Submission on Review of Local Government Act 1989

Jointly submitted by:

Wyndham City,
Brimbank City Council and
City of Moonee Valley

18 December 2015

PART 1 – INTRODUCTION TO SUBMISSION

This Joint Submission is made by the following councils **Wyndham City, Brimbank City Council and the City of Moonee Valley**:

It is intended to complement a submission made by any of the councils individually, including an Addendum provided by Brimbank City Council (Attached).

The councils have a common view about a number of issues canvassed in the Discussion Paper. This Submission gives voice to this common view. It does *not* address every question asked by or issued raised in the Discussion Paper. Rather, it concentrates on selected questions and issues in respect of which a common view is held.

The Submission is structured by reference to the Chapters contained the Discussion Paper. So, for example, Part 2 of the Submission addresses some questions posed by and issues canvassed in Chapter 2 of the Discussion Paper.

Before addressing these matters specifically, however, something should be said about themes which pervade the Discussion Paper. The themes involve the tension between local sector autonomy (on the one hand) and State oversight (on the other hand), the extent to which council roles and functions should be appropriately described and the level of prescription to which any new *Local Government Act* (**new Act**) should descend.

Autonomy v State Oversight

The Discussion Paper explicitly refers to 'the appropriate balance between state government oversight and sector autonomy'.[1] It is a theme which is developed throughout the Discussion Paper.

It is acknowledged that the State Government has a legitimate interest in ensuring that the Victorian local government sector operates effectively and efficiently. To that end, it is understandable that a new Act may contain provisions which reserve powers of oversight or even intervention to the State Government. Such provisions should, however, be exceptional. Consistent with what is said in Part IIA of the *Constitution Act 1975*, Victorian local government should be seen as an essential tier of government which is both autonomous and democratic in character.

A new Act should, therefore, optimise the autonomy conferred on councils. Councils should be free to make decisions in the best interests of the communities that they represent. Legislative provisions which unnecessarily circumscribe this freedom will not be supported.

This Submission emphasises the importance of autonomy. The councils accept that, in return for a grant of autonomy, all councils should be:

1. transparent in their decision-making; and

2. accountable for the decisions which they make.

The requirements of transparency and accountability will, for the most part, be effective substitutes for unduly restrictive processes or procedures or reporting designed to support State Government oversight.

Take procurement as an example. This Submission will advocate for the existence of a general power to contract, without the constraints currently found in s 186(1) of the *Local Government Act 1989* (**the existing Act**). Councils should be able to procure goods, services or works of *any* value without having to undertake a tender (or, for that matter, other competitive) process.

Any risk that a council could abuse such a broad-ranging power can be overcome by insistence upon transparency and accountability in the procurement process. The council should keep a record of all contracts entered into, with an explanation as to why the contract was procured in the way that it was. Its

[1] See pg. 14.

publicly accessible explanation about the procurement method it employed makes it accountable to its ratepayers and residents.

Other examples could be given. The central point is that the 'balance' referred to in the Discussion Paper can best be maintained by giving emphasis to autonomy and relying upon transparency and accountability mechanisms for ensuring that the autonomy is not abused.

Roles and Functions of Councils

The councils accept that the roles and functions of the Victorian local government sector will alter over time. In a sense, the roles and functions evolve, whether on account of changes in demographic or community expectation or cost shifting from other tiers of government.

This makes it impossible (and potentially counter-productive) to fix the roles and functions with any certainty. While some characteristics will be perpetual others might not.

Despite this, the councils support the concept of the new Act describing the general roles and functions of Victorian councils. In the existing Act, s 3D attempts to describe the role of a council while s 3E endeavours to describe the functions of a council.

Section 3D's description of the role of a council is a sound one. There is no reason why it could not be replicated in a new Act.

Section 3D's articulation of council functions is less appealing. It is appreciated – as the Discussion Paper points out[2] – that the functions are cast in wide terms, and that this widely cast provision replaced a Schedule which listed a series of specific functions. The latter risked being construed narrowly, and meant that councils could not, without reference to a listed function, justify what would otherwise be a very legitimate involvement in an activity occurring within their municipal districts.

The broadly-expressed functions in s 3E(1) of the existing Act do not, however, adequately capture the range of activities undertaken by councils. Nor do they easily accommodate inter-governmental collaboration or shared service arrangements. Although a generic (rather than specific) approach to the description of functions is supported, a more contemporary and less theoretical statement of functions is recommended.

