LEGISLATIVE ASSEMBLY

Thursday, 13 November 1997

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Mr Speaker (The Hon. John Henry Murray) took the chair at 10.00 a.m.

Mr Speaker offered the Prayer.

UNIVERSITY OF WESTERN SYDNEY BILL

Bill introduced and read a first time.

Second Reading

Mr AQUILINA (Riverstone - Minister for Education and Training, and Minister Assisting the Premier on Youth Affairs) [10.00 a.m.]: I move:

That this bill be now read a second time.

Universities are a source of our State's intellectual power and knowledge. They provide thousands of students with the skills and ability to actively participate in society and in employment. Without them this State would not have the rigour and capacity to be a leading force in business and industry, whether it be large or small. Learning and education are fundamental rights of all people. They should be available to students regardless of their background, their ability to pay, where they live and what their goals and ambitions may be. Learning institutions, therefore, require input from the community and must be receptive to the community's needs.

This bill goes a long way towards looking after the people in one of Sydney's fastest growing and demanding populations - western Sydney. It will ensure that local residents and those from greater New South Wales have a first-class learning facility available to them. This legislation strengthens the federation structure of the University of Western Sydney while, at the same time, leaving the university members able to respond to the needs of their local communities in the greater western Sydney region. The legislation also repeals and replaces the University of Western Sydney Act 1988. As this House would be aware, the University of Western Sydney has been a federated network university since its inception in 1989. It comprises three network members: the University of Western Sydney, Hawkesbury; the University of Western Sydney, Macarthur; and the University of Western Sydney, Nepean.

Back in 1995 one member of the university federation, the University of Western Sydney, Nepean, sought to secede to achieve greater autonomy. This proved to be the catalyst for structural changes required for the future evolution of the university. What followed was extensive community consultation within the university itself and with the wider community led by a review committee headed by former Supreme Court Justice and current Chancellor of Southern Cross University, the Hon. Andrew Rogers, QC. The concerns of the University of Western Sydney, Nepean, were fully aired at that time and a range of models for a new University of Western Sydney structure was reviewed. The outcomes of this consultation are addressed in the detail of the structural arrangements identified in this new legislation.

The bill proposes a strengthened university federation and clarifies the governance of the university. Clause 7 clarifies that the structure of the federation consists of the office of the vice-chancellor and the university members - the University of Western Sydney, Hawkesbury; the University of Western Sydney,

If the authority and the director do not have the financial capacity to properly investigate a major change involving a person or organisation becoming associated with the casino business, the authority might not be able to guarantee that the casino will remain free from criminal influence and exploitation, or that gaming will be conducted honestly. The Government has determined that the Consolidated Fund should not have to bear the cost of supporting investigations in market-driven circumstances where one set of commercial parties proposes to replace another.

The third proposal in the bill relates to the basis upon which a person may be excluded from the casino. Under section 81 of the Casino Control Act, the Commissioner of Police may direct a casino operator to issue an exclusion order to a person patronising the casino. Strictly, "casino" means only that area defined by the Casino Control Authority as the location for the conduct of gaming. In this strict sense, "casino" does not include substantial parts of the permanent casino complex, such as restaurants, bars, theatres, forecourts and public thoroughfares. It would be unacceptable if the casino operator, regulatory agencies and police were impotent to readily address the conduct of undesirable activities in areas, including those that I have mentioned.

The bill addresses this situation by authorising the making of regulations which would prescribe additional areas to be part of the casino, to be termed "the casino precinct", and thus empower the Commissioner of Police to direct the casino operator to issue an exclusion order covering some or all of the casino precinct, as well as the casino itself. It is intended that the precise area or areas which are contemplated as being subject to the commissioner's widened power will be determined through consultation. This bill also includes two minor amendments which are essentially of a statute law nature. The first of these addresses references in the Casino Control Act to "slot machines". The bill will replace the few references to "slot machines" in section 8 of the Act with the expression "gaming machines". This will achieve consistency with terminology applicable to machine gaming facilities in clubs and hotels. After all, casino gaming machines are similar to the machines installed in clubs and hotels in New South Wales.

