Local Government Act Review

The Rights of Ratepayers

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December 2015

Purpose of this paper

This paper has been prepared for the Local Government Act Review by Campbell Duncan, Principal of Duncan Lawyers and formerly Manager of Legislation, Department of Local Government during the drafting and implementation of the *Local Government Act 1989*.

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Part A — Legal context of local government decision-making

Local government has a high level of interaction with ratepayers, local residents and workers, stakeholders and other members of the community. In these interactions, the council might be acting as:

- *service provider*, for example in the provision of early childhood services;
- *regulatory agency*, for example in deciding whether to issue a planning permit;
- *advocate*, making representations to other levels of government and other bodies on behalf of its community;
- *taxation authority*, raising revenue from land tax ("rates");
- *prosecution authority*, issuing infringement notices and participating in court proceedings in relation to a range of offences.

It is difficult for any agency to perform such a range of functions well. It is particularly difficult when, as with local government, these functions must be provided across a large number of subject areas under resource constraints.

However, change has occurred since enactment of the current legislation. After the *Local Government Act 1989* (the Act) was enacted, councils in Victoria have been restructured, with 79 councils instead of the 210 which existed in 1989. Arguably, a smaller number of councils, serving a larger population, have greater capacity than the councils of 1989.

Technological change, especially the introduction and development of the internet, has affected the means, speed, and transparency of councils' interactions with ratepayers, stakeholders and the community generally. Furthermore, the legal context within which local government operates has developed since 1989, as have concepts of regulation and statutory compliance.

Local government as a statutory decision-maker

Councils are constituted under an Act of the State Government. Their powers are statutory powers, and when they make decisions they are subject to the limitations of the principles of administrative law. However, they are also a tier of government, recognised by the *Constitution Act 1975 (Vic).* As a result, many of their decisions can be described as political decisions.

Local government performs a range of functions within a defined geographic area. Unlike State and Commonwealth governments, it is not explicitly divided into a legislature and an executive. It does not have formal ministries, each headed by an elected representative.

These differences affect the decision-making process. Local government has no cabinet to act as a forum for debate or a filter for policy initiatives. Instead, most councils operate with a committee structure. Those committees may have delegated decision-making power, or they may be advisory. Councils also have extensive interaction with council staff, who make many recommendations as well as decisions under delegation.

The requirements of administrative law

Administrative law (common law)

Councils must abide by any legislation which provides the council with the power to make statutory decisions. While many Acts provide a mechanism for reviewing council decisions, it is frequently the case that the relevant legislation does not specify the consequences of failure to comply with the decision making requirements provided in the legislation. Councils must also comply with the common law requirement that decision makers provide procedural fairness when making decisions of an administrative nature.

If a decision maker fails to provide procedural fairness or comply with a procedural requirement, the decision which follows may be declared invalid. For this to occur, someone would need to challenge the decision in the course of a legal action.

Although proceedings of this type are facilitated by the *Administrative Law Act 1978* they are expensive and the outcome uncertain. If the decision maker failed to comply with a required procedure, there is no certain consequence – a court might declare the decision to be invalid, taking into account the nature of the decision considered in the context of the whole of the legislation,[1] or it might decide that the decision is valid despite deficiencies in the decision-making process.

The uncertainty of the application of common law rules and the expense and delay of court proceedings makes common law action an unattractive option for any potential litigant.

For legislators, there has been some caution exercised in preventing decisions from becoming invalidated. For example, protective provisions have been inserted into some sections of the Act at different times, and in no particular pattern. An example is s 82(3) of the Act, inserted by amendment in 2008. This stipulates that failure to comply with the section (relating to information on council websites) does not affect the validity of a public notice or of documents on the list. It would seem that this provision was inserted to eliminate the risk of a declaration of invalidity for failure to comply with administrative law (on the basis of "procedural ultra-vires").

[1] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

Administrative review: the Commonwealth model

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) provides for judicial review of administrative decisions taken by Commonwealth agencies. It does not apply to State or local government bodies: however, it could serve as a potential model.

The ADJR Act applies to decisions made under Commonwealth legislation, whether or not the Act is referred to in that legislation – it is of general application.[2]

The key concept is that the legislation applies to a "decision". Under the ADJR Act judicial review is available in respect of a "decision to which this Act applies," as well as to "conduct" for the purpose of making that sort of decision and breaches of a duty to make a decision. The ADJR Act (s 3) defines "decision" to include specific determinations, including giving or refusing to give consent or a permission or imposing a condition or restriction.

The ADJR Act extends to cover recommendations. Under s 3(3) of the Act:

> "Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision […].

The ADJR Act (s 3(5)) provides that reviewable "conduct" includes activity which is preparatory to making a decision, such as holding an inquiry or investigation.

The public participation objectives of the 1989 Act

The Act was developed around two themes – greater autonomy and greater accountability. The two concepts were linked: councils were to be freed of many of the onerous procedural and permission requirements which had previously applied, but they would be accountable to their communities and to the state government for their actions.

Expressed in this way, the second theme (accountability) suggests that councils were to be held to account for their errors, with the possibility of intervention *after* the event. That may be an over-simplification as the Act contained provisions intended to improve the quality of decision-making. This was to be achieved through improved transparency, and through public participation in decision-making.

In the Act as initially made, the objectives of a council included (s 7):

> "(a) To facilitate the involvement of members of the community, users of facilities and services and Council staff in the development, improvement and co-ordination of local government."

[2] However, some decisions (for example, migration decisions) has been removed to other legislation.

This provision does not explicitly refer to involvement of members of the public in council decision-making, although it could be read as including "involvement" of that type.

Section 7 of the Act was removed by the *Local Government (Democratic Reform) Act 2003* and substituted by s 3C *Objectives of a Council.* The substituted provision makes no reference to the involvement of the community in management of local government.

The statement in s 3 of the Act is not definitive of the objectives of the Act. Identification of the purposes of legislation is not achieved by reference only to the expressed objectives, but also by considering purposes and objectives that arise by implication from the terms of the Act.[3] It is therefore relevant, in identifying public participation objectives of the Act, to consider public participation features, whether or not they are expressed to be objectives. It is relevant, therefore, to take into consideration:

- provision for special committees, to which members of the public may be appointed;
- provision for advisory committees, to which also members of the public may be appointed (although this is not expressly provided for in the of the Act);
- provision for open meetings (but without a *requirement* for public participation in them);
- the s 223 public consultation procedure, which applies to a review of councillor allowances (s 74), the making of local laws (s 119), the making of a council plan (s 125) or a budget (s 129), a change to the system of land valuation (s 157), establishment of special rate schemes (s 163A), the granting of rebates and concessions (s 169), sale or exchange of land (s 189), leasing of land, use of land for another purpose (s 192), regional library agreements (s 197) and decisions about drainage works (s 199, s 200)

The Act, if read in that way, can be seen to have public participation objectives notwithstanding the repeal of s 7(a) of the Act.

Given the importance of the issue (public participation), it seems appropriate that one of the stated purposes of the Act, or of councils (or both), should be to facilitate appropriate public participation in decision-making by local government.

Decision-making processes of local government

Officers, committees and council

The Act is the instrument that constitutes councils, giving them legal status and regulating their decision-making powers. A council is a legal entity (s 5 of the Act) with the powers of a legal person, including the power to enter into contracts and sue and be sued. It makes

[3] *Pfeiffer v Stevens* [2001] HCA 71 at [48] per McHugh J (High Court).

decisions by resolution or by delegation (see comments below about the confusing definition of "resolution of the Council").