Level of Prescription

The councils are conscious that a lack of prescription can sometimes lead to uncertainty of application. In the past there have been instances of councils advocating for more enabling (and less prescriptive) legislation only to question why, when the enabling legislation has been passed, the legislation now fails to provide sufficient guidance on what councils are meant to do.

As a general proposition, though, prescription is undesirable. Given the choice between provisions which are enabling and provisions which are prescriptive, the councils unreservedly support the former. Prescriptive provisions should only appear in the new Act were they are absolutely necessary.

A balance must therefore be maintained between provisions which are enabling and provisions which are prescriptive. Prescriptive provision should appear only where they are necessary to ensure certainty and clarity of operation.

Ultimately, the councils' vision for a new Act reflects the vision of the New South Wales Local Government Acts Taskforce (**the NSW Taskforce**) for its State's legislation. In its 2013 Report to the New South Wales Minister for Local Government – *A New Local Government Act for New South Wales and Review of the City of Sydney Act 1988* – the NSW Taskforce envisaged:

[2] See pg. 19.

> principles-based, enabling legislation that is streamlined, easily understood, in a logical framework, eliminates unnecessary red tape and will provide a legislative and statutory framework to meet the current and future needs of the community of the local government sector.[3]

PART 2 – THE ROLE OF COUNCILS

General Power of Competence

The councils support the existence of a general power of competence (rather than a series of powers which are prescribed). Broadly speaking, they support the approach of the Local Government Charter contained in the existing Act – a general power of competence linked to functions which are, in turn, linked to the role and, ultimately, the objectives, of the council. In other words, the rationale behind sections 3C, 3D, 3E and 3F of the existing Act is logically sound and appropriately leads to a grant (in section 3F) of a general administrative power.

It is not as the grant of a general power of competence is unqualified. Courts have interpreted, and presumably will continue to interpret, legislation conferring broad powers on councils by reference to accepted notions of municipal concern.[4] This contextual limitation is ordinarily accompanied by a textual limitation, ensuring that the general power of competence is subject to any limitations or restrictions imposed by or under any other legislation.[5]

This support for the existing Act's approach to conferring a general power of competence is not, however unequivocal. If a general enabling power is to be linked to the functions of a council then it is important that those functions sufficiently describe the activities which can be undertaken by councils. Mention has already been made of the deficiencies in section 3E of the existing Act, and of the need for a fresh approach to the articulation of council functions.

Further, the existing Act embodies a confused relationship between the general grant of administrative power set out in section 3F(1) and a series of more specific powers described in succeeding provisions of the Act. Sometimes what purport to be specific powers are not really powers at all. Rather, they are processes or procedures which need to be followed in the exercise of a power.[6]

It is important that a new Act better describe the nexus between the general power of competence and other – more specific – provisions which assume the existence of a power but limit the scope or exercise of that power in some way.

Penalties

The councils do not support the concept of penalties for non-compliance with a duty or obligation imposed on a council.

There are numerous instances of the Victorian Parliament creating (or providing for the creation of) bodies and imposing duties, and conferring functions and powers, on such bodies. It is extremely rare to find examples of bodies being subjected to the risk of a penalty if a duty is not performed. There appears to be no warrant for councils being subjected to special treatment in this regard.

It is not as though a failure to comply with any duty or obligation imposed by a new Act will go unpunished. There is the potential for:

1. a person with the requisite legal standing to bring a proceeding in a Court (and perhaps obtain the Prerogative Writ of Mandamus to compel performance of a duty or obligation);

2. an investigation or inquiry by an external body or agency (such as the Ombudsman or Local Government Investigations and Compliance Inspectorate); and/or

[3] Taskforce Report (16 October 2013 pg 9).
[4] See, for example, *Lynch v Brisbane CC* (1961) 104 CLR 353, 364 and *Jovanovic v Southorn* [1987] Tas. R. 7.
[5] See section 3F(1) of the existing Act as an example.
[6] See generally Part 9 of the existing Act, with particular reference to sections 186, 189 and 190.

3. media comment.

There is also the ultimate sanction – suspension or even dismissal of Councillors.

Councils therefore have incentives to meet their legislative obligations. It is unnecessary for these incentives to be accompanied by a penalty regime, involving one tier of government bringing proceedings against another tier of government to punish it for non-compliance.

Review of Administrative Decisions

The Discussion Paper raises issues about the review of 'administrative decisions'. It is unclear whether the review being canvassed is internal or external.

