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Local Government Amendment (Governance and Planning) Bill 2016

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1. Introduction

Given their instrumental role in both the everyday events of communities and the planning of local places and neighbourhoods, the inner-workings of the local government sector in NSW have long attracted public scrutiny. Recent wide-reaching, and at times controversial, reforms to the sector have generated significant media attention and increased levels of public interest.

Central to these reforms is the Baird Government's \$1 billion [Fit for the Future](#) (FFTF) package, launched in September 2014. Whilst the majority of media attention has focused on the local government amalgamations, other less controversial changes have also been introduced.

The most recent of these are encapsulated in [Phase 1](#) of the Government's broader reform of the [Local Government Act 1993](#) – the [Local Government Amendment \(Governance and Planning\) Bill 2016](#) (Governance and Planning Bill), introduced in the Legislative Assembly on 22 June 2016. This Bill aims to improve the performance, transparency, governance and accountability of local councils in NSW.

This e-brief summarises recent and proposed local government reforms, including those contained in the Governance and Planning Bill. The Bill's key provisions are set out alongside the relevant recommendations of two Government-commissioned reports.

2. Recent legislative and policy reforms

2.1 Independent Local Government Review Panel and Local Government Acts Taskforce – October 2013

The financial and structural issues of the local government sector have rarely been absent from the NSW political agenda. These issues were earmarked as priorities for the newly elected O'Farrell government in 2011 where, amongst other developments, it appointed the [Independent Local Government](#)

[Review Panel](#) (the Panel) to conduct a wide-ranging review of local government. On 21 October 2013 the Panel released its final report, [Revitalising Local Government](#), concluding that “no change is not an option”.¹ It claimed that:

Local government in NSW needs a new agenda and a fresh start. The same applies to its relationship with the State government and how the two work together in practice.²

Alongside the Panel, a [Local Government Acts Taskforce](#) (the Taskforce) was appointed to rewrite the [Local Government Act 1993](#) (the LG Act) and examine the [City of Sydney Act 1988](#). It delivered its [final report](#) in October 2013. Whilst it supported the [City of Sydney Act 1988](#) in its present form, it strongly advocated a fundamental restructuring of the LG Act, based around the [integrated planning and reporting framework](#) developed by the Office of Local Government (OLG) in 2009.

2.2 Recent reforms including Fit for the Future – September 2014

With the key recommendations of the Panel and the Taskforce in mind, the Government responded with the [announcement](#) of the Fit for the Future (FFTF) reform package on 10 September 2014. It also released a document outlining its [response](#) to their specific proposals.

The FFTF reforms fall into three categories:

1. Creating new councils
2. Improving council performance
3. Strengthening the system of local government

Points 2 and 3 are addressed, in part, by the Governance and Planning Bill (see section 3). Recent non-FFTF reforms include two bills that have dealt with councillor misconduct and integrity (see sections 2.2.1 and 2.2.3).

The General Purpose Standing Committee No. 6 conducted an [inquiry](#) into local government in NSW, completing its [final report](#) in October 2015. The report made a number of observations about the progress of the FFTF reforms; [key recommendations](#) for the Government included:

- Recommendation 11: commit to a policy of no forced amalgamations of local councils, except in circumstances where it can be established that a council is severely financially unsustainable to the point of bankruptcy or unable to maintain an acceptable level of service provision.
- Recommendation 13: encourage local councils with council-elected mayors to initiate a referendum on whether the mayor should be popularly elected or elected by councillors.
- Recommendation 14: seek to amend the Local Government Act 1993 to increase to two years the period a mayor elected by the councillors is to hold office.³

2.2.1 Regulation of councillor misconduct – December 2015

Whilst not officially part of the FFTF program, a number of related amendments were made to the LG Act in December 2015. Section 451, which previously allowed councillors to vote on a large-scale planning issue in an area where they also had multiple pecuniary interests, received specific attention with the introduction of the [Local Government Amendment \(Councillor Misconduct and Poor Performance\) Act 2015](#). With the OLG having recently [commenced proceedings](#) against Auburn Deputy-Mayor Salim Mehajer in the NSW Civil and Administrative Tribunal, Minister Toole noted that the Bill was intended to address:

...the understandable community disquiet at the potential for misuse by councillors who are property developers of the provisions of section 451.⁴

Section 451 was amended so that councillors are now only permitted to vote on matters where the pecuniary interest affected is their principal place of residence. Any additional interests in an area will require a councillor to abstain from voting.