Confusing definition of "resolution of the Council"

Under s 3 of the Act, a council exercises its powers by "resolution of the Council". This term is defined to include a resolution made at a council meeting, and also:

> "(b) a resolution made at a meeting of a special committee; and
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> (c) the exercise of a power, duty or function delegated to a member of Council staff under section 98."

This is confusing drafting – the Act uses a term which has an accepted meaning ("resolution") to include a concept which is quite different in nature – a decision by a council officer made under delegation. It includes in the concept of a resolution "of the Council" a resolution made at a meeting which is *not* a council meeting – a meeting of a special committee.

The delegation concept

Most statutory organisations have the ability to delegate decision making powers. In the Act, delegation can be made to a special committee or to an officer. If power is delegated to the CEO, the CEO can onward-delegate to another officer (s 98(3) of the Act).

It is common for statutory corporations to have power to delegate functions to members of staff. The more problematic concept is delegation by councils to special committees, as it enables council decisions to be made by committees which include persons who are not subject to the discipline of being elected (councillors) or employed by council (council staff).

Overlaps and gaps

The Act is not the only legislation which specifies, facilitates or controls the decision-making processes of local government. Other legislation which controls the internal procedures of councils includes the *Planning and Environment Act 1987* (s 188 of which deals with delegation of powers under that Act) and the *Infringements Act 2006* (providing for internal review of decisions).

If all provisions dealing with council decision-making processes were located in the Act the possibility of confusing inconsistencies would be lessened. It would not necessarily be a better approach for administrators or the public, however, if it were necessary to consult the relevant sectoral legislation as well as the *Local Government Act* in order to find the applicable law.

The possibility of overlaps can be managed by the harmonisation of provisions. An example of this is the definition of "special committee" in the *Local Government Act 1989,* which is

not limited to committees established under the Local Government Act – and therefore includes a committee constituted under s 188 of the *Planning and Environment Act 1987.*

There is a corresponding possibility of gaps. This is particularly an issue with internal review of decisions.

Transparency in decision-making

Transparency in decision-making was not a stated objective of local government in the Act as made. However, following amendment in 2003 by the *Local Government (Democratic Reform) Act 2003*,[4] s 3C of the Act now includes as a "facilitating objective" of a council:

> "(g) to ensure transparency and accountability in Council decision making."

[4] The *Local Government (Democratic Reform) Act 2003* (which was an amending Act) had objectives, one of which (s 1) was to further democratic reform of local government by 'improving the accountability of local government and the transparency of decision making". In the second reading speech for the *Local Government (Democratic Reform) Bill 2003*, the Minister observed that the Bill "proposes the most comprehensive set of changes to local government legislation since the act was passed in 1989. When implemented, these changes will make local government significantly more democratic, more transparent, more accountable and more effective." (Minister Thwaites, Legislative Assembly, 15 October 2003 p 1032).

Part B — Regulatory reform – recent developments

The Act was developed in the period 1986-1989, nearly thirty years ago. It was, by the standards of the time, modern legislation. It was relatively brief, and was drafted in a style which avoided much of the detail, repetition and prolixity of its predecessor legislation. It was drafted on the basis of administrative law principles under which councils, as statutory decision makers seeking to achieve statutory objectives, had some latitude in the exercise of discretions but were required to follow correct procedures.

In the (nearly) three decades since, statutory approaches to regulatory issues have developed. In this section, two of those changes are identified – sanctions and enforcement, the process for making and publicising secondary legislation and "legislative instruments".

Sanctions and enforcement

Legislation can be seen as an expression of policy in a special form – it expresses policy and gives effect to it. The operative effect relies on compliance with its requirements – if there is no compliance, there is no operative effect.

Prescriptive and performance based regulation

In the period since the Act was passed the issue of compliance and enforcement has been considered by legislators and writers. One writer, Professor Freiberg, in *The Tools of Regulation*,[5] has observed that:

> Traditionally, regulators have relied primarily upon prescriptive regulation, namely a rule or statement that specifies in relatively precise terms what is required to be done. In this case enforcement focuses upon adherence to the rules and standards that is presumed to bring about the desired regulatory outcome.[6]

This description could be applied to much of the *Local Government Act* 1958, although it is not clear that all of the requirements could reasonably have been presumed to bring about desired regulatory outcomes.

By contrast, performance-based regulation specifies desired outcomes or objectives, but not the means by which they must be met. Professor Freiberg (at p 89) comments that this form of regulation has become more popular over the past two to three decades and is regarded as more flexible than prescriptive regulation. He further comments (at p 90):

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[5] *The Tools of Regulation,* A. Freiberg, The Federation Press, 2010.
[6] At p 89, citing May, PJ, "Social Regulation" in Salamon LM (ed) *The Tools of Government: A Guide to the New Governance,* New York, OUP.

> In some jurisdictions it is specifically preferred over prescriptive regulation in the hierarchy of interventions[7] […] but despite these stated preferences, prescriptive standards are probably the dominant mode of regulation.

The autonomy and accountability principles on which the Act is based broadly fit the description of performance-based regulation – that is, the Act specifies desired outcomes and objectives. Further, schedule 8 to the Act carries the concept to local laws, by providing where appropriate local laws should set performance standards rather than prescribe detailed requirements on how to achieve those standards.

This analysis indicates that the Act, in contrast with its predecessor, is consistent with legislative trends of the past two to three decades. There remains, however, the issue of compliance and sanctions. A question which arises for those who deal with local government is – what happens if the obligations are not complied with?

The issue has been raised in the Local Government Act Review Discussion Paper. The Discussion Paper raises the question of sanctions in relation to several specific issues, including failure of a council to comply with planning, reporting and meeting requirements and, more generally, (p 26) whether the legislation should provide consequences such as penalties or sanctions for non-compliance.

Chain of responsibility

One of the difficulties created by principles-based legislation is to identify the person *or persons* who should be held to account for compliance with obligations. In the case of local government, there are at least three categories of persons who, potentially, should have responsibility for compliance – the council, councillors and other individuals.

A legislative approach which has been taken in other contexts is to impose obligations on multiple parties. Under the *Rail Safety (Local Operations Act) Act 2006* (s 4) "rail safety is the shared responsibility" of specified categories of person, such as operators, workers and equipment designers. Under the *Road Safety Act 1986,* if a vehicle is in breach of a mass or dimension limit, specified persons are guilty of an offence, such as the operator (s 174), the consignor of goods on the vehicle (s 171) and the packer of the goods (s 172).

The underlying concept is that, if an unwanted event occurs, multiple persons may be guilty of a statutory offence.[8] The severity of the offence varies according to the circumstances and the degree of culpability.

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[7] He cites the Government of Victoria 2007 *Victorian Guide to Regulation,* Melbourne, Department of Treasury and Finance, p 3-8.

[8] There may also be criminal responsibility on another basis, such as being an accessory to the crime.

The enforcement pyramid

Multiple and overlapping sanctions are available under some legislation. This is commonly found in relation to industry regulation, where there is an agency which can be described as the regulator. The selection and use of sanctions by regulators depends on the circumstances.

