Second Reading

The Hon. MATTHEW MASON-COX (Parliamentary Secretary) [6.24 p.m.], on behalf of the Hon. Greg Pearce: I move:

That this bill be now read a second time.

I am pleased to introduce the Local Government Amendment Bill 2011. The bill fulfils the Government's ongoing commitment to improving efficiency and effectiveness in local government. Both the Government and the local government sector agree that there is a need to reshape the structure, governance and financing arrangements and the functions and capacity of the local government sector to better enable councils to serve their communities in a challenging and rapidly changing environment. This agreement has been unanimously endorsed recently at the historic Destination 2036 conference attended by the leaders of all 152 local councils in the State.

The proposals in the bill contribute to creating favourable conditions for councils to engage in structural reform to achieve a strong and sustainable local government sector now and in the future. The proposals will benefit councils and ratepayers by facilitating improvements in the effectiveness of local government generally. The proposals reduce the period of the employment protections provisions for council staff following amalgamations of councils; return to councils their body corporate status; introduce caretaker provisions to regulate council decision-making before ordinary elections; and extend the maximum term of the lease or licence of community land from 21 years to 30 years. They clarify provisions relating to pecuniary interests and provide pecuniary interest exemptions in relation to the adoption of standard local environmental plans. I seek leave to incorporate the balance of the second reading speech in *Hansard*.

Leave granted.

I now turn to the detail of the Local Government Act amendments.

The first proposal is designed to address concerns expressed by councils that the present special arrangements that exist for non-senior staff of councils affected by the constitution, amalgamation or alteration of council areas represent a disincentive for councils to engage in structural reform through voluntary amalgamations and other shared services arrangements.

The present employment protection provisions in the Act effectively prohibit councils from changing or appropriately adjusting their staff structures for a period of three years where staff transfers occur as a result of an amalgamation or boundary alteration. The bill proposes the reduction in that period from three years to one year.

Historically, the old Local Government Act 1919 in section 20C prescribed a three-year period for employment protections for council staff that were transferred. However, under the less prescriptive 1993 Local Government Act a broader approach was taken.

The second reading speech of 27 November 1992 explained that the provisions for the division of assets and liabilities after council areas had been altered, and the consequent transfer of staff were not continued. At page 10412 of *Hansard* Mr Peacocke, Minister for Local Government, and Minister for Cooperatives, noted:

In future such matters will be left for the relevant councils to negotiate according to modern management principles. Agreements reached on assets, liabilities and staff will be able to be given binding legal effect by proclamations, if desired.

As a result, section 20C of the old 1919 Act was not re-enacted in the 1993 Act. Instead provision was made for a proclamation of the Governor for the purposes of constituting areas to make such provisions as are necessary and convenient for the transfer of staff under section 213.

This section clearly leaves considerable power for the Minister to direct the reallocation of resources, including employees, following the constitution of a local government area.

This legislative regime had been successfully in operation for 10 years until 2004 when the then Labor Government amended the Act to insert a new part 6 into chapter 11 entitled "Arrangements for council staff affected by the constitution, amalgamation or alteration of council areas".

The amendments in part 6 prohibit councils from changing their staff structures where staff transfers occur as a result of an amalgamation or boundary alteration. In particular, section 354F prohibits councils from reducing their staff numbers for a period of three years. The employment provisions apply to all affected non-senior staff of a council, that is, transferred staff, existing staff of a transferor council and remaining staff of a transferor council.

Since the insertion of part 6 into the Act, those councils which underwent amalgamations for the purpose of improving their efficiencies and providing better services to their ratepayers expressed concerns that achieving any form of savings proved to be difficult because they were forced to carry the work forces of two or more councils without any extra resources.

As I mentioned earlier, more recently councils expressed concerns that the employment provisions in part 6 represent a disincentive for councils to engage in a local government structural reform through voluntary amalgamations and other shared services arrangements.

It is considered that the employment protection provisions in the current Act are overly prescriptive and fetter the ability of councils to have full control over the transfer of assets and staff where a restructure occurs due to amalgamation or reconstitution of local government areas.

It is further considered that the provisions represent a departure from modern management principles and limit a council's ability to determine its organisational structure in accordance with its workforce management plan—section 403 (2) of the Act—which forms an integral part of the new Integrated Planning and Reporting framework for councils.