The Act introduced the following key changes:

- Disqualification from holding civic office for a period of 5 years for a councillor who has been suspended for misconduct three times.
- Expansion of the definition of ‘misconduct’ to include conduct that is intended to prevent the proper or effective functioning of a council.
- Streamlining of the process for dealing with councillor misconduct to ensure faster but fair outcomes.
- Requiring a councillor to comply with any Performance Improvement Order issued to their council or face suspension.⁵

2.2.2 Council amalgamations and the Stronger Communities Fund – May 2016

Council amalgamations are not a new concept to NSW, with council numbers having fallen from 324 in 1910 to 152 prior to the 2015 amalgamations. Indeed, according to Kortt and Wallis, a “curious feature” of Australian State and Territory governments has been their particular “penchant for structural reform of local government...by compulsory council consolidation”.⁶

Having campaigned on a policy of “no forced amalgamations”⁷ during the 2011 election campaign, the Liberal-National Coalition began to reverse its position prior to the return to the polls in 2015. It announced the Fit for the Future reform package in September 2014, which invited councils to review their performance and consider options – including reform – for the future. In total, 139 proposals were received from 144 councils. These proposals were then reviewed by the Independent Pricing and Regulatory Tribunal (IPART), which deemed councils either “fit” or “not fit” for the future in its [final report](#) in October 2015.⁸

Having previously only referred to amalgamations as being voluntary, under a [proclamation](#) issued by the Governor of NSW on 12 May 2016, 19 new

councils were created via compulsory merger. The [Stronger Communities Fund](#) was established in October 2015 in order to assist with the financial costs of these amalgamations – both compulsory and voluntary. Under this program, \$10 million will be provided to a new council formed as a result of two councils, or parts of two councils, merging. A new council formed as a result of three or more councils merging will be eligible to receive \$15 million. Temporary administrators were also appointed until the next election period, which for the amalgamated councils will take place in September 2017. Councils that did not amalgamate will face election on 10 September 2016.

On 15 April 2016, Botany Bay Council [unsuccessfully appealed](#) the outcome of the Land and Environment Court's decision to dismiss its summons seeking judicial review of its proposed amalgamation in the Court of Appeal. As of 1 August 2016, [12 council merger proposals](#) were pending, with 7 awaiting the outcome of their challenge against their amalgamation in the Land and Environment Court.⁹ On 1 August 2016, Woollahra Council [launched an appeal](#) in the NSW Court of Appeal, following the [dismissal of its challenge](#) to its proposed merger with neighbouring Waverley and Randwick councils.

2.2.3 Local Government and Elections Legislation Amendment (Integrity) Act 2016 – July 2016

Unlike State elections, local government elections and candidates had previously been exempted from donations caps under [section 95AA](#) of the [Election Funding, Expenditure and Disclosures Act 1981](#). Following the introduction of the [Local Government and Elections Legislation Amendment \(Integrity\) Act 2016](#) these exemptions were repealed and the following caps introduced:

- \$5000 on political donations to or for the benefit of a registered party;
- \$2000 on political donations to or for the benefit of:
 - a party that is not a registered party, or
 - an elected member, or
 - a candidate, or
 - a third-party campaigner.

The Act also:

- prevents councillors from making decisions on planning matters in which they or a relative have a pecuniary interest, where the permissible use of land is not being altered;
- forces councillors to hand over any financial benefit they have received if they voted in a matter in which they had a pecuniary interest;
- requires candidates at Local Government elections to disclose that they are a property developer or associate of a property developer;

- bans people convicted of a crime within the past seven years from standing for council if that crime carries a potential jail term of five years or more; and
- restricts people convicted of a court offence under the Election Funding Act from standing for council for two years.¹⁰

Whilst it had been anticipated that accompanying expenditure caps would be introduced in the same Act, an OLG [media release](#) dated 22 June 2016 stated:

Local government expenditure caps will be implemented as part of a broader review of the State's election funding laws once the Joint Standing Committee on Electoral Matters delivers its review of the Schott report on political donations.