There is, of course, a fundamental issue as to what constitutes an administrative decision. Under Administrative Law principles, *any* exercise of statutory powers by a council is capable of being characterised as an administrative decision (in the sense of being a decision made by an administrative decision-maker). Some of these decisions may be decisions made by members of council staff acting as delegates. Others will be decisions taken by Councillors collectively, and expressed through a resolution made at a duly constituted council meeting.

It can hardly be the case that the existence of a right of review should turn on precisely who made the relevant decision. Similarly, it would be difficult to distinguish between and among decisions so as to make some reviewable (internally or externally) and others non-reviewable.

In any event, ultimately the decision for the council are decisions of a democratically elected body. Rights of review (but more particularly external review) are therefore difficult to justify.

While the councils therefore submit that a new Act should not impose any new review mechanisms, they accept that transparency and accountability will sometimes require a review of the process followed or even a review of a decision itself. So, a new Act might properly require councils to establish their own internal review processes without stipulating the scope or detail of those processes. Rather, councils would be free to determine how their own internal review processes would be structured and when they should be enlivened – whether, for example, there is to be an Internal Ombudsman to whom any aggrieved person can 'appeal' or whether more specific arrangements are to be implemented in respect of particular decisions or types of decisions.

The concept is, then, one of councils being autonomous in their response to requests for review. Instead of a 'one size fits all' review regime a new Act would stop at mandating that some system of internal review be created, and that the internal review arrangements be publicly accessible. Each council will then decide what internal review is to look like, and when it is to be available.

A similar approach could be taken to complaint-handling. A 'top down' system of complaint-handling is unlikely to prove effective or be capable of universal application. Yet every council currently has some system for handling complaints, and accepts that it is in the public interest that processes for handling complaints are equitable and effective. As with internal review rights, the most appropriate structure is one which leaves councils free to shape how their own complaints-handling processes function. Each council will be accountable for the processes it devises and follows.

PART 3 – HOW COUNCILS ARE ELECTED

Electoral arrangements for the local government sector have been the subject of recent and extensive review. Some of the councils made submissions during (or have publicly responded following the completion of) the review process.

The councils support a rationalisation of the arrangements for handling and resolving election complaints. They also support a rationalisation of the arrangements for enforcing compulsory voting. The Victorian Electoral Commission should have responsibility for all of this.

Beyond this there remains an issue which is worth canvassing. It is not referred to in the Discussion Paper but goes to the continuing qualification of a person to be a Councillor. The issue is whether some training or other form of professional development should be mandated for Councillors.

The role of a Councillor is an important but complex one. Councillors oversee large budgets, and are accountable for operations which are highly regulated. There is at least an issue as to whether, in these circumstances, they should be compelled to undertake some basic financial training and other training designed to assist them in understanding their (and their councils') legislative obligations.

This issue was recently addressed by the Metropolitan Local Government Review Panel appointed by the Western Australian Minister for Local Government.[7] It noted the familiar debate between those who argue that training should be a prerequisite to continuing in office and those who point out that similar requirements are not imposed on members of the Australian or relevant State Parliament. Even if some form of training was mandatory, questions may arise as to who is to administer the training and how successful completion of the training is to be measured.

Perhaps the best approach is, again, one which rests with the notion of council autonomy, complemented by principles of transparency and accountability. A new Act might simply empower councils to adopt training policies and to report on what training has been undertaken by both elected members and members of council staff. Each council then decides what training is to be made available to Councillors. The public will come to see who does, and who does not, undertake the training referred to in the council's training policy.

[7] Metropolitan Local Government Review Panel's *Metropolitan Local Government Review* (July 2012 pgs 152-154).

PART 4 – HOW COUNCILS OPERATE

Role of Mayor

The Discussion Paper raises two issues:

1. should the Mayor be directly elected; and

2. should the Mayor be given executive power?

The issues are, to some extent, linked.

Views on a directly (or popularly) elected Mayor differ. The mixed views are probably a reflection of mixed experiences on the part of councils or those who work in them.

There is, however, a common view that the role of the Mayor should be clarified. There is also a common view that providing the Mayor with executive power is undesirable. It would blur lines of demarcation between the Mayor and a council's organisation, and invite controversy unless accompanied by a dedication of resources towards enabling the balance of elected members to hold the Mayor to account.

In a sense, legislating for an enhanced role for the Mayor assumes a shift towards a different model of governance.[8] If there is to be any legislated change, it should be left to each council to decide whether the Mayor is to be given executive decision-making powers, and, if so, the extent of these powers.