Legislative reform in this area has been influenced by the concept of responsive regulation, developed by Ayers and Braithwaite. The concept of "response" relies on the regulator's awareness of the behaviour and responses of those who are regulated. The available responses can be arranged in a pyramid, with mild responses at the base of the pyramid and strong responses at the apex. The approach has been described by the Australian Law Reform Commission as follows:[9]

> Under the "enforcement pyramid" model Ayres and Braithwaite advocate what they describe as a "tit for tat" approach, under which breaches of increasing seriousness are dealt with by sanctions of increasing severity, with the ultimate sanctions (such as imprisonment or loss of a licence to carry on a business) held in reserve as a threat.

The pyramid metaphor is used because most regulatory action occurs at the base of the pyramid.

The actions which make up the pyramid vary according to the administrative and legal context. In a typical pyramid[10] self-regulation (conforming to norms, ethics, codes and principles) is at the base. Above it, as the pyramid narrows, are administrative actions – warning or improvement notices and infringement notices. Above those are court-based actions – penalties, banning orders/injunctions, licence or accreditation disqualification, civil sanctions and, at the apex, criminal sanctions.

Sanctions and enforcement – government bodies

There is no reason in principle why a government body (such as a council) should not be the subject of regulatory requirements, and accompanying enforcement and sanctions. If a government body conducts an activity which others equally might conduct (such as managing a work place), the obligations of the workplace are applicable to it.[11] Similarly, with some modifications, the requirements of the *Building Act 1993* apply to the Crown and to public authorities.[12]

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[9] ALRC *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* Report #95, 2002, p. 35. See also Freiberg, *The Tools of Regulation* at p 97.
[10] Freiberg, *The Tools of Regulation* at p 98.
[11] Section 6 of the *Occupational Health and Safety Act 2004* provides: "to avoid doubt, the Crown is a body corporate for the purposes of this Act and the regulations".
[12] *Building Act 1993, s 217.*

There are also instances of legislation which creates a partial or complete exemption from liability for the Crown, for example allowing civil proceedings but exempting criminal proceedings and civil penalties.

In the Ayres and Braithwaite "responsive regulation" model discussed in this report, the second tier of the enforcement pyramid is described as administrative sanctions. An example of a targeted administrative sanction which can be applied to local government is an order under s 224 of the *Building Act 1993.* If the Minister administering that Act considers that a council has not satisfactorily carried out a function given to it under the *Building Act*, the Minister may order the council to pay all of the costs, charges and expenses incurred in carrying out that function. Although this may be characterised as cost recovery rather than a penalty, it is an unwanted consequence imposed on a council which fails to carry out its functions.

Law making and legislative instruments

At the time of enactment of the *Local Government Act 1989* requirements which applied to the making of secondary legislation had recently changed. The *Subordinate Legislation Act 1962* had recently been amended to require the preparation of regulatory impact statements, but local laws (and before them, by-laws) were exempted. It did not apply to "legislative instruments" (as the term is used in Victoria).[13]

Adoption and adaptation of process requirements

The *Subordinate Legislation Act 1962* applied only to "statutory instruments," which were defined to exclude local laws. Its successor, the *Subordinate Legislation Act 1994*, also excludes local laws.

The *Subordinate Legislation Acts,* although not applicable to local laws, have provided a model for local government legislation. This includes, notably, the requirement for notification of proposed local laws and the criteria (schedule 8) for revocation of local laws.

The adaptation of the *Subordinate Legislation Acts* to local laws was only partial. Two major features of the *Subordinate Legislation Act 1962* were not applied to local laws:

- regulatory impact assessment. Instead of regulatory impact analysis, councils are required only to give notice of the "purpose and general purport" of the proposed local law. There is no apparent link in the Act between the publicly-available analysis made at the time of making a local law and the criteria to be considered by the Governor in Council in subsequently deciding whether to revoke the local law.

[13] In Victoria a legislative instrument is an instrument made under an Act or statutory rule that is of a legislative character, but excludes a statutory rule. The Commonwealth *Legislative Instruments Act 2003* includes subordinate legislation in the definition of "legislative instrument".

- mandatory analysis by a third party. Under the *Subordinate Legislation Act 1994* a regulatory impact statement must be prepared and evaluated before subordinate legislation is made, and the subordinate legislation is subject to analysis by the Chief Parliamentary Counsel – in all cases.

In principle, it would be possible to amend the *Subordinate Legislation Act 1994* to remove the exclusion applying to local laws. The regulatory impact statement requirements of that Act would then apply to local laws. If so, local laws would be subject to Parliamentary oversight and disallowance – something which is unlikely to be welcomed by councils, and would sit uncomfortably with the status of local government as a sphere of government.

Extension of the requirements to legislative instruments

The *Subordinate Legislation Act 1994* was amended in 2010 to apply to a wider group of instruments. Instead of only subordinate legislation, the Act now applies to "legislative instruments," that is, an instrument made under an Act or statutory rule that is of a legislative character – for example, guidelines or standard operating procedures. The definition does not extend to instruments of a legislative character made under a local law.

The requirements of the *Subordinate Legislation Act 1994* include a requirement to consult, in accordance with guidelines under the Act, with any sector of the public on which a significant economic or social burden may be imposed by a proposed legislative instrument so that the need for, and the scope of, the proposed legislative instrument is considered (s 12C). With some exceptions, a regulatory impact statement must be prepared for a legislative instrument (s 12E). The RIS must include an assessment of the costs and benefits of the proposed legislative instrument and of any other practicable means of achieving the same objectives and the reasons why the other means are not appropriate. (s 12H). Under s 16F (2) of the Act the instrument maker must cause an up to date consolidated version of the legislative instrument prepared under subsection to be available for inspection by any person free of charge during office hours and be published on the internet.

Part C — Specific issues

Access to information

Information asymmetry

A constant difficulty for members of the public in dealing with large organisations is information asymmetry. This occurs when the organisation has more information available to it than they do. Further, it is disempowering if members of the public *believe* that the organisation has more information available to it than it actually does.

The objectives of a council under s 3C(2)(g) of the Act include, "to ensure transparency and accountability in Council decision making". This is supported by several specific provisions, including the requirement (s 89) that meetings should generally be open (unless a decision is made to close the meeting on a specified ground), and that councils are to maintain websites (s 82A) on which documents or lists of documents are to be maintained.

Further, local government is subject to the *Freedom of Information Act 1982,* so that members of the public are entitled to obtain access to documents using the procedures under that Act.

The concepts of transparency and access to information are important. For those who deal with local government, as well as residents, ratepayers and members of the public generally, access to information issues are practical issues. It is difficult to comment meaningfully on proposed local laws if their meaning is contingent on the content of other documents which are not available within the consultation period. It is difficult (for example) to comment on an internal review process if that review process, and the criteria for it, are embedded in guidelines which are not readily available to the public or the existence of which is not readily ascertainable.

Availability of documents

Section 82A of the Act contains specific provision for documents to be identified and (in some cases) to be available for downloading. The section requires councils to maintain websites, and, on their websites, to:

- *publish* any public notice which is required to be published;
- *publish* specified documents, including budgets and Council plans;
- *have available* a consolidated and up-to-date copy of each local law; and
- *have a list* of documents which the Council is required to have available, including information about how a member of the public can examine the document.