The NSW Electoral Commission has advised that it would not be possible to implement expenditure caps in time for the September 2016 elections.¹¹

3. Local Government Amendment (Governance and Planning) Bill 2016

3.1 Purpose of the Bill

Introduced in the Legislative Assembly on the 22 June 2016, the purpose of the [Local Government Amendment \(Governance and Planning\) Bill 2016](#) was described in the Second Reading speech as:

...start[ing] the journey away from process-focused local governance towards principle-focused governance...¹²

The Bill proposes a range of changes, including:

- streamlining the integrated planning and reporting framework and increasing its prominence in the Act;
- the introduction of new purposes for the Act and guiding principles for local government;
- clarification of the roles and responsibilities of councillors, mayors, administrators and general managers,
- the improvement of governance of councils and professional development for councillors;
- the consolidation of the ethical conduct obligations of councillors;
- the appointment of the Auditor-General as the auditor of all councils; and
- new methods of performance management

3.2 The integrated planning and reporting framework

A primary recommendation of the Taskforce was that the integrated planning and reporting (IPR) framework currently contained in section 406 of the LG Act be elevated to "form the central framework of the new Act".¹³ Introduced in 2009, the IPR provisions were designed to provide a uniform strategic planning mechanism to be used throughout the entire local government sector in NSW. Due to its current position in the current LG

Act, the Taskforce did not believe the IPR functioned effectively or received appropriate attention. To combat this, it recommended that reference to the framework in the amended LG Act occur both earlier on and with more frequency. According to the Taskforce, this would help to:

...develop a streamlined Act that eliminates unnecessary red tape and duplication. More importantly, the IPR framework will support more autonomy for councils which engage effectively with their communities to deliver outcomes that the community has identified as essential for its wellbeing and long-term sustainability.¹⁴

The Bill proposes reference to this framework as early as section 8A (Guiding principles for councils), together with sections 8C (Integrated planning and reporting principles that apply to councils), 232 (The role of a councillor), 406 (Integrated planning and reporting guidelines) and 438HC (Operations of financial controller).

3.3 Purposes of Act and principles for councils

Based on the views of the submissions it received during the consultation period, the Taskforce recommended that the purposes of the Act set out in section 7 be consolidated into three subsections. Section 7, as proposed by the Bill adopts the recommendation in principle, while splitting the purposes into five subsections:

- (a) to provide the legal framework for the system of local government for New South Wales,
- (b) to set out the responsibilities and powers of councils, councillors and other persons and bodies that constitute the system of local government,
- (c) to provide for governing bodies of councils that are democratically elected,
- (d) to facilitate engagement with the local community by councils, councillors and other persons and bodies that constitute the system of local government,
- (e) to provide for a system of local government that is accountable to the community and that is sustainable, flexible and effective.

The proposed section 7 removes a number of key provisions from the existing section, in particular, the references to resource management (section 7(d)) and ecologically sustainable development (section 7(e)). Reference to ecologically sustainable development has been relocated to the proposed section 8A(2), where it is listed as a principle to apply to a council's decision-making.

Complementing these streamlined purposes in section 7, the provisions of Chapter 3 concerning principles for local government have been expanded significantly in the Bill. Based on the feedback received during consultation, the Taskforce recommended that the Act clearly articulate the role and guiding principles for local government. It appears that this recommendation played a clear role in the Government's drafting of the proposed Chapter 3.

The principles cover three areas: general guidance; sound financial management; and integrated planning and reporting principles that apply to councils. In the Second Reading speech the Minister noted:

These principles are both guiding and aspirational. They are not intended as binding rules, but they set down in writing what we expect from local government.¹⁵

Overall, the principles focus on meeting community expectations and attempt to ensure that, in the exercise of their functions, local government stands up to public scrutiny.

3.4 Roles and responsibilities and improved governance

Both the Panel and Taskforce noted that the lack of clarity around the roles and responsibilities of council officials in the current LG Act tended to create confusion. The Bill seeks to address these issues by introducing more detailed job descriptions in Chapter 3, further clarifying the roles of the governing body, elected councillors and mayor amongst others.