Chief Executive Officer and Staff

The Discussion Paper does not produce any compelling argument to change. Consistent with the existing Act, a council should be free to:

- choose who its Chief Executive Officer is to be;
- decide the terms of the employment relationship;
- manage the Chief Executive Officer's performance; and
- reappoint the Chief Executive Officer towards the end of the employment term, if it wishes to do so.

Chief Executive Officers should be free to make similar choices and decisions in respect of the staff they manage.

There are few instances of relevant provisions in the existing Act failing a council. Problems that have arisen are more explicable by reference to the state of relationships than unsuitable legislative provisions.

The provisions of Division 4 of Part 4 of the existing Act have achieved little. Complaints against a Chief Executive Officer are capable of being investigated fairly without resort to probity auditors or a mandated process. It is unnecessary for a new Act to contain similar provisions.

Delegations

The approach of the existing Act is supported by the councils. Broad powers of delegation exist. It is up to each council to decide what is to be delegated and to whom.

The existing Act requires a delegation to be effected by an 'instrument of delegation'.[9] Frequently delegations are effected through resolutions, without any accompanying instrument. There is some doubt as to whether the resolution can qualify as an instrument of delegation.[10]

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[8] See P Allan, L Darlison and D Gibbs, *Are Councils Sustainable? Final Report: Finding and Recommendations – Independent Inquiry into the Financial Sustainability of NSW Local Government,* Local Government and Shires Associations of NSW, Sydney, May 2006.

The need for an 'instrument of delegation' is questionable. As long as the delegation is clearly documented (as it is in the case of a resolution) the delegation should be legally effective.

Section 86(3) of the existing Act provides for a delegation of power to a Special Committee. It reflects the distinction which the existing Act draws between Advisory Committees (on the one hand) and Special Committee (on the other hand). Some complications arises out of this.

It is not uncommon for councils to establish Special Committees but not delegate any powers to them. This causes the distinction between Advisory Committees and Special Committees to break down. Perhaps a change in nomenclature is necessary, so that Special Committees are confined to committees to which powers are delegated. This Submission will return to the issue of Special Committees below.

Meetings

It is not uncommon for the constitutions of companies to provide for meetings of Boards of Directors by electronic means. The existing Act expressly allows for participation by electronic means when Boards of Regional Library Corporations are meeting, at least in circumstances where a local law of the Regional Library Corporation makes provision for this.[11]

There appears to be no policy justification for treating meetings of a council or a Special Committee differently. Councillors ought to be able to participate if reliable technological links exist. Just as with meetings of Regional Library Corporation Boards, appropriate safeguards can be introduced to ensure that any necessary conflict of interest obligations are observed.[12]

The councils support the idea of flexibility in meeting arrangements. Consistent with what has been said about autonomy, councils should be able to decide when they meet the type and extent of prior notice given to members of the public. Again, an obligation to maintain a publicly accessible account of why decisions were made to hold particular meetings or communicate with members of the public in a particular way will ensure that there is no real room for abuse. Given recent events at some Victorian council meetings, it might even be that councils should be free to decide whether, in a particular instance, no part of the meeting should be held in public.

Finally, a point should be made about meetings of Special Committees. As indicated above, what are essentially Advisory Committees are often constituted as Special Committees. A Special Committee is, under the existing Act, subject to various meeting procedure constraints. Generally, members of the public will have a right to be present at a Special Committee meeting of any kind.[13] The provisions relating to conflicts of interest apply to meetings of Special Committee.[14]

There is merit in confining Special Committees to committees having delegated power. Beyond this, there is merit in a council being able to act flexibly in relation to a Special Committee, without any presumptions about public presence or other meeting procedure constraints.

Consultation

A number of provisions in the existing Act require councils to give public notice of a proposal, invite submissions, consider any submissions received and hear from anyone who wishes to be heard in support of their submission *before* making a specified decision.[15] Public notice involves publishing a notice in a

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[9] See sections 86(3) and 98(1).
[10] See further *B (A Solicitor) v Victorian Lawyers RPA Ltd* (2002) 6VR 642.
[11] See section 197E.
[12] See section 79(6) of the existing Act. Any technological link could be terminated by a council (and then reactivated once the next item of business is reached) and/or a Councillor or member of Special Committee could be required to make a statutory declaration that he or she did not view or listen to any part of the deliberations in respect of which the conflict of interest was disclosed.
[13] See section 89(1) of the existing Act.
[14] See section 79 of the existing Act.
[15] See, for example, sections 129 and 223 of the existing Act.

newspaper generally circulating within the municipal district (and chosen by the council for the purpose).[16] Publication of a proposal in the *Victoria Government Gazette* is also, on occasions, mandated.[17]

The councils believe that such rigidity in notice or communication requirements is unnecessary. An obligation to consult should exist. But councils should be free to decide what form this consultation should take. They should justify their choices and be accountable for them.