Section 82A was inserted into the Act by the *Local Government Amendment (Councillor Conduct and Other Matters) Act 2008*. It refers to a technology which was not available

when the Act was enacted. In the second reading speech for the amending Act the Minister explained that this was one of several amendments to the Act intended "to improve transparency, accountability and functioning" of councils.[14]

The section went some way towards updating local government legislation to reflect modern technology. However, the amendment appears to have been limited and cautious. In particular, the requirement for publication applies only to specified documents. For other documents, the council website is to *list* documents, but there is no requirement that the documents be published.

With the movement towards use of electronic documents since 1989, and even since 2008, it seems unlikely to be an onerous requirement for councils to have *available to download* any of the documents which it is currently required to have available for inspection. There are three reasons in particular why this would be a useful reform:

1. With changes in technology, it is now relatively simple for documents to be maintained in electronic format (typically, pdf format);
2. Although the reform appears to be relatively minor in scope, it represents a change in approach. A practice followed some years ago, by some councils, was to require members of the public to stand at the counter of the council office to inspect application documents which had been lodged in support of a permit application. There may have been some practical reasons for this at the time, but in any event, council officers would not release the documents nor copy them (whether or not for a fee). The process was time consuming, expensive and unnecessary. It is to be hoped that that practice is not now followed by any council. It seems desirable, nonetheless, for the Local Government Act to support its own statement of objectives by establishing requirements which encourage open government and transparency of process;
3. The Local Government Act provisions may be used as a model for councils for local law requirements. If the Local Government Act draws a distinction between documents being "available" and documents being published on the council website, it is possible that councils will draw a similar distinction.[15]

As mentioned elsewhere in this report, legislative reform since 1989 has included development of the concept of legislative instruments. The Commonwealth *Legislative Instruments Act 2003* applies to "legislative instruments", which are defined to include written instruments of a legislative character which were made in exercise of a power delegated by Parliament (s 5).[16] Commonwealth legislative instruments are lodged with the Commonwealth Parliamentary Counsel, who maintains them in a register (s 20). The

[14] Legislative Assembly 11 September 2008, p 3645.
[15] An example is minutes of meetings: local laws typically require that these be available for inspection (for example, cl. 202 of the Stonnington *General Local Law 2008*). There seems to be no practical reason why these should not be available for download from council websites.
[16] In Victoria, see Part 3A of the *Subordinate Legislation Act 1994.*

legislative instruments can be browsed and downloaded from a webpage.[17] While it may not be practicable for documents relied upon by local government to be maintained in a central registry, by analogy it would seem to be desirable, and consistent with the approach taken by the Commonwealth, for those documents to be available for download from the council website or another website.

Participation in decision-making

Multi-tiered decision-making

A council is a legal entity[18] consisting of its elected councillors.[19] Its decisions are not all made by the councillors, however. The council's delegates can also make decisions, which have the same legal effect as decisions made by the council. A council is able to delegate decision-making powers to a special committee,[20] the chief executive officer[21] or a member of staff.[22]

Many decisions are made after consideration of recommendations. Recommendations may be made by council staff or by advisory committees. There can be two levels of recommendations, with council staff making recommendations to advisory committees, which then make recommendations to the council.

Recommendations are often acted upon. Even if recommendations are not acted upon, they are influential and will almost invariably influence council decisions. They are often, therefore, of importance in the decision-making process.

There is no reason in principle why the public should not have some right of participation in decisions to make recommendations. Participation in decision-making, to be effective, should not be limited to final decisions. The degree and nature of the participation should be shaped by the stage in the decision-making process. It may be inappropriate, for example, to allow questions or oral presentations to be made to advisory committees.

Consultation processes

Section 223 of the Act provides a standardised process for public submissions. The process relies on the concept of a "public notice", which is a notice in a newspaper (s 3 definition) and on the council website (s 82A of the Act). Its publication is not targeted at specific groups or stakeholders.

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[17] At https://www.comlaw.gov.au/Browse/ByTitle/LegislativeInstruments/Current#top
[18] s 5 of the *Local Government Act 1989.*
[19] s 3B of the *Local Government Act 1989.*
[20] s 86 of the *Local Government Act 1989.*
[21] s 98 of the *Local Government Act 1989.* The CEO may be empowered to further delegate powers to members of staff.
[22] s 98 of the *Local Government Act 1989.*

There is much to be said for simplification and standardisation. The section 223 process seems to be appropriate for issues of general application, such as council budgets.

In relation to specific issues where it is appropriate to seek out stakeholders, it may require supplementation. This has already occurred in relation to special charge schemes: s 163 was amended in 2003 by insertion of sub-section (1C), which requires the council to send a copy of the public notice to each person who will be liable to pay the charge.

A similar concept could be applied to the process for making local laws: that is, that the legislation could require that affected stakeholders be identified, notified and consulted. The corresponding requirement under the *Subordinate Legislation Act 1994* (s 6) provides that, where the guidelines under that Act requires consultation, there is consultation in accordance with those guidelines with *any sector of the public on which a significant economic or social burden may be imposed* by the proposed statutory rule so that the need for, and the scope of, the proposed statutory rule is considered.

Committee and Council meetings

Special committees and advisory committees

The concept of participatory democracy is embedded in the provisions of the Act under which council powers may be delegated to special committees which include members of the public.

It would be possible under these provisions for expenditure and other decisions to be made by a committee on which councillors have been out-voted by non-councillors. It might be expected, nonetheless, that this has rarely if ever happened.

Although special committee are within the concept of participatory democracy, the principle of participatory democracy does not *require* their creation. It is possible for members of the community to participate in council decision-making other than by becoming voting members of special committees.

The City of Maroondah *Special Committees of Council Handbook 2012* includes a list of benefits of special committees, somewhat weighted to the use of special committees as local committees (see *Functions of special committees*, below). The list is (p 12):

- local needs being met by local residents;
- strengthening a sense of community within the municipality;
- delegation of functions, duties and powers to the community, providing direct community involvement, accountability and ownership of projects and facilities;
- networking and resource sharing between people working towards a common goal.

Functions of special committees

Councils have made varying use of special committees. These include:

- *Committee of the Council.* It is possible to constitute a special committee comprising only councillors.

  Potentially, a council might delegate powers to a committee comprising some, but not all, of its members, thereby excluding some councillors from participation in decision-making. This possibility is lessened by the restrictions in the Act on the powers which may be delegated.

  It is open to councils to appoint *all* councillors to a special committee. The City of Boroondara has taken this approach, creating two special committees (the Services Special Committee and the Urban Planning Special Committee) with all councillors being members of each committee. This is, in effect, an implementation of the "committee of the whole" concept which pre-dates the 1989 reforms;
- *Local committees.* Councils manage many local facilities, such as halls and sporting facilities. Some councils establish special committees to manage local facilities and delegate to them management and revenue/expenditure functions relating to those facilities.
- *Special purposes committees.* A special committee might have functions in a sectoral rather than geographic area. An example is the Enterprise Maribyrnong Special Committee established by the City of Maribyrnong, the members of which include councillors and persons with business, property or community interests in the municipal district, and which has advisory functions as well as delegated powers.

Advisory committees

Advisory committees have two characteristics – they provide advice, and they have no delegated powers.[23] They are referred to in the Act, but largely they are regulated by local laws and council resolutions. As with special committees, they might have functions relating to a sectoral area (for example, the City of Boroondara Bicycle Users Group, comprising a councillor, members of staff, two nominees of the Boroondara Bicycle Users Group and a member of the public), or a geographic area.