The bill will also make clear the term of the appointment of a deputy member of the Casino Control Authority and the circumstances in which such a position becomes vacant. A deputy member is a person who is appointed by the Minister responsible for the Casino Control Act to act in the place of a member of the authority when the member is absent. The bill states that a vacancy in the office of deputy member would arise in the case of death, completion of a term of office, resignation, bankruptcy, becoming a mentally incapacitated person or being convicted of an offence punishable by at least 12 months imprisonment. These circumstances are exactly the same as those that already apply to the appointment of authority members. I commend the bill to the House.

Debate adjourned on motion by Mr Downy.

LOCAL GOVERNMENT AMENDMENT (OPEN MEETINGS) BILL

Bill introduced and read a first time.

Second Reading

Mr E. T. PAGE (Coogee - Minister for Local Government) [11.03 a.m.]: I move:

That this bill be now read a second time.

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It gives me great pleasure to introduce the Local Government Amendment (Open Meetings) Bill. The bill will improve the transparency of the local government decision-making process by enhancing public access to council meetings and also improve the openness of local government by providing the public and councillors with greater and more convenient access to council-held information. The bill is a practical application of the Government's social justice strategy, which is based on the four principles of equity, access, participation and

rights. The New South Wales Social Justice Directions Statement commits the Government to ensuring that people have better opportunities for genuine participation and consultation about decisions affecting their lives.

To achieve this outcome in the context of local government, it is important for a council's decision-making processes to be as open, responsive and effective as possible. The Government believes that the potential of local government is best realised when its decision making is open and accountable to the local community. However, for accountability to be effective, there need to be mechanisms for citizen knowledge and participation in decision making. The ability of the public and the media to attend council meetings and observe the deliberations and decisions of elected representatives plays a crucial role in achieving better standards of accountability. A majority of councils in New South Wales certainly recognise and support this.

The existing Local Government Act 1993 includes various provisions aimed at ensuring that local communities can participate in council decision-making processes and can access information held by councils. As a general principle, councils are required to conduct meetings in public. Section 10 of the Act sets out the grounds on which a council meeting may be closed to the public. The public and councillors have a right of access to correspondence, reports and to certain information held by the council. Section 12 of the Act lists the documents that are available as of right. However, the Act also recognises that in certain circumstances a council may need to conduct its business in private to allow it to consider confidential information. The power to close meetings to the public is therefore important.

From a public policy perspective, it is essential that the legislation achieve an appropriate balance between these two competing policy objectives - that of maximising open decision making and that of protecting, where necessary, genuinely confidential information. The Government believes, as a matter of principle, that this balance should be struck so that it furthers rather than hinders the democratic aspirations of local communities. Unfortunately, since the commencement of the Local Government Act in 1993 it has become increasingly clear that the law is not always achieving this balance. Reform is therefore necessary.

Concern has been expressed that the current circumstances under which a meeting may be closed are too broad. Some of the reasons given by some councils for closing meetings to the public in recent times have been spurious, contrary to the intention of the Act and, in some cases, simply unlawful. For example, some councils have excluded the public and press from meetings when issues were being discussed such as grazing leases, naming streets, setting opening hours and increasing admission fees for use of a swimming pool, controversial development applications and rezonings, public health concerns, the performance review of a general manager and deregistration of child-care centres.

A number of councils, unfortunately, habitually close meetings to the public when considering matters of vital public interest and some routinely have special confidential sections of their business papers prepared for every meeting. There are, of course, some councils whose meetings are always open to the public. It seems that in too many cases the matters addressed in these closed sessions are not truly confidential; rather, they are controversial. The Government believes it is unacceptable for the public to be excluded from a meeting just because a council majority considers an issue to be controversial. The democratic process is undermined in these instances and the Government is not prepared to allow such councils to use the Local Government Act as a device to inappropriately shield themselves from public scrutiny.

The Ombudsman has also expressed concern about this issue. In her 1994-1995 annual report the Ombudsman indicated that her office had received a number of complaints about decisions made in closed meetings. It was reported that in a number of cases the public was improperly denied the right to hear debate on matters of public interest. These concerns were reiterated in the Ombudsman's 1995-96 annual report and at least one full inquiry into a council decision to close a council meeting to the public has been undertaken. This bill has been drafted to respond positively to the Ombudsman's concerns and to put an end to the abuse of section 10.