So, councils may, in years to come, obtain details of the email addresses of most of its ratepayers and residents. A direct email to ratepayers or residents, perhaps supplemented by a newspaper advertisement or website post, may – in the relevant circumstances – be sufficient notice of something which is proposed.

Complaint-Handling

This Submission has already addressed the councils' preferred approach to complaint-handling. It did so in elaboration of what was said about the review of administrative decisions.

A 'one size fits all' approach is undesirable. Each council should be able to decide how it responds to complaints. The new Act should not go beyond requiring a council to adopt a complaint-handling process.

Local Laws

The scope of a council's local law-making power is an ample one. It largely mirrors the general grant of administrative power conferred on councils.[18]

The maximum penalties which a local law can impose are, however, wholly inadequate. They have not kept pace with changes since the existing Act was introduced. In particular, they have not mirrored legislative developments which have allowed penalty units under Acts and Regulations to be indexed, and so undergo adjustment each year.[19] The maximum penalty which a local law can impose should be increased. The increase should be complemented by treating penalty units under local laws like penalty units and monetary units under other legislation.

[16] See the definition of 'public notice' in section 3(1) of the existing Act.
[17] See, for instance, section 119 of the existing Act.
[18] See section 111(1) of the existing Act.
[19] See the *Monetary Units Act 2004*.

PART 5 – PLANNING AND REPORTING

The planning and reporting obligations contained in Part 6 of the existing Act are already stringent and burdensome. The councils do not support further changes that would increase the number of reports to be provided or lengthen the period for which a plan is intended to be current.

It is not as though the public receives inadequate information about the financial and other plans of a council. The provisions of the existing Act should not be replaced by provisions which impose unrealistic and unnecessary reporting obligations on Victorian councils.

PART 6 – COUNCIL RATES AND CHARGES

In the absence of any other logical criterion, ownership of land seems to be the most appropriate criterion for the imposition of rates and charges. A new Act will, however, need to address a number of issues relating to rates and charges.

Rateability

Section 154(2)(c) of the existing Act provides for a rate exemption in respect of any part of land which is used exclusively for 'charitable purposes'. The concept of 'charitable purposes' is a technical one, linked to the 1601 *Statute of Uses* and a series of decisions of the courts.[20] Land can be used exclusively for charitable purposes even though the owner or occupier is not a person in 'need'. Hence the perpetuation of rate exemptions for private schools and, at least in some instances, private hospitals.

At a minimum, the concept of 'public benevolent institution' should replace the concept of 'charitable purposes'. This better aligns with the tax treatment of 'charities' under Commonwealth law.[21]

More fundamentally, however, the extent of any exemption should be left to councils to determine. It should not necessarily be the case that a total exemption from rates and charges is assured.

The Discussion Paper refers to research undertaken by Deloitte Access Economics Pty Ltd in 2013.[22] That research considered the approach of a number of jurisdictions (including other Australian States, New Zealand, Canada and the United Kingdom). A number of the jurisdictions provide for a 'discount' or rebate in respect of land used for charitable or like purposes. This makes sense. It is difficult to see why bodies which are not in 'need' of assistance should not make a contribution towards the provision of infrastructure and services by a council.

The extent of rate relief provided to such a body could be the subject of a council policy. Again, autonomy dictates that a council should be free to develop the policy and establish criteria for the extent of the relief to be given to a body. The policy (and the reasoning within it) should be transparent. A council will be accountable to its community for the development and application of such a policy.

Mix of Rates and Charges

The councils appreciate that, with the enactment of the *Local Government Amendment (Fair Go Rates) Act 2015*, there is heightened scrutiny of the use of rating powers. A new Act should, however, better reflect councils' revenue needs.

A municipal charge serves a limited purpose. Those councils which impose a municipal charge do so without obvious reference to recoupment of expenditure on administration. Under the existing Act, a municipal charge is intended to cover some of a council's administrative costs.[23]

Instead of a municipal charge councils should be empowered to impose charges or levels for specified purposes. An infrastructure services levy is an example of what could be permitted. What would be imposed would have a specific purpose. The proceeds would be quarantined, and used solely to achieve that purpose.