Governing body

Proposed amendments to the role of the governing body under the new section 223 are designed to replace its previous “board-like” description. Under the current LG Act, the role of the governing body is to:

...direct and control the affairs of the council in accordance with this Act.

The new section 223 proposed by the Bill is considerably longer. It sets out 12 new roles for the governing body which the Minister argues will:

...further sharpen the distinction between the functions of the governing body – in which councillors must act collectively – and the role and responsibilities of an individual councillor¹⁶

Councillor

The role of an individual councillor is set out in section 232 of the LG Act:

...the role of a councillor is divided into two parts: as a ‘member of the governing body’ and as an ‘elected person’. The former is seen as deliberative – planning, resource allocation, policy development and performance monitoring... The role of the councillor as an elected person is described in terms of community representation, leadership and communication. This is more clearly ‘political’ and includes those functions that most councillors would regard as fundamental to being re-elected.¹⁷

The Government’s [response](#) to the Panel’s report suggested many councillors did not fully grasp the difference between their two roles as individual councillors and members of the governing body. The Bill therefore proposes to amend section 232 to further emphasise the different requirements of each of the two roles, as recommended by the Panel.

Following on from a recommendation of the Taskforce, the Bill also proposes the insertion of a new section 233A which would require a councillor to take an oath or affirmation before the first meeting of the council. According to the Taskforce, the insertion of an oath is:

...a mechanism for inducting councillors into their role and reinforcing the serious nature of the role and the chief responsibilities and duties the role entails.¹⁸

The [Explanatory Paper](#) noted:

Both Victoria and Queensland require their councillors to take an oath of office. It is proposed that the NSW law should operate in a similar way to Victoria and Queensland.¹⁹

Mayor

As currently set out in section 226 of the Act, the role of the mayor is:

- to exercise, in cases of necessity, the policy-making functions of the governing body of the council between meetings of the council
- to exercise such other functions of the council as the council determines
- to preside at meetings of the council
- to carry out the civic and ceremonial functions of the mayoral office.

On this section the Panel noted:

Both internationally and in some other states increasing emphasis is being placed on the mayor as a means of strengthening civic leadership including representing the local community in regional, state and national forums. The trend has been highlighted by recent changes to local government Acts in Queensland and New Zealand. Emerging features of the role of mayors include:

- Formulating a vision for the area, and playing a leading role in community engagement, strategic planning and policy development
- Close involvement in preparation of the budget, so that the mayor can become a champion for its adoption and consistent implementation
- Leading the councillors to ensure good governance
- Forging partnerships with government agencies, other service providers, business and community groups
- Providing advice and strategic direction to the CEO (General Manager).²⁰

The Panel recommended that further authority and a greater leadership role be granted to mayors, suggesting that a provision be made for the appointment of full-time mayors. It also recommended that mayors be permitted to choose their deputy-mayor and propose a committee structure for the council. It argued:

The Panel's focus is on better defined *responsibilities* which will add *stature and authority* to the role of mayors, but not increased *powers*. The responsibilities suggested...are all based on established practice elsewhere and should be detailed in the Act.²¹

The amendments proposed by the Bill with respect to mayoral roles do not go as far as the Panel recommended. They omit many of the recommendations designed to grant the mayor greater authority over other councillors and make no reference to the provision of full-time mayors. In response to the Panel's recommendations, the Government noted:

The Government recognises the important role of the Mayor in providing leadership to the council and the community. It recognises that the role of Mayor will inevitably vary given the size of the council and the nature of the community, and believes it is for the council to determine the appropriate time required to fulfil this important strategic role.²²

Both the Panel and Taskforce recommended an increase in mayoral terms. Under an amended section 230, the term for mayors elected by councillors would increase from 1 to 2 years. According to the Second Reading speech, this was proposed as a measure of improving governance across all councils.²³ The media has suggested that the proposed amendments are also designed:

...to stop politicking for the top job which begins almost immediately after a mayor is elected.²⁴

The Panel supported this idea, arguing that annual elections create unnecessary instability and the risk that councillors will simply 'take turns' rather than taking the role seriously.