The bill also follows on from a commitment I gave during the passage of the Local Government Legislation Amendment Bill 1995. A number of

amendments to that bill were moved by the Hon. Richard Jones in the other place. They sought to improve open decision making at the local government level. At that time the Government indicated it was concerned with aspects of the amendments, but was also keen to provide an opportunity for further consideration and consultation on the issues raised by Mr Jones. To this end, in October 1996 I released a discussion paper containing options to reform those provisions of the Local Government Act 1993 regulating open council meetings and public access to council information.

Copies were sent to all New South Wales councils, councillors and members of Parliament. Many more were sent to members of the public and various community and public interest groups. The Government's social justice reference group was also consulted. A total of 174 responses were received, including 108 from councils. The comments contained in the responses, most of which were generally or specifically supportive of the legislative changes being proposed, were considered in the development of this bill. The underlying principle of section 10 of the Local Government Act is that council meetings should be open to the public whenever possible. However, this important principle is not specifically stated in the Act. The bill will rectify that position by making it a statutory requirement for a meeting of the council, and meetings of its committees of which all members are councillors, to be open to the public.

The Act will also clearly state that everyone is entitled to attend such meetings. Of course, this general requirement will be subject to the remaining provisions in the bill. This recognises that there are limited circumstances, provided by the legislation, under which meetings may be closed to the public. The bill introduces a requirement for a council to give notice of an intention to close a meeting or part of a meeting to the public. This requirement will allow members of the public to be aware of issues to be considered in a closed meeting and provide them with an opportunity to make representations to the council concerning whether or not the meeting should be closed. Opportunity will also be provided for a council to close a meeting without prior notice when it becomes apparent during the course of debate that a matter should be considered in a closed meeting and the council resolves that it is too urgent to be deferred.

One principal problem addressed by the bill is the failure of certain councils to provide meaningful reasons when closing meetings to the public. For example, some regard a reference to the relevant subsection of section 10 as providing adequate reason for closing a meeting to the public. Such information on its own fails to give members of the public sufficient detail as to why they should be excluded from the meeting. The bill will require councils to clearly state the grounds for closing a meeting to the public. They will be required to clearly state under which provision the meeting is being closed, the subject, and the specific reason why it is being closed. Currently, the only information from the proceedings of closed meetings to which the public has had a right of access is the resolutions passed at those meetings.

The bill will broaden the public's knowledge of those proceedings by requiring councils to make reports of the closed parts of meetings available to the public immediately after the need for keeping the information confidential has passed. Advice will be provided to councils on appropriate time limits for releasing information from closed meetings. There are some issues such as personal hardship, personnel matters and trade secrets which it is generally agreed should not be made public. Provision will be made to exempt records of the parts of closed meetings in which such issues were discussed from being made available to the public.

An overriding public interest test, requiring that the disclosure of information would be contrary to the public interest, will be applied to any proposals to close council meetings to the public. It will be similar to the qualification contained in a number of exemptions in schedule 1 to the Freedom of Information Act 1989. However, it will not override the privacy of individuals in cases of personal hardship and personnel matters or of trade secrets. The bill will also apply the public interest criteria to the provision of information to the public by councils under section 12 of the Local Government Act, subject to the same protection of the privacy of individuals when it relates to personal hardship and personnel matters concerning particular individuals and trade secrets. Some councils have closed meetings to the public for the whole of an item under discussion despite the fact that only a portion of the debate concerns genuinely confidential information.

The bill will clarify that a council may close a meeting only for so much of the discussion as is necessary to preserve the relevant confidentiality, privilege or security, and only when it would be contrary to the public interest for the matter to be discussed in an open meeting. The bill will also refine the types of matters for which councils may close meetings to the public. These important new provisions are contained in clause 10A(2) of the bill.
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The Act will now require that commercial information is also of a confidential nature before a council meeting may be closed to consider it. Information would be confidential in such circumstances as when knowledge of it would prejudice the commercial position of the person who supplied it, for example a proposed marketing strategy, or reveal a trade secret, for example the ingredients of a product.