Like the municipal charge, service rates and charges levied under section 162 of the existing Act are of limited utility. Only a service rate or charge for the collection and disposal of refuse is legally viable.

Conceptually there is no reason why councils should not be empowered to declare rates and charges in respect of other services which they provide. The character of the rate or charge will mean that what is declared is not really intended to generate additional revenue – it is intended, rather, to ensure that the cost of the provision of the relevant service is fully funded by service users.

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[20] See, for example, *Salvation Army (Victoria) Property Trust v Shire of Ferntree Gully* (1952) 85 CLR 159.
[21] See further the *Income Tax Assessment Act 1936* (Cth).
[22] See pg 70 of the Discussion Paper. The research appears in 'Review of local government rating exemption provisions', a Report commissioned by Local Government NSW.
[23] Section 159(1) of the existing Act.

It might be thought that provisions in a new Act enabling councils to levy specific purpose rates or charges or a greater variety of service rates or charges could lead to an unbridled search for extra income and a circumvention of the rationale for rate capping. The role of the Essential Services Commission under Part 8A of the existing Act will, though, presumably be replicated in any new Act. If rate capping remains, the Essential Services Commission will monitor revenue derived from rates and charges that are not in the nature of general rates. Councils which abuse the autonomy given to them would risk the rate cap being extended to the additional types of rates and charges which they impose. In this way, safeguards will accompany greater choice in the types of rates and charges available to councils.

Rate Relief

Unless (financial) hardship exists, a council can only provide rate relief through a rebate or concession granted under section 169 of the existing Act. It is unclear whether this section can accommodate long-term rate relief arrangements, such as those which could be expected to be embodied in a Rating Agreement.

A new Act should give councils the power to provide rate relief in circumstances where they satisfied that it is in the best interests of their communities. The power should extend to rate relief provided for in a Rating Agreement.

Unless privacy requirements dictate otherwise, the existence of and reasons for the rate relief should be articulated in a publicly accessible register. Once more, transparency of decision-making and accountability are the best means of ensuring that a more straightforward power to provide rate relief will be exercised appropriately.

PART 7 – SERVICE DELIVERY AND FINANCIAL DECISION MAKING

Investments

Section 143 of the existing Act details where a council may invest its money. Apart from specific securities and institutions, there is an ability to invest 'in any other manner approved by' the Minister for Local Government 'after consultation with the Treasurer'.[24]

The councils believe that the power of approval should not rest with the Minister for Local Government. A council's Audit Committee ought to be able to approve an investment not otherwise specifically provided for in legislation. Any such decision by the Audit Committee should be reported to the council, and be accessible to members of the public.

Sale and Leases of Council Land

Specific procedures must be followed by a council proposing to sell or lease land under the existing Act. Sections 189 and 190 require councils to comply with section 223 before finalising any sale or lease. So, a council must give public notice, invite submissions, consider any submissions received and hear from anyone wishing to be heard in support of their submission *before* selling or leasing land.

A new Act should not be so prescriptive. Councils should be required to undertake community consultation before consummating a sale or lease. The form and extent of that community consultation should be for the council to decide. Its reasons for following that form of community consultation to that extent, and for ultimately deciding to sell or lease the land, should be documented and be available to the public.

Procurement

The Discussion Paper notes difficulties which attend the operation of section 186(1) of the existing Act.[25] This is the section which requires a council to undertake an open or closed tender process before entering into a contract for the supply of goods or services or the carrying out of works where the transactional value is equal to or greater than a specified amount.[26]

The thresholds provided for in section 186(1) have never been regularly reviewed. Even if they had been, the provision would still have been bedevilled by the types of issues identified in the Discussion Paper.

The NSW Taskforce considered a similar provision in the New South Wales *Local Government Act 1994*. It recommended that:

> rather than the legislation setting a monetary threshold, a more flexible principles-based approach be established to enable councils to determine their threshold based on a risk assessment of the proposed procurement and the procurement principles ...[27]

Every Victorian council must prepare and approve an procurement policy.[28] A council must comply with its procurement policy.[29] This procurement policy could set out when a council must undertake a tendering (or other form of competitive) process before procuring goods, services or works. It would be for the council to decide what triggers competitions. The public availability of the procurement policy, complemented by requirement to maintain a contracts register:

- outlining contracts entered into by the council; and
- explaining why a particular procurement process was followed before entering into each contract,

would help ensure transparency of decision-making and accountability for the (procurement) decision(s).