Also, the provisions provide council employees affected by amalgamation or reconstitution of local government areas a level of employment protection not afforded to employees in other industries.

Finally, the power to ensure the protections listed in part 6, chapter 11 already lies with the Minister by virtue of section 213 of the Act. That section gives the Minister the power to make provision for the transfer of employees by proclamation.

The bill addresses all of the abovementioned concerns by reducing the period of employment

protection provisions from three years to one year. The period of one year will achieve the balance between the industrial rights of council non-senior staff and the ability of councils to shape their structures to enhance and streamline their management and operational processes.

The second proposal in the bill will return councils their legal status as bodies corporate.

The proposal was requested by the Local Government and Shires Associations of New South Wales [LGSA] as part of their NSW Election Priorities 2011. In response to that request I have given a commitment to the local government industry to consider reversing the legal status of councils from a body politic of the State to a body corporate.

In developing the proposal, the Division of Local Government consulted with NSW Industrial Relations.

By way of background, the Local Government Act was amended by the Local Government Amendment (Legal Status) Act 2008 in November 2008. The effect of the amendment was that the legal status of general purpose and county councils changed from a "body corporate" to a "body politic of the State".

The amendment was necessary to address the uncertainty as to whether or not local councils met the definition of a constitutional corporation, which is a financial or trading corporation, within the meaning of section 51 (xx) of the Australian Constitution.

That definition relies on the sources of income for each individual council and whether that income is the result of trading activity or from other forms of revenue.

The established approach of courts and tribunals was that questions of this nature are issues of fact, so that whether a particular council was a constitutional corporation or otherwise would be contingent on the particular activities of that council.

This uncertainty was made more acute by the operation of the Commonwealth Workplace Relations Act 1996 as amended by the WorkChoices legislation. The issue for local councils and their employees was therefore a question of whether they were in the Commonwealth or New South Wales industrial relations systems.
The amendment removed the uncertainty by changing the legal status of general purpose councils and county councils in section 220 of the Act from a "body corporate" to a "body politic of the State with the legal capacity and powers of an individual".

This amendment ensured that councils could not be characterised as constitutional corporations for the purposes of section 51 (xx) of the Australian Constitution and therefore could not be regarded as employers for the purpose of the Commonwealth Workplace Relations Act.

The amendment also ensured that local government employees stayed within the New South Wales industrial relations system.

In late 2009, the Federal Government made significant changes to its industrial relations laws. As a result, the Commonwealth Fair Work Act 2009 was enacted.

Following negotiations between the State and Federal governments in relation to the industrial coverage of private and public sector employers, the Federal Government recognised that certain entities are integral to State, Territory or local government

administration and agreed that the employment relationships of these entities may be appropriately regulated by States and Territories.

Accordingly, the Fair Work Act provides that a State may declare that particular bodies that are established either for a public purpose or for a local government purpose that might otherwise be caught by the national system are not national system employers. Any such declaration, however, is only effective if endorsed by the Commonwealth Minister.

In December 2009 all councils in New South Wales and a number of specified council formed entities were declared as non-national system employers for the purpose of the Fair Work Act.

The effect of the Declaration of Exclusion is that all councils are covered by the New South Wales State industrial relations jurisdiction.

As I mentioned earlier, the proposal was requested by the Local Governments and Shires Associations.

The Local Governments and Shires Associations is of the view that the status of councils as a "body politic of the State" negatively impacted on certain councils' activities. For example, according to the Local Governments and Shires Associations, councils experienced difficulty in obtaining federal funding for trainees and apprentices because the funding was only available to corporations and not individuals.

Also the Local Governments and Shires Associations asserts that councils reported being excluded from tendering for construction work on Australian government-funded projects because they did not have a federal industrial instrument and were therefore unable to comply with the National Code of Practice for the Building and Construction Industry and the associated implementation guidelines.

The Local Governments and Shires Associations also stated that it had received legal advice identifying potential problems for councils in relation to taxation arising from the different treatment of corporations and individuals under federal taxation law.

The Local Governments and Shires Associations noted that notwithstanding, the fact that councils are currently characterised as "bodies politic of the State", councils are nonetheless bound by some of the general protection provisions of the Commonwealth Fair Work Act 2009.