The major point of divergence between the Panel's recommendations and the Government's Bill lies in the method of electing the mayor. The Panel believed that, as in other jurisdictions, including Queensland, Tasmania and New Zealand, mayors should generally be popularly elected. At present, the majority of mayors are elected by the councillors, as opposed to being directly elected by the community. Overall, the Panel called for:

- Mandatory direct election of mayors in all metropolitan councils, in other councils with populations of 40,000 or more, and in designated regional centres;
- Elsewhere, election of the mayor to be either directly by the voters or by the councillors, with the default position remaining election by the councillors; and
- Requirement that all councillors vote in an election to choose the mayor.²⁵

The Panel argued that a new system of mandatory direct election would be strengthened by clearer enunciation of the mayoral role (see previous discussion), thereby permitting popularly elected mayors to discharge their responsibilities without unwarranted interference.

Whilst the Government stated that it supported these suggestions in principle, most of the Panel's recommendations were not incorporated into the Bill. There is no inclusion of a change to mandatory direct elections, the Government having instead stated that it will "give further consideration...to greater powers for the community to decide if they wish to have a directly elected mayor."²⁶ Interestingly, whilst no mention is made in the Bill, the Government has said that it will make voting for the mayor compulsory for councillors prior to the local government elections in September 2016.²⁷

3.5 Consolidation of the ethical conduct obligations

The ethical conduct obligations of local government representatives are currently contained within two parallel schemes in the relevant legislation: those contained within the current [model code of conduct](#) (made under [Chapter 14, Part 1](#)), and those contained within the pecuniary interest sections ([Chapter 14, Part 2](#)).

According to the OLG's Explanatory Paper:

The separate regulation of the obligation of council officials to disclose and appropriately manage pecuniary conflicts of interests is a historical anomaly that arose from the fact that these provisions predated the prescription of a Model Code of Conduct and the provision for a disciplinary regime with respect to councillor misconduct.²⁸

Whilst the Taskforce commented that the contents of the current code of conduct were adequate, it did note its concern with the language of the pecuniary interest provisions. It recommended that these sections of the LG Act be re-written in plain language so that they can be easily understood by those who are required to abide by them.

3.6 Appointment of the Auditor-General

Under the current audit provisions of the LG Act, councils have the discretion to appoint an accredited auditor of their choosing, subject to the requirements of sections 422 and 423. One of the changes proposed by this Bill is the removal of this discretionary power and the insertion of the requirement that the Auditor-General conduct audits for all councils. This amendment was given particular focus in the Minister's Second Reading speech:

Most importantly, under the amendments introduced by the bill, councils will become subject to oversight by the Auditor-General for their general audits and those of their subsidiary entities from this financial year. This is a major reform that brings New South Wales into line with most other Australian jurisdictions and New Zealand, and that will provide greater consistency and certainty across the sector. It will also ensure that reliable financial information is available that can be used to assess councils' performance and for benchmarking.

The Auditor-General is independent of the Government. She is accountable directly to the Parliament in relation to the exercise of her functions. The Auditor-General will be free to engage private sector auditors to assist her with her new responsibilities. The Audit Office anticipates that such contractors would be engaged after a competitive tender process. This is also similar to other jurisdictions. I am advised that the expectation of the Audit Office is that the majority of council audits will be delivered through contracted auditors who are accredited by the Auditor-General, with the Auditor-General conducting a small number in house. The Audit Office has committed to working with councils' current audit firms, where they are accredited, over the transition period.

...The Auditor-General will also be empowered to conduct sector-wide performance audits to identify trends and opportunities for improvement across the sector. This is similar to her powers in relation to State Government agencies and will be a very important new source of guidance for both councils and the State Government.²⁹

Along with the responsibility for conducting audits for all councils, it is proposed that the Auditor-General be granted new powers under section 421B to conduct issues-based performance audits in key areas at their discretion. This was a recommendation of the Panel, and as noted in the Explanatory Paper:

...such audits have been conducted by the Victorian Auditor-General for many years. Topics are selected in consultation with the sector, and recent audits have covered important issues such as rating practices, sustainability of small councils, business planning, fees and charges, and use of development contributions. They usually involve a small sample of representative councils. The audits do not question the merits of councils' policy objectives. Rather, the purpose of the audit is to assess whether councils are achieving their objectives and operating economically, efficiently and effectively.³⁰

3.7 Performance management

Methods of performance management are currently contained in Part 6 of the LG Act and grant certain powers to the Minister in circumstances of poor or non-performance. Under a proposed section 438HB the Minister would also be able to appoint a financial controller to a council in cases where a performance improvement order has also been issued. This is considered an additional remedy available to the Minister before the need to appoint an administrator becomes necessary.