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[24] Section 143(f).
[25] See pg 80 of the Discussion Paper.
[26] This is $150,000 in relation to goods and services and $200,000 in relation to works.
[27] NSW Taskforce Report pg 43.
[28] Section 186A(1) of the existing Act.
[29] Section 186A(9) of the existing Act.

The councils believe that a new Act should grant them the autonomy to procure goods, services and works in a manner consistent with their procurement policies. Any monetary thresholds should be theirs to prescribe. If no competitive process has been followed before entry into a particular contract the reasons for this will be recorded and published.

Entrepreneurial Powers

If a new Act imposes restrictions on councils engaging in entrepreneurial activities, a recalibration of those entrepreneurial activities is necessary. The existing Act uses concepts such as 'union of interest', 'cooperation' and 'reciprocal concession' which lack an accepted commercial meaning.

It would also be disappointing if the equivalent provision in a new Act unnecessarily constrained councils wishing to collaborate and engage in a shared service provision. While it might not be necessary to expressly provide for the formation of new regional bodies, councils attracted to the sharing of resources should not find themselves deterred by a provision which is uncertain in its application or unjustifiably prescriptive in its requirements.

PART 8 – COUNCILLOR CONDUCT OFFENCES AND ENFORCEMENT

Councillor Conduct

The councils welcome the reforms embodied in the *Local Government Amendment (Improved Governance) Act 2015.* Although it would be helpful to have some guidance on the qualifications of the 'arbiter' who is to conduct the internal resolution process under a Code of Conduct, [30] the reforms appear to be clear in their intention.

The councils would like to see the reforms in operation before deciding whether a new Act should adopt the same or a modified approach.

Conflict of Interest

It is accepted that a broader concept of conflict of interest is preferable to a concept of pecuniary interest. It is also accepted that, with the passage of time, the provisions contained in Division 1A of Part 4 of the existing Act have proven workable.

That said, the provisions appear to be unnecessarily complex. There remains considerable uncertainty over the operation of a number of the provisions.

What amounts to a direct interest under section 77B(1) of the existing Act is almost impossible to discern. The provision is cast in terms so broad as to make almost anything capable of qualifying as a direct interest.

Section 78B(1)(b) – which is concerned with a class of indirect interest – is similarly vague. It distinguishes between a 'consultant' and 'contractor', even though a consultant will ordinarily be a contractor.

Section 78C(1)(a) precludes a gift being an 'applicable gift' if it takes the form of reasonable hospitality received at an event or function attended in an 'official capacity'. The latter phrase causes confusion – almost invariably Councillors will be invited to attend a function or event in their capacity as Councillors. Yet it can hardly have been the intention of the provision that this alone will prevent a conflict of interest from arising.

The councils believe that an attempt should be made to remove some of the uncertainties inherent in the concepts used in the provisions of the existing Act, and introduce a legislative regime which is simpler in its expression and more certain in its application. Such a regime might well form the basis of training programs for Councillors.[31]

Confidentiality

An amendment to section 77 of the existing Act will soon become operative.[32] When this occurs, a breach of section 77(1) will (again) involve the commission of an offence. The councils support this.

A new Act should similarly make it an offence to divulge confidential information. Unlike section 77(1) of the existing Act, a new Act should:

- provide for the deliberations which occur during a closed meeting of a council or Special Committee to be confidential (and not just information provided to such a meeting).

  Councillors and members of Special Committees have an expectation that what they say during a closed meeting will remain confidential. This should be supported in any new legislative provision; and

[30] See section 18 of the *Local Government Amendment (Improved Governance) Act*, which will introduce section 81AA into the existing Act.
[31] See Part 2 of this Submission.
[32] See section 17 of the *Local Government Amendment (Improved Governance) Act.*

- there should be clarification of whether a Chief Executive Officer who has designated information as confidential is able to revoke that designation.

  Currently, the language of section 77(2)(c) infers that a resolution might be necessary in order for the confidentiality restriction to be lifted. This can cause practical inconvenience.

PART 9 – MINISTERIAL POWERS

Reference has already been made to the councils' preference for autonomy, qualified by transparency and accountability obligations.[33] It follows that, in the view of the councils, powers of Ministerial intervention should be kept to a minimum.

A Ministerial power to direct a council to amend, discontinue or replace its governance processes and policies will soon become operative.[34] The councils do not support a new Act containing a like provision. It runs counter to local government autonomy. Sufficient safeguards already exist to prevent governance abuse.[35] Ultimately, a failure to provide good governance could permit the suspension or dismissal of Councillors.