In conclusion, the Local Governments and Shires Associations stated:

As the industry focuses on the future by planning for inevitable change in a holistic and strategic way, it is necessary to create an environment that ... encourages a new way of working within councils, between councils and their communities. As local government in NSW considers improving service delivery through resource sharing it is therefore, apparent that there will also be a commercial need for councils to be once again characterised as bodies corporate.

The present position of the Local Governments and Shires Associations is that in light of the express exclusion of local government from the Commonwealth industrial relations system by the Commonwealth legislation, the legal status of councils can now be restored to bodies corporate without impacting upon whether councils belong to the State or Federal industrial

relations systems.

It is therefore proposed to amend the Act to provide that councils are bodies corporate.

The third proposal in the bill will amend the Act to enable regulations to be made that prevent councils from making major or controversial decisions during an election period that would bind an incoming council.

Recurring and significant problems are claims of inappropriate council decision making during the period leading up to council ordinary elections every four years.

The current Act does not provide for nor compel councils in New South Wales to observe a caretaker convention. However, prior to each local government election in 2004 and 2008 the Division of Local Government issued a circular to councils advising them that they were expected to assume a "caretaker" role during election periods as an accepted practice of responsible government.

The circulars emphasised that during caretaker periods councils should exercise due caution in making major policy decisions, including:

· determining controversial or significant development applications;

· new or potentially controversial permanent appointments of general managers;

· entering into major contracts or undertakings.

While councils are expected to consider and comply with circulars issued by the Division of Local Government and to ensure that major decisions were not made which would limit the actions of an incoming council, in the weeks leading up to the 2004 and 2008 ordinary elections the division received strong expressions of concern from the community regarding some councils' actions. These included controversial developments being fast tracked to avoid election deadlines, use by councillors of council resources such as the inappropriate use of council motor vehicles and secretarial services and the use of council employees for the distribution of how-to-vote material at polling places and other matters.

In Victoria, councils are required by Act to observe special caretaker arrangements during the period leading up to local government elections. Queensland has also introduced similar arrangements in the Queensland Local Government Act 2009 following review of local government electoral procedure.

It is proposed to amend the Act to introduce a regulation making power to list those matters that should not be determined by councils during a caretaker period that would commence four weeks, after further consultation, before their ordinary elections every four years. The matters will include the following:

· entering into a contract that exceeds a certain value, for example a value of $150,000 or 1 per cent of the council's revenue from rates in the preceding financial year, whichever is greater;

· making major decisions such as the employment of a permanent general manager or the determination of controversial or significant developments;

· publishing electoral matter unless it only contains information about the electoral process.

The proposed amendments will prevent a council from making major or controversial decisions during an election period that would bind an incoming council. They will also ensure transparency and accountability in decision-making during election periods and improve community confidence in councils.

The fourth proposal in the bill will change the Act to make the voting system in a contested election optional preferential where one councillor is to be elected and proportional representation where two or more councillors are to be elected.

Under the Act, a council must have at least five and not more than 15 councillors, one of whom is the mayor.

Currently, the system for counting votes in a contested election of a councillor or councillors for a ward or undivided area is to be optional preferential if the number of councillors to be elected is one or two, or proportional representation if the number to be elected is three or more—section 285. The system for election of a popularly elected mayor is Optional Preferential—section 284.

Of the councils that are divided into wards, 10 of those have less than three councillors per ward—all 10 having two councillors per ward.

This means that two voting systems currently apply in New South Wales for election of councillors in multi-vacancy electorates. The Proportional Representation system applies to 142 councils while the Optional Preferential system applies to the remaining 10.

Under the Optional Preferential system, to be elected, a candidate requires a majority—50 per cent plus one—of the formal votes in the count. If no candidate receives more than half of the first preference votes, a process of distributing votes takes place where one by one the candidate with the fewest votes is eliminated and those ballot papers are distributed to the remaining candidates according to the next preference shown on each ballot paper.

This process of elimination continues until one candidate has a majority of the votes. The method of counting votes under the Optional Preferential system is set out in schedule 4 to the Local Government (General) Regulation.

Under the Proportional Representation system, candidates need to obtain a quota to be elected. The quota is determined by dividing the total number of preference votes by one more than the number of candidates to be elected, and increasing the quotient by one.

