for determining grain tonnage stored on site should tonnage be referred to in any calculation of contribution to the local government in lieu of rates.

Discussion points

The CBH Group (commonly known as CBH, an acronym for Co-operative Bulk Handling), is a grain growers' cooperative that handles, markets and processes grain from the wheat-belt of Western Australia. In 2016 the Australian Taxation Office revealed that despite generating more than \$3.4 billion in revenue in 2013/14, the company paid no tax. This made it Australia's biggest revenue earner not to pay tax in the period under review.

Under the LGA s.6.26(2)(i) and s.6.26(3), the CBH has been provided an exemption in which their land is not a rateable land. This places an impost on the rest of ratepayers and is regarded unequitable.

20 Process for terminating the Chief Executive Officer

Recommendation

That the LGA be amended to include a provision to the effect that a Council cannot terminate the contract of the Chief Executive Officer until the proposal has been referred to an independent and suitable resourced authority, prescribed in the LGA, to consider the validity of the grounds for the termination, and, if necessary seek further legal or ministerial advice before approving the termination.

Discussion points

All Councils should provide procedural fairness when handling the employment contract of all employees, as part of best practice, if not under contractual requirements. This should also be extended to the Chief Executive Officer.

The ease in which CEO can be sacked by Council compared to other sectors will result in uncertainty which in the long term may dissuade competent and capable candidates from seeking the leadership role in local government.

21 Sitting fees for external members on Council Committees

Recommendation

That section 5.100 of the LGA be amended to allow sitting fees for external members on committees of council, particularly the Audit Committee.

Discussion points

Increasingly, councils are seeking to establish committees with expert members – particularly in the areas of audit and risk, planning and strategy. This is particularly the case with the Audit Committee where it is recommended that at least one member has a mix of accounting and financial expertise, as well as industry knowledge, to enable the Audit Committee to discharge its mandate effectively.

At present, a person who is a committee member but who is not a council member or an employee is not to be paid a fee for attending any committee meeting and may only be reimbursed expenses. Amending the LGA to allow for the payment of sitting fees to external members on committees would increase the expertise available to elected members and staff and allow for enhanced decision-making.

22 CEO Performance Review

Recommendation

That the LGA be amended to prescribe the manner in which the CEO performance review is to be conducted and to exclude Councillors who have actual or perceived bias from being involved in the performance review process.

Discussion points

Currently, section 5.38 of the LGA requires that the CEO's performance is reviewed at least once in relation to every year of employment. The LGA does not prescribe the manner in which that performance review is to be conducted.

Additionally, the LGA should be amended to exclude Councillors who have actual or perceived bias from being involved fundamentally in the performance review process. A Councillor should be excluded, for example, when there is a current complaint made about that Councillor by the CEO. It is not uncommon for the CEO of a local government authority to be the one to make a complaint against a Councillor for a potential breach of the LGA or Regulations on behalf of the local government.