Public participation in meetings

A council is constituted by its councillors,[24] and it is they who are accountable to the electorate. If (as is generally the case) it is impracticable for the councillors, meeting as the council, to make all decisions, it would be possible to allocate decision-making powers to council committees and council staff, without public participation.

[23] See definition in s 3 of the *Local Government Act 1989.*
[24] *Local Government Act 1989,* s 5B.

It could be said that the Australian system of local government is based on the concept of participatory democracy, and that public participation in meetings serves purposes beyond the need to make a particular decision correctly. If so, however, it remains important that public participation operate effectively. If it does not, there are risks of distortion of decision-making caused by excessive influence of individuals or groups, time-wasting and disenchantment with the decision-making process.

Council meetings occur under a number of statutory provisions. In addition, there is the option (identified in the Local Government Review Discussion Paper at p 51) of deregulation, allowing each council to decide how best to make its decisions and to meet objectives of transparency and accountability. For this mechanism to operate, it would be necessary for a council to take the view that public *participation* (as distinct from *attendance* at open meetings) furthers those objectives. A council might conclude, for example, that those objective are furthered by allowing questions and answers in a town hall style meeting[25] but not by allowing speeches or presentation of petitions.

Models for public participation (other than committee membership)

Right to attend meeting

The right to attend meetings is not, strictly, a model for public participation, although attendance at a meeting can provide opportunity for informal interaction. Further, the transparency which open meetings provides is likely to assist members of the public to better understand issues and the dynamics of council decision-making, and thereby to facilitate their participation in other ways (for example, in preparing written submissions or in discussions with councillors).

Written submission – in response to a proposal

Councils frequently develop proposals which they expose for public comment. For some of these, a standard procedure has been created under s 223 of the Act for making written submissions. That procedure includes an entitlement to make an oral presentation.

While the procedure is consistent with the concept of public participation, much depends on the ability of members of the public to understand the proposal and make relevant comments on it. Under s 223 of the Act the council is required to specify the "matter" in respect of which the right to make a submission applies, and the public notice must contain prescribed details in respect of the matter. It can be expected in many cases that a newspaper notice will provide an inadequate understanding of the proposal under consideration. In many cases, it will be useful for members of the public to be able to access supporting reports and other documents, as well as an analysis of alternatives to the

[25] A council meeting is by definition a town hall meeting. A town hall *style* meeting is a meeting at which members of the public are able to put questions and obtain immediate responses.

proposal. This would facilitate more effective comment and analysis: even a submission along the lines, "I oppose the proposal" will be more effective if the writer has access to an analysis of the status quo option.

Right to ask questions and the right to speak

As noted above, the section 223 consultation process, if followed, confers a statutory right to make an oral submission.[26]

One means by which public participation is provided for in local laws is by reference to it in the agenda of meetings. An example is the City of Melbourne *Conduct of Meetings Local Law 2010.* This includes (cl 2.11) a default "order of business on the Agenda" for ordinary council meetings, which makes no provision for public participation. However, a further provision (cl 3.11) makes corresponding provision for special committees – but in this case includes the item "public questions".

The City of Melbourne local law is supplemented by a *Meeting Procedures Code.* The Code makes provision for public participation in two ways:

- it provides for a person to request to be heard at a special committee meeting in relation to an agenda item. The Code provides that "any person wishing to be heard at a special committee meeting shall be granted a period of three minutes to speak" (cl 3.15(f)). No provision is made for members of the public to address a council meeting;
- it elaborates the "public questions" agenda item for "ordinary special committee meetings" (cl 31.5(d)). A 15 minute period is to be allowed, and questions are to be limited to 90 seconds in duration. The chairperson is, where practical, to refer the question to the relevant "portfolio holder", who may answer the question, refer it to a council officer or "take the question on notice to seek additional information on the issue". The chairperson may disallow a question if it is a repetition, objectionable, irrelevant, raises a confidential issue or is asked to cause embarrassment.

The City of Boroondara is currently proposing a *Meeting Procedure (Additional Amendments 2014) Local Law.* Under the proposal members of the public will face limitations on the number of times each year that a person can participate in this way. The Council has issued a *Community Impact Statement* which characterises the purpose of question time as being an information gathering opportunity:[27]

> "The purpose of public question time at Ordinary Council meetings is to provide an opportunity for members of the community to ask questions of Council so that knowledge or information may be obtained from Council regarding a particular

[26] *Local Government Act 1989,* s 223(1)(b).
[27] City of Boroondara *Local Law Community Impact Statement: Meeting Procedures (Additional Amendments 2014) Local Law*, p 4.

> matter. Public question time does not exist as an opportunity for members of the community to seek to impose their views upon Council through preambles or questions which are designed to express an opinion rather than to acquire information. It is a time for questions rather than submissions.
>
> Over time there has been a number of instances where preambles to questions and the questions themselves have been used to make submissions. This is an inappropriate use of public question time.
>
> Given that public question time is a discretionary activity, Council is proposing to change the current system […]"

Councillor voting

Legislative history

The Act was preceded by the release of a 1966 discussion paper, *Principles for a New Local Government Act*. Included in the "principles" was the principle (cl 7.4):

> Any councillor or member of a committee will be permitted to abstain from voting unless a decision of council, or committee, is required by legislation.

As enacted, however, this is was not expressly provided for, although it might have been assumed that a councillor wishing to "abstain" would be able to leave the room. As enacted the Act (s 90(1)) provided that, when a question before a council or special committee was to be determined, "unless otherwise prohibited by this Act, each Councillor or member of the special committee present must vote".

This provision was removed in 2012 by the *Local Government Legislation Amendment (Miscellaneous) Act 2012*. At the same time, a provision was inserted (s 90(10(d)) under which a question is determined in the affirmative by a majority of the Councillors or members of the special committee present at a meeting at the time the vote is taken voting in favour of the question.

The amendment was explained in the Minister's second reading speech as follows:[28]

> The bill will remove the unenforceable provision that makes it compulsory for all councillors in a council meeting to vote. This will be replaced by a provision specifying that a majority of the councillors in the meeting must vote in favour of a motion before the motion can pass. This will allow a councillor to abstain from voting in a meeting, but the abstention will not alter the number of votes required for the motion to pass.

[28] Minister Powell, Legislative Assembly 20 June 2012, p 2874.

A councillor who has left the meeting because of a conflict of interest, or who is otherwise absent, is not counted as either having voted or as an abstention for the purpose of this provision.

Discussion

The concept of optional voting for councillors has the appearance of inconsistency with the requirement that persons who are on the voters roll must vote at council elections (s 40 of the Act). The concept of abstaining, or of leaving the room, has the appearance of inconsistency with the objective of transparency.

An allied requirement is that voting be must not be in secret (s 90 (1)(ca) of the Act). If government is to be transparent, the voting record of councillors should be visible: the councillor's position on an issue should not be a matter of inference from whether the councillor was in the room at the time, or from the timing of his or her departure from the room.

The arguments in support of removal of the requirement to vote were pragmatic – it was described by the Minister as being "unenforceable". The provision which was inserted does not prohibit the practice, but rather alludes to it (by use of the concept of being present at the meeting at the time the vote is taken).

The inserted provision has some similarity to the corresponding provision in New South Wales, under which a councillor who is present at a meeting of a council but who fails to vote on a motion is taken to have voted against the motion.[29] The difference between the two is perhaps abstract, but raises an issue of principle – the New South Wales provision in a sense forces a councillor present at a meeting to vote, if only by the device of "deeming" a negative vote.