Votes above the quota—surplus votes—may be transferred to other candidates according to the next preference shown on each ballot paper. If at any stage of the count there are no more surplus votes to transfer but not all councillors have been elected, the candidates with the fewest votes are eliminated and the ballot papers are distributed to the remaining candidates according to the next preference shown on each ballot paper.

This process continues until all councillors have been elected. The method of counting votes under the Proportional Representation system is set out in schedule 5 to the Local Government (General) Regulation.

The Optional Preferential system is generally used across all levels of government in single-

member electorates because this voting system is not designed to allocate seats or offices in proportion to the overall number of votes obtained by the candidates.

For this reason, the Proportional Representation system is generally used in multi-member electorates, and because this system does not require candidates to achieve vote majorities in order to be elected. It allocates seats or offices in proportion to votes won.

The use of the Optional Preferential system in multi-vacancy elections in conjunction with group voting is generally viewed as being unfair. For example, where the number one candidate on a group ticket receives an absolute majority and is elected, then following distribution of preferences the number two candidate on that group ticket is invariably elected at the expense of candidates who may have received a significant number of the first preference votes.

The Proportional Representation system is used in the multi-member electorates for the New South Wales Legislative Council and the Australian Senate while the Optional Preferential system is used in the single member electorates for the New South Wales Legislative Assembly and the Australian House of Representatives.

The voting systems for local government in other Australian States is similarly configured, Queensland being the exception with a simple majority voting system applicable in multi-vacancy electorates.

The Proportional Representation system is generally acknowledged as the fairest system for use in multi-vacancy electorates in that each section of the community receives representations according to its electoral strength. That is, the majority rules but substantial minorities are still represented in proportion to the number of votes cast for them.

In addition, the proposal ensures consistency in systems for counting of votes across all council areas.

This proposal was included in the Local Government Amendment (Elections) Bill 2008 which was introduced in the Legislative Assembly on 4 April 2008. At that time this proposal was supported by members of the Coalition in both Houses of Parliament.

During debate of that bill in the Legislative Assembly on 8 April 2008 Mr Chris Hartcher, MP, member for Terrigal, said of this proposal:

> It is important that if there is to be a proportional representation system that that system be consistent with other voting systems. Therefore, bringing local government elections into line with Legislative Council elections is to be supported, if that is the effect of the legislation.

The bill was then introduced to the Legislative Council on 9 April 2008 where Mr Don Harwin, MLC, said:

> I certainly welcome a number of specific changes in the bill, particularly the fact that councils which are divided into wards and which have only two councillors per ward will have proportional voting. That is appropriate, as I am on the record as saying previously.

However the bill was subsequently withdrawn as a number of amendments unrelated to this proposal were made to the bill in the Legislative Council and were unacceptable to the former Government.

This bill will amend the Act to make the voting system in a contested election optional preferential where only one councillor is to be elected, instead of one or two councillors, and proportional representation where two or more councillors are to be elected, instead of three or more councillors.

The fifth proposal in the bill will extend from 21 years to 30 years the maximum period for which a council may grant a lease or licence in respect of community land.

The Local Government Act 1993 requires all public land held by councils to be classified as either operational or community land.

Operational land generally includes land occupied by council offices, works depots, many car parks, et cetera, being mainly land used by the council in the practical provision of local government services within its area. The Act imposes minimal controls over the management, use or disposal of operational land by councils.

Community land includes parks, playgrounds and other land, formerly identified as public reserves and drainage reserves, being land intended to be preserved and used to meet the recreational, cultural, health, social, welfare, and similar needs of the community or for the general enjoyment of the public.

The Act prohibits the sale or exchange of community land and puts in place a system for the control and management of community land by councils and provides for public participation in that management process.

For example, the current maximum period under the Act for which councils can grant a lease or licence over community land is 21 years. This limits a council's power to alienate community land to 21 years.

The Act also recognises the need for leases or licences of community land to be granted for public purposes on a privately operated commercial basis in appropriate circumstances and subject to compliance with the tendering provisions—section 46A.

Before resolving to grant a lease for a term longer than five years, a council must comply with the following requirements of the Act:

· give public notice of the proposal

· include specified information in the notice

· accept written submissions during a 42-day submission period

· consider all written submissions received during that period.

If a submission in the form of an objection is received during the submission period, then the Act prohibits a council from granting the lease without the approval of the Minister for Local Government.