Nor do the councils support the idea that a failure to fulfil a legislative duty should give rise to penalties. This Submission has already addressed the issue of penalties.[36] A failure to comply with a legislative provision will not necessarily go unpunished or remedied. For the reasons already outlined in Part 2 of this Submission, a penalty regime is unnecessary.

[33] See Part 1 of this Submission.
[34] See section 40 of the *Local Government Amendment (Improved Governance) Act*, which will introduce a new section 218A into the existing Act.
[35] The safeguards include monitoring by integrity bodies and the media.
[36] See Part 2 of this Submission.

PART 10 – HARMONISATION OF THE LOCAL GOVERNMENT ACT

Roads

A number of provisions in the existing Act are concerned with roads.[37] Separately, the *Road Management Act 2004* sets out various road management functions of councils.

A new Act should address this. It appears appropriate for all provisions concerning roads to appear in the *Road Management Act*.

Cultural and Recreational Lands

Currently the *Cultural and Recreational Lands Act 1963* determines what amounts can be levied in respect of certain land. This Act is outdated.

Land currently subject to the *Cultural and Recreational Land Act* should be brought within the ambit of a new Act. Any new Act should treat such land in the same way as land used exclusively for charitable purposes should be treated – councils should be empowered to decide what level of 'discount' is to apply in respect of such land.

Occupational Health and Safety

There is an increasing tendency for Councillors to complain to their council's Chief Executive Officer about the conduct of another Councillor, and to allege 'bullying' by that other Councillor. This places the Chief Executive Officer in an untenable position. On the one hand he or she is, as the chief administrator of an undertaking, required to do that which is reasonably practicable to ensure that the workplace is safe. On the other hand he or she lacks any real ability to regulate the conduct of Councillors.

The intersection between the *Occupational Health and Safety Act 2004* and a new Act needs to be considered. Any provisions in a new Act relating to Councillor conduct need to be linked to *Occupational Health and Safety Act* obligations. It is one thing to provide – as the existing Act soon will – that bullying can amount to serious misconduct, and justify an application to a Councillor Conduct Panel.[38] It is quite another to leave the Chief Executive Officer practically powerless to act in circumstances where, pending any serious misconduct application being heard, a recurrence of bullying is risked.

Perhaps the *Occupational Health and Safety* should expressly empower a Chief Executive Officer to register a complaint with WorkSafe, and impose an obligation on the latter to investigate and direct that a Councillor (or Councillors) engage or desist from engaging in certain conduct. WorkSafe would then have an obligation to monitor the conduct or take other measures to prevent any injury (physical or mental) to the Councillor who is the victim of the bullying.

[37] See, for example, section 204-207A of and Schedules 10 and 11 to the existing Act.
[38] See section 12 of the *Local Government Amendment (Improved Governance) Act*.

ADDENDUM - BRIMBANK CITY COUNCIL

Brimbank City Council strongly encourages the State Government to take the opportunity through the review to pursue a new, innovative model of Local Government legislation for Victoria: A model of simplified and enabling legislation supported by a system of well-developed and maintained Practice Notes and Guidelines.

Brimbank City Council endorses, in-principle, the joint submission from Brimbank, Wyndham and Moonee Valley city councils, to the State Government's Discussion Paper on the review of the Local Government Act 1989, with the inclusion of the following comments reflecting Brimbank City Council's specific position:

- **Page 6 – How Councils are Elected (Training)**
  Given the wide variation in the ability of councils to provide Councillor training, and the need for consistency across the sector, there should be a system that provides an incentive, for example, recognition and/or linked to allowances, for Councillors to undertake accredited training.

- **Page 8 – Meetings (Electronic Attendance)**
  Given the nature of the matters required to be considered by councils, and noting the example of Regional Library Corporation Boards is not comparable to the broad responsibilities of councils, in person attendance by Councillors at Council Meetings should continue to be required.

- **Page 11 – Rateability (Exemptions)**
  Brimbank supports a review of the provisions relating to rating exemptions to address inherent inconsistencies and anomalies in the current provisions, but on the basis that rateability provisions should be consistent across the sector. Brimbank does not support a model where exemptions would be left to each council to determine.

- **Page 13 – Investments**
  Noting the demonstrated strength and protection in Victoria of council (ratepayer) funds - as a consequence of a conservative investment regime - compared to other States, Brimbank does not support a model that would allow individual councils to determine investments - either with or without Audit Committee oversight.