If (as it seems) it is desirable that councillors vote on motions before the council, it is unfortunate that the requirement has been deleted for pragmatic reasons (that is, enforceability). An option would be to state the principle that councillors should vote as an aspirational statement in the Act or in a code of conduct. A provision such as the New South Wales provision would also be an option in that it prevents a councillor who is present in the room from adopting a passive position on a question before the meeting.

Internal review

Internal reviews generally

Council decision-making is multi-tiered, with many decisions being made at a relatively low level within the organisation. A difficulty for local government is that some of these

[29] r 251(1) *Local Government (General) Regulation 2005* (NSW).

decisions, such as enforcement of vehicle parking laws, are high volume but can produce strong responses from members of the public. A newspaper account of an "appeal" from a parking infringement notice, set out below, provides an example.

The Act does not include provision for internal review of decisions. There is, however, provision in other legislation for internal review of decisions.

Some councils have provided for internal review of decisions. An example is cl 208 of the Stonnington *General Local Law,*[30] which provides for internal review of a "notice to comply" issued under the local law. A notice to comply is a written direction to remedy a "situation" which appears to constitute a breach of the local law, or to "do anything" which, under the local law, can be the subject of a notice to comply. Under cl 208 (1) (which is headed "Appeals"):

> "Any person who is aggrieved by a direction or Notice to Comply may, within 28 days after the date of issue of the direction or notice, apply to Council to be heard and may make a written submission for consideration by Council."

It is an offence to fail to comply with a notice to comply. An infringement notice may be issued for that offence. Further, under cl. 1006, the council may cancel, suspend or amend a permit if satisfied that there has been a substantial failure to comply with a notice to comply.[31]

The review process appears to be premised on the ability of the Council, after considering the written submission, to decide:

- to cancel the notice, on the basis that the Council is able to undo what it has done;[32]
- to take no further action.

The local law makes no further provision about internal reviews. It can be assumed, however, that for the "written submission," to be successful, it would need to address the question of whether there was a sufficient "situation" or basis for a direction to be given. A further possibility would be that the submission would be directed to persuade the council to take no further action – that is, not to issue an infringement notice or to take action in respect of the person's permit.

The local law differs from the internal review provisions of the *Infringements Act 2006* (see below) in several respects, including:

- the grounds for review are not specified;
- there is no requirement that the person who conducts the review be a different person from the original decision-maker. However, High Court authority indicates

[30] The City of Stonnington was selected for no particular reason. Other councils have similar local laws.
[31] This appears to be the meaning of the provision. The relevant provision reads (in part) "a substantial failure to comply with a Permit condition or Notice to Comply relating to the Permit".
[32] See s 41A of the *Interpretation of Legislation Act 1984.*

that it is a requirement of administrative law that a review decision be made by a person who was not the original decision-maker[33] so that requirement is, in effect, added by common law.

Infringement notices

Much of the enforcement activity undertaken by local government is by way of issuing infringement notices under the *Infringements Act 2006,* including parking infringement notices. For the purposes of that Act, the council is an "enforcement agency."[34]

Under the *Infringement Act 2006,* a procedure is specified for the conduct of internal reviews (Division 3 of Part 2 of that Act). Some features of that procedure are:

- the grounds for an application are limited, but include "special circumstances" and "exceptional circumstances" (s 22);
- an application may be made once only in relation to an alleged offence (s 22(2)(e));
- the agency may "stop the clock" by requesting additional information (s 23);
- the agency is required to review the decision, and advise of the outcome. The review is not to be conducted by a person who was involved in the decision to issue the infringement notice (24).

A report in *The Age* newspaper (November 2015)[35] provides an illustration of the review process. In the incident reported, a motorist purchased a ticket and placed it on the dashboard of the car, but, for unknown reasons, the ticket was upside down. An infringement notice was issued. The motorist provided information about the incident to the Port Phillip Council, but the Council decided not to withdraw the notice.

Some relevant features of the report are:

- the motorist considered that it was "fair enough" that the infringement notice was issued, but was "outraged' that it was not withdrawn once it was accepted that a parking ticket had been purchased;
- the motorist "was bewildered by the appeals process" and was "hard pressed to think of what would constitute a successful appeal." As reported, the Council's mayor also described the internal review as an "appeal";
- the motorist was informed (correctly) that he was only entitled to submit one application for any one infringement offence.

The incident appears to raise the following issues of relevance to the Local Government Act review:

- there appears to be little awareness of the distinction between review and appeal;

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[33] *Isbester v Knox City Council* [2015] HCA 20.
[34] Schedule 1 to the *Infringements (General) Regulations 2006*
[35] "Upside down logic of parking inspectors leaves drivers fuming", T. Doutre, *The Age* 9 November 2015.

- the report makes no reference to the grounds which were available to the council on an internal review. The council's response, as reported, placed emphasis on the motorist's responsibility (to ensure that the ticket was visible), but the question which should have been considered was whether the circumstances were special or exceptional. The circumstances appear to have been *unexceptional*, so it is doubtful whether the council would have been able, within the criteria in s 22 of the *Infringements Act 2006*, to withdraw the notice.

Complaint handling

Complaint handling is a concept which is distinct from internal review of decisions. A member of the public, taking into consideration the circumstances of an initial decision, may have no complaint about the original decision. The newspaper account (above) of the internal review of a parking infringement notice provides an example of a member of the public who had no complaint about the initial decision but was unhappy about the review decision.

The Act is silent about complaint handling. Complaint handling by local government has been the subject of a recent report by the Ombudsman, *Councils and complaints – A report on current practice and issues.* (February 2015). A recommendation made in the report is (page 11):

> The Minister for Local Government consider including within the *Local Government Act 1989,* a requirement that councils have a complaint handling policy and procedures, and an internal review function for reviewing council complaint handling decisions.

The issue of complaint handling is similar to, but not the same as, the issue of internal review. Two points of difference are:

- a resident or ratepayer may be satisfied with the way in which an original decision was made, but wishes to have the decision reconsidered by the organisation at a higher level or in light of additional information;
- a complaint may relate to process or management rather than the decision which was made. For example, a ratepayer may wish to express concern about means by which refuse was collected one morning – and not the decision to collect refuse.

Legislative context

The Act does not provide for internal review of decisions. The issue is made complicated by several factors:

- many council decisions are subject to external review. A large number of contentious decisions by councils are made under the *Planning and Environment Act 1987*, which provides for applications to be made to VCAT in respect of the grant or refusal of permit applications, the imposition of conditions and (for a permit applicant) failure

to decide within a period of time. Creation of an internal review process would add an additional level of decision-making, creating added expense and delay;

- councils have a multi-tier decision-making process for many of their decisions. Many decisions are made on the recommendation of officers. The decision-maker in that circumstance is in a position to review and consider officer recommendations, in a process which has some similarities to the review of a lower-level decision;
- internal review of decisions is provided for in other legislation and some local laws, so that there *is* statutory provision for internal review of some decisions, and, separately, for internal review by some councils.

External review

Victoria has no ADJR Act

Local government in Victoria operates under State law: the Local Government Act is a State Act. In Victoria, unlike the Commonwealth,[36] there is no general right to apply for review of administrative decisions.