Eleven councils in the Hunter area, represented by Hunter Councils Inc., expressed concerns that particularly for leases of community land for commercial purposes, a longer period of up to 30 years is desirable.

In support of its proposal, Hunter Councils Inc. submitted that:

Increasingly, this [21 years] limitation is standing in the way of effective utilisation of the lands in question because of the commercial constraints such a period of time imposes. The proposed amendment will facilitate access to loans with an industry standard 30 year timeframe while at the same time preserving accounting and reporting regimes that ensure that councils are paying due regard to aspects of probity and assessment.
Wyong Shire Council also expressed support for the proposal to extend the maximum period for granting a lease or licence of community land to 30 years. The council submitted that the proposal would provide flexibility to councils, lessees and the community when considering the use of community land.

The Local Government and Shires Associations of New South Wales also support the proposal.

It is considered that the extended term of lease may strengthen the commerciality of a leaseholder by giving a longer period to amortise a loan and therefore provide them improved circumstances in sourcing loan options.

It is also considered that from a council perspective a 30-year lease or licence may allow a greater period of amortisation for capital expenditure. This in turn may encourage councils to maximise their capital expenditure on community land.

However, the Act recognises that classification as community land reflects the importance of the land to the community because of its use or special features.

The proposal in this bill therefore provides that a council may apply to the Minister for approval to grant a lease, licence or other estate in community land for a period from 21 to 30 years subject to the Minister being satisfied that the council has:

· met all requirements applicable to the granting of leases or licences over community land for a term not exceeding 21 years, that is, public consultation, consideration of submissions and other matters; and

· demonstrated that special circumstances exist to grant such approval.

The matters that may constitute special circumstances would include the need to secure finance or a need to have a longer period of the lease to receive a return on capital expenditure on the part of a proposed leaseholder or other matters.

The sixth proposal in the bill seeks to address the unintended consequence that flows following the introduction of misbehaviour provisions a number of years ago.

The Act prescribes a number of circumstances where a vacancy occurs in a civic office of a councillor.

One of those circumstances arises when a councillor is absent from three consecutive ordinary council meetings without the prior leave of the council.

However, if a councillor's absence occurs as a result of them being suspended from civic office by the Local Government Pecuniary Interest and Disciplinary Tribunal for a pecuniary interest breach under section 482, their civic office does not become vacant.

Section 482 prescribes the sanctions that can be imposed by the tribunal in relation to pecuniary interest matters and includes the power to suspend a councillor from civic office for up to six months where it finds a pecuniary interest complaint against the councillor proved.

Section 482A prescribes the sanctions that can be imposed by the tribunal in relation to misbehaviour matters and also includes the power to suspend a councillor from civic office for up to six months where it finds a misbehaviour complaint against the councillor proved.

However, the Act does not provide for an exemption similar to the one referred to above in relation to a civic office of a councillor suspended by the tribunal for misbehaviour.

To ensure consistency and to correct the unintended consequence, the bill proposes to amend the Act to provide that where a councillor's absence from three consecutive ordinary meetings is caused by suspension for misbehaviour, the councillor's civic office does not become vacant.

In the absence of this provision, should the tribunal suspend a councillor for misbehaviour for three months of more, the councillor would automatically lose their seat and a by election would be necessary unless it occurred 18 months prior to a general election.

The seventh proposal in this bill is aimed at clarifying that the exemptions in the Act allowing councillors and designated persons not to disclose their pecuniary interest in strictly defined circumstances cannot be relied upon where they have non-pecuniary conflicts of interests.

The Act provides that councillors and designated persons must disclose their pecuniary interests in any matter before council. However, section 448 of the Act contains a number of exemptions to that requirement.

For example, a councillor does not need to disclose their interest as an elector, a ratepayer, a member of a club unless that councillor is an office holder and has other interests.

Apart from pecuniary interests, councillors, council staff and designated persons may have conflicts of non-pecuniary interests. These are managed by the Model Code of Conduct.

The Model Code provides that a conflict of interests exists where a reasonable and informed person would perceive that a councillor could be influenced by a private interest when carrying out their public duty. The Model Code is prescribed by the Act.

An example is where a councillor is a member of a club which has a multimillion dollar development application before the council. As a member of the club the councillor could rely on section 448 (e) of the Act and not disclose the interest in so far as it constitutes a pecuniary interest.