This power is modelled on those available in Queensland, rather than on a recommendation of the Independent Panel or Taskforce. It is designed to broaden the options available to the Minister to improve council performance in cases of real financial risk, without having to resort to appointing an administrator.

4. Conclusion

Whilst a number of councils are still challenging the amalgamations in the Land and Environment Court, 76 councils will go to the polls on 10 September 2016. If the amendments proposed in the Bill are passed, councils returning to office after these elections will encounter the challenge of understanding their new roles in the face of continued public scrutiny. With Phase 2 of the LG Act reforms still to be announced, it is likely that local government issues will continue to be a feature of the political agenda.

¹ NSW Independent Local Government Review Panel, [Revitalising Local Government](#), Final Report, October 2013, p 77.

² Ibid. p 7.

³ General Purpose Standing Committee No. 6, [Local Government in New South Wales](#), Recommendations, 29 October 2015.

⁴ P Toole, [Second Reading Speech](#), NSW PD, 16 September 2015, p 5.

⁵ [Local Government Amendment \(Councillor Misconduct and Poor Performance\) Act 2015](#)

⁶ Michael A Kortt and Joe Wallis, *Forced Amalgamations: Lessons from Victoria, Perspectives on Australian Local Government Reform* (2015), p. 132.

⁷ Page D, [Government sticks to election promise of no forced amalgamations](#), Media Release, 21 March 2013.

⁸ Independent Pricing and Regulatory Tribunal, [Assessment of Council](#)

[Fit for the Future Proposals](#), Final Report, October 2015, pp 2-3.

⁹ Local Government NSW, pers. comm., 1 August 2016

- ¹⁰ Office of Local Government, [Council integrity legislation passed](#), Media release, 22 June 2016.
- ¹¹ Ibid.
- ¹² P Toole, [Second Reading Speech](#), NSW PD, 22 June 2016, p 55.
- ¹³ Local Government Acts Taskforce, [A New Local Government Act for New South Wales and Review of the City of Sydney Act 1988](#), Final Report, 16 October 2013, p 6.
- ¹⁴ Ibid. p 6
- ¹⁵ P Toole, [Second Reading Speech](#), NSW PD, 22 June 2016, p 55.
- ¹⁶ Ibid.
- ¹⁷ Ibid.
- ¹⁸ Local Government Acts Taskforce, [A New Local Government Act for New South Wales and Review of the City of Sydney Act 1988](#), Final Report, 16 October 2013, p 49.
- ¹⁹ Office of Local Government, [Towards New Local Government Legislation Explanatory Paper: proposed Phase 1 amendments](#), 2015, p. 9.
- ²⁰ NSW Independent Local Government Review Panel, [Revitalising Local Government](#), Final Report, October 2013, p 63.
- ²¹ Ibid. p 64.
- ²² Office of Local Government, [Independent Local Government Review Panel recommendations and Local Government Acts Taskforce recommendations](#), NSW Government Response, September 2014, p. 10
- ²³ P Toole, [Second Reading Speech](#), NSW PD, 22 June 2016, p 55.
- ²⁴ Anne Davies, [Local Government Act overhaul could hasten council amalgamations](#), Sydney Morning Herald, 11 August 2015.
- ²⁵ NSW Independent Local Government Review Panel, [Revitalising Local Government](#), Final Report, October 2013, p 65.
- ²⁶ Office of Local Government, [Independent Local Government Review Panel recommendations and Local Government Acts Taskforce recommendations](#), NSW Government Response, September 2014, p. 10.
- ²⁷ Ibid. p. 9.
- ²⁸ Office of Local Government, [Towards New Local Government Legislation Explanatory Paper: proposed Phase 1 amendments](#), 2015, p. 18
- ²⁹ P Toole, [Second Reading Speech](#), NSW PD, 22 June 2016, p 55.
- ³⁰ Office of Local Government, [Towards New Local Government Legislation Explanatory Paper: proposed Phase 1 amendments](#), 2015, p.26.

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