Legal challenge – administrative law invalidity

The low value of transactions and the non-final nature of decisions create an environment in which enforcement action is not frequently initiated by ratepayers against local government. A person who has been issued with an infringement notice for a parking offence has little financial incentive to defend the allegation if the cost of doing so greatly exceeds the amount of the penalty.

A challenge to a council decision in the higher courts is expensive, time consuming and the outcome is uncertain. The Supreme Court case *Payne v Port Phillip City Council* [2007] CSC 507 is an example. The issue in that case was the placement of a commercial advertising sign: the plaintiff argued it was not an offence to do so because the local law creating the offence was invalid. The court dismissed the claim. It was not for the court to consider whether the prohibition was good policy or not.

Statutory reviews (specific issues)

Most review powers relate to decisions made by councils, as distinct from providing a means of considering complaints against councils.[37]

[36] For Commonwealth decisions, see the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[37] However, the *Planning and Environment Act 1987* does create a right to apply to VCAT in relation to a planning permit application if the council fails to make a decision within the required time.

The review powers are conferred by several Acts. There are differences between procedures. A further difference is the criteria for decision. Under the *Planning and Environment Act 1987* hearings consider permit applications afresh – the application to VCAT is a merits review and not a form of complaint process. An application to VCAT in respect of a special charge scheme under the Act is also not a complaint process.

Complaint to the State Government

The Minister

The Minister, supported by the Department, has powers of intervention, either directly or by way of recommendation to the Governor in Council. From a ratepayer's perspective, this avenue has limitations as it is not the Minister's function to make decisions instead of the council where those decisions are properly for the council to make.

Complaint to sectoral agencies

Many of the discretions exercised by councils relate to sectoral areas, such as health services and road infrastructure. A ratepayer who is dissatisfied with a council decision may consider taking it to the relevant State agency. A member of the public wishing to follow this course confronts at least two difficulties. First, the state agency is likely to respond that the issue is for the council to decide. Second, arrangements between the state agency and the council (dealing with issues such as funding, decision-making responsibility and criteria for decisions) may be affected by agreements between the agency and the council. A member of the public may have little awareness of the terms of those agreements.

Complaint to the Ombudsman

This is an avenue which is frequently used. From the ratepayer's perspective, a difficulty is the limited powers of the Ombudsman, who is concerned with the quality of administration rather than sectoral issues.

Local laws

Local government as a law-maker

Councils are empowered to make legislation – local laws. Local laws are a form of secondary legislation, that is, they are made under authority of an Act. In this they (and the territories) differ from other Australian governments – the Commonwealth and states have constitutional power to make legislation.

Although local laws are secondary legislation, they differ from other secondary legislation made under State Acts:

- the empowering Act (the *Local Government Act 1989*) is not sectoral in nature, in that it does not deal with a sector of State Government activity. It is better

characterised as being constitutional in nature. The *Building Act 1993* (for example) is a sectoral Act – it deals with the construction, modification and demolition of buildings. Regulations made under it are closely connected with the provisions of the Act under which they are made. Local laws, by contrast, deal with a range of issues which have no close connection with provisions of the Local Government Act. The Local Government Act confers law-making power on councils by reference to the objectives of councils rather than the objectives of the Act, and thus is more akin to a constitutional provision than a sectoral provision;

- the law-makers – that is, councils – have electoral mandates. This gives them legitimacy which is distinct from that of the State Government. Democratic accountability for making local laws is to the local community and the local electorate. By contrast, secondary legislation made under other Acts is the responsibility of the Minister. The Minister under the Local Government Act has a power of intervention, but has no involvement in the making of local laws;
- many of the procedural requirements which apply to other secondary legislation do not apply to local laws. The requirements of the *Subordinate Legislation Act 1994* do not apply to local laws,[38] and consequently there is no requirement for preparation of a regulatory impact statement, nor are they subject to disallowance by Parliament. As they are not subject to disallowance, they are not the subject of analysis and report by the Chief Parliamentary Counsel.

The Act sets out consultation requirements for local laws. Under s 119 of the Act, a Council must give notice in the *Government Gazette* and a newspaper of the purpose and general purport of the proposed local law, information about where a copy of the proposed local law and explanatory document may be obtained, and information about making submissions. In accordance with s 223 of the Act, members of the public have a right to make a submission about the proposed local law.

An area in which statutory law has developed in parallel with common law is the making of subordinate legislation. Under s 123 of the Act the Minister may recommend the revocation of local laws, taking into consideration whether there has been a substantial breach of any of the matters listed in Schedule 8 to the Act. The meaning of this provision was considered by the Victorian Supreme Court in *Payne v Port Phillip City Council* [2007] VSC 507, which found that the contents of schedule 8 are not intended to govern the validity of local laws. The court commented [at 18]:

> the nature of a number of the matters set out in schedule 8 is such that it is most improbable that the legislature would have intended that they be justiciable in that they are unsuitable for judicial determination and involve matters of policy or political or administrative judgement.

[38] They are excluded from the definitions of "legislative instrument" and "statutory rule" in s 3 of that Act.

The applicant in that case is likely to have been led astray by the similarity between the grounds for revocation and the common law grounds for invalidity of subordinate legislation. The court, in response, noted that under s 123 of the Act the Minister is to consider whether there has been a "substantial" breach of any of the matters listed in schedule 8 of the Act.

Intervention by the Minister under s 123 of the Act requires a "policy or political or administrative judgment" by the Minister. While it would be open to a member of the public to raise an issue with the Minister, there is no procedure for this, nor any right of intervention in the process for members of the public.

Model local laws

Diversity in local government has some disadvantages for ratepayers and others. For commercial enterprises with properties in multiple municipal districts, differences in payment methods and dates can create confusion, error and expense. Differences in requirements about placement and design of street furniture, use of shopping trolleys, waste disposal and use of large vehicles[39] may have some justification in the variability of local circumstances, but all potentially add to the difficulties of ratepayers and others in going about their businesses and their lives.

The Local Government Act Review Discussion Paper (p 55) mentions the possibility of model local laws. Creation of model local laws may assist in improving consistency between councils: however the task of preparing and maintaining them to a good standard would be resource intensive. Similar outcomes might be achieved by:

- setting out more requirements and processes in the Act, concentrating on areas in which common approaches are desirable. An example is complaint handling processes;
- external assessment of draft local laws before they are made, possibly during the section 223 consultation process. This would better align the *Local Government Act* approach with the *Subordinate Legislation Act 1994* approach, but would be resource intensive.

Sanction and enforcement mechanisms

An issue raised by the Local Government Act Review *Discussion Paper* (p 29) is the question of sanctions and enforcement: should the legislation provide consequences such as penalties or sanctions for non-compliance, and what form should these take?

A much wider range of sanctions and enforcement mechanisms is envisaged in legislation now (as compared with 1989), such as civil penalties, negotiated sanctions, conditions of

[39] This list is extracted from the list of issues dealt with in the Maribyrnong City Council *General Purposes Local Law.*

accreditation and performance management. Although not all of these are available, or appropriate, in a local government context, the larger "tool box" available to regulators creates the possibility of a nuanced approach to enforcement, seeking to achieve outcomes though a combination of measures.

Responsive regulation

A useful analytical tool for considering the enforcement of obligations, especially as they apply to organisations which pursue objectives in a rational way, is the model of responsive regulation. In this model, the regulator and the regulated have an ongoing and interactive relationship. The regulated entity acts rationally, and responds to regulatory actions which are taken.