This is because section 448 (e) provides that an interest as a member of a club or other organisation or association does not have to be disclosed by a councillor, unless the interest is as the holder of an office of the club or organisation, whether remunerated or not.

However, for the purposes of the Model Code of Conduct, this interest may also constitute a conflict of non-pecuniary interests so that a reasonable and informed person may perceive that the councillor may be influenced by that interest in making their decision on the club's development application.

On one view, section 448 may be interpreted to mean that councillors regardless of the nature of their interests, that is, pecuniary interest or a conflict of non-pecuniary interests, can rely on it and not disclose their interests.

This has never been intended. In the interest of open and transparent governance, these types of interests should be disclosed and managed in accordance with the provisions of the Model Code of Conduct.

To correct this unintended consequence this proposal will put it beyond doubt that section 448 exemptions may only be invoked by councillors where councillors have pecuniary interests.

The final proposal in this bill will greatly assist councils in implementing their area-wide standardised Local Environmental Plans.

Honourable members would be aware that amendments to planning legislation introduced by the Government in 2006 required all councils to implement a standardised local environmental plan for their local government areas in accordance with the Standard Instrument under the Environmental Planning and Assessment Act 1979.

As part of this process, councils are required to accommodate future residential and employment growth within their local government areas.

As at 31 July 2011, 126 of the 152 general purpose councils in New South Wales have yet to have their local government area-wide standardised instrument local environmental plans made.

Transferring a council's existing planning controls into the standardised instrument format is likely to result in some changes to the development potential of land throughout its local government area.

Consequently, many councillors in New South Wales have a pecuniary interest, in terms of the Local Government Act, in the preparation of a standardised instrument local environmental plans for their local government areas.

The Act requires a councillor or member of a council committee, such as a staff member, to orally declare a pecuniary interest arising in a matter before a meeting of the councillor committee and to not be present at the meeting at any time when the matter is being considered, discussed or voted on.

This, in turn, leads to many councils being unable to form or maintain a quorum to discuss and vote on their standard instrument local environmental plans.

Where such situations arise the Act recognises that in certain circumstances the interests of the electors of a local government area prevail over the requirement for councillors with pecuniary interests to leave the room and not even remain in sight of the meeting.

This is reflected in section 458 of the Act which authorises the Minister for Local Government to allow a councillor or a member of a council committee to participate in the discussion of, or vote on, a matter before the councillor committee despite having a pecuniary interest in the matter.

In order to grant such a dispensation, the Minister must be satisfied that either the council cannot form a quorum without the dispensation or that it is in the public interest of the electors for the area that the dispensation be granted.

In every case there must be a separate application by each councillor which precisely identifies that councillor's pecuniary interest or interests in the matter.

A councillor's pecuniary interest in a matter is defined in the Act as not only the pecuniary interests of the councillor but also the pecuniary interests of related persons, such as a spouse, de facto partner, relatives and employer.

The need to obtain such dispensations is causing significant delays to the implementation of standardised instrument local environmental plans across New South Wales.

Not only may pecuniary interests arise and be identified at the outset of the implementation process, they may also arise and be identified during the course of the process, for example, by reason of a proposed amendment to a draft standardised instrument local environmental plan.

In each case, where the pecuniary interests of the councillors are such that the council is unable to form or maintain a quorum, the process may not be commenced or continued until new applications have been prepared and dispensations granted.

For the above reasons, this final proposal in the bill will allow councillors to be present and take part in a meeting and vote on a matter in which they have a pecuniary interest if the matter relates to the making, amendment or alteration of a local environmental plan that applies to either an entire local government area or a significant part of it.

However, a level of transparency and accountability will be retained by requiring councillors to disclose an interest in the local environmental plan where one exists. To this end, the bill proposes that the regulations be amended to prescribe a form and content of disclosure by councillors. The usual penalties for a failure to disclose such an interest will apply.

Finally I note that the Division of Local Government has consulted with the Department of Planning and Infrastructure regarding the proposed amendments. The Department is supportive of the proposed approach and considers that the amendment should progress urgently to enable the standard instrument local environmental plan program to proceed without delay.

In closing, I reinforce that the Government looks forward to local councils embracing these changes to the Act to continue the improvements in delivering quality services to their communities in a sustainable manner.

I commend the bill to the House.