Within the model of responsive regulation is the concept of an enforcement pyramid, which is a sequence of enforcement actions that can be taken, arranged in order of severity. As mentioned earlier in this paper (at p 9), the enforcement pyramid was developed by Ayres and Braithwaite in the 1990s, and has been influential in regulatory theory.

As envisioned by Ayres and Braithwaite, the concept of responsive regulation incorporates a two-level enforcement pyramid (court based sanctions and administrative sanctions) and, sitting below it, "self-regulation".[40]

It is possible to modify the Ayres and Braithwaite model. Local government, as a sphere of government, is accountable to its local community. For local government, local accountability can be seen imposing a sanction for poor governance, incentivising local government in much the same way as administrative and court-based sanctions. For example, if a council is seen as being poorly governed, councillors are likely to suffer a diminution of electoral popularity: the loss of electoral support is a form of sanction. To avoid this, they will modify their behaviour in order to change that perception – if so, local accountability will have operated as a form of responsive regulation.

Accordingly, for local government the enforcement pyramid can be modified by including all three influences on compliance behaviour, arranged in a hierarchy of severity. As modified, it can be shown as in Figure 1.

[40] In a generalised version of the pyramid, self-regulation (markets, norms, ethics, codes, standards, principles, information, persuasion and general law) sit *under* the pyramid. Self-regulation and the enforcement pyramid together make up responsive regulation: Freiberg, *The Tools of Regulation,* p 98.

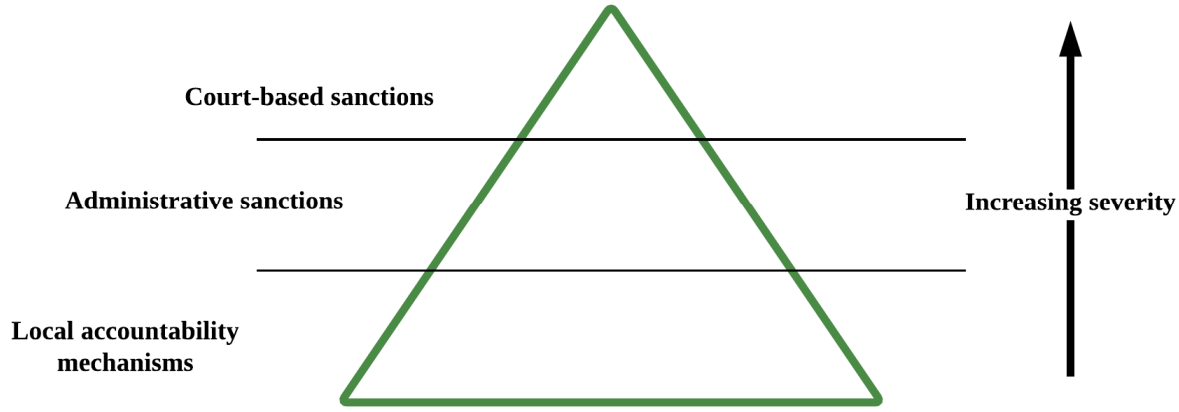

Figure 1: Enforcement pyramid incorporating local accountability

The pyramid comprises three levels:

- *local accountability mechanisms* – it was expected, when the Act was made, that councils would be accountable to the local community for the achievement of their objectives and the objectives of the Act. Local accountability mechanisms include open meetings, public participation, reporting and transparency;
- *administrative sanctions* – the possibility of intervention by the State Government, for example by revocation of local laws or suspension of the council, would motivate councils to align their behaviour with the requirements of the Act;
- *court-based sanctions* – at the peak of the pyramid was the possibility of legal proceedings to enforce the obligations of the Act.

Operating within these constraints, under a responsive regulation model councils should establish a culture of compliance. The higher parts of the pyramid (administrative and court-based sanctions) would not often be invoked, and in that sense deviation from good governance would be self-correcting.

Relatively frequent use of the lower part of the pyramid

There may be circumstances in which administrative or court-based action against a council is warranted. However, it is desirable that, as far as possible, enforcement action be limited to the lower part of the pyramid, with good governance being achieved without external intervention.

To this end, it seems desirable that any administrative action which is taken should be directed to achieve *two* ends: to improve compliance, and to improve the effectiveness of local accountability. This would be achieved if administrative sanctions operate to influence the opinion of stakeholders and members of the public about the quality of local governance. This mechanism is shown in Figure 2.

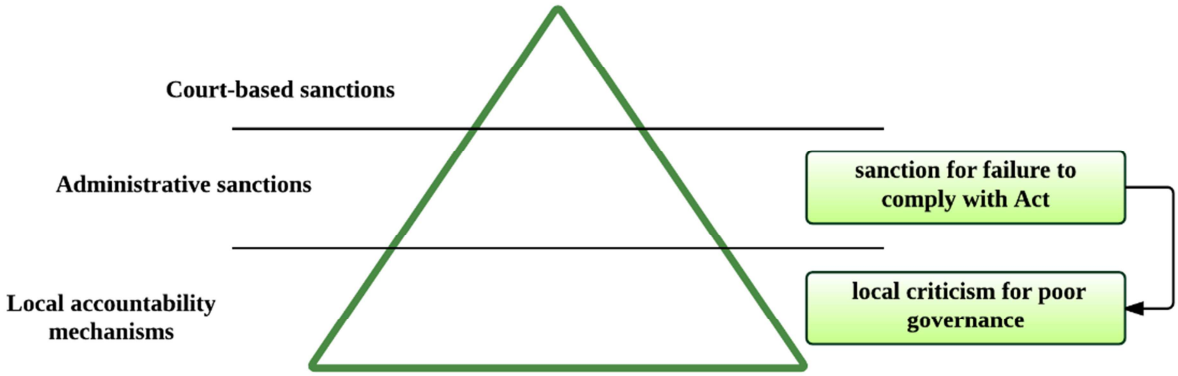

Figure 2: Administrative action which improves local accountability

An example would be use of an infringement notice system. Under that system, a State Government agency issues infringement notices to councils which fail to meet (for example) statutory deadlines for lodging documents. Councils would modify their behaviour to avoid enforcement action of this type – in this case, by ensuring that the required documents are lodged within time.

A second effect of the enforcement action would be the damage it does to the council's reputation (and self-perception) as being the provider of good governance. This effect would be enhanced by publicity and by a requirement that details of the enforcement action be included in the council's annual report. This could affect the council's reputation, and adversely impact on individuals within the organisation (in particular, councillors wishing to be popular with voters and CEOs mindful of their key performance indicators). To avoid this adverse consequence, the council, and the individuals within it, would seek to improve compliance.

If this mechanism is to operate well, consideration might be given to:

- providing for infringement notices to be issued against councils for breaches of the Act which are unambiguous, such as failure to lodge documents within specified time limits;
- requiring councils to make public, for example in their annual reports, data about administrative sanctions which have been imposed;
- ensuring that council plans and individual employees' key performance indicators make reference to the number of administrative sanctions which are applied to the council and to the responses to those sanctions.

It seems unlikely that local communities would react adversely to the possibility that some small part of the resources of their councils may be used to meet sanctions which have been imposed. They may even see some symmetry in councils, which issue many infringement notices, having infringement notices issued to them. Their greater concern would be as to the quality of local governance. It is likely that they would accept and agree that administrative sanctions, if used appropriately, would operate to improve the quality of governance.

ISBN 978-1-74146-965-3 (pdf)

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