Councils will be able to close meetings to consider matters with commercial implications, such as proposals for the sale of land, the rezoning of land and the entering into of contracts only in circumstances when the information, if disclosed, would confer a commercial advantage on the person with whom the council is conducting or proposing to conduct business. This important safeguard will ensure that genuinely confidential information can be protected. It is proposed that the power for a council to close a meeting to the public when considering information that is subject to legal obligations of confidence be removed. This will overcome concerns that councils or other persons may seek to avoid public scrutiny by simply including a clause imposing legal obligations of confidence in contracts so that the entire meeting considering the matter would be closed to the public. It is important to note, however, that the other provisions in the bill will ensure that genuinely confidential information can still be protected.

The Act currently provides that a council may close a meeting to the public when receiving and considering legal advice concerning litigation. Some councils have abused this provision to close meetings to the public merely on the possibility that legal advice to be considered relates to matters that may go to court. The section was never meant to be used so broadly. To resolve this problem, the bill provides that a council may close a meeting to consider legal advice only when the legal issues are substantial issues about the matter before the council, are clearly identified in the report to council, and are fully discussed therein.

In the interests of preserving peoples' rights under other parts of the law, the bill will provide for councils to deny public access to minutes of meetings, business papers or other documents when disclosure of the matter would be contrary to law. The foregoing amendments to section 10 of the Act will undoubtedly make it more difficult for a council to exclude the public from its meetings. In the main, that is their object. However, the provisions will still enable a council to protect genuinely confidential information from public disclosure. Any council that has a genuine reason to close a meeting under the current law will continue to be able to close a meeting under the proposed new law.

The majority of councils that adhere to the spirit of existing section 10 of the Local Government Act will notice little substantive change in their meeting practices. They will, however, be required to adhere to the new procedural requirements. The Government does not believe that these provisions will be onerous for councils. They will, however, ensure that members of the public are not inappropriately excluded from council meetings. Members of the public need open access to council records in order to make informed judgments on local government issues. Councillors also need access to information to enable them to properly carry out their functions as elected representatives. The Act will be amended to enhance the accessibility of council information.

The general manager or other council officer who refuses to give the public or councillors access to information will be required to give reasons for the refusal. A council will be required to review any decision by the general manager or other council officer restricting public or councillor access to information of any kind after three months to determine whether the grounds for the decision are still current. If it determines that they are not and there are no other grounds for maintaining them, council must remove the restriction or refusal of public or councillor access. If the council determines that the reasons for refusal are still current, the member of the public or councillor may apply for the decision to be reviewed at further three-monthly intervals. A councillor or member of the public dissatisfied with a decision of the general manager or the council also has the

right to seek access to council records through the Freedom of Information Act and, if access is not granted, to lodge a complaint to the Ombudsman or an appeal to the District Court.

Section 12 of the Local Government Act provides a list of documents that a council must make available to the public on request. Development and building applications will be included in the list to encourage public participation in building and development approval processes. It will allow members of the public to more closely scrutinise complex development and building proposals that may have a direct impact on them. It is proposed to provide that, when a right to inspect documents is conferred or granted by or under the Act, that right will include a right to take copies, either free of charge or on payment of reasonable copying charges, as the council chooses.

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The right will include building or development applications but will not include building and development plans and specifications, other than plans that show the height and external configuration of the building in relation to the site on which it is proposed to be erected. It also will not apply to commercial information contained in those applications which is likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret. I anticipate that the Local Government Amendment (Open Meetings) Bill 1997 will provide a fresh impetus for all councils, particularly those councils in which closed meetings are now a regular feature, to be more accountable to their communities. This will result in a more responsive and responsible form of local government. I commend the bill to the House.

Debate adjourned on motion by Mr Rixon.

Mr ACTING-SPEAKER (Mr Gaudry): I welcome to the gallery members of Petersham TAFE.

FISHERIES MANAGEMENT AMENDMENT BILL

Second Reading

Debate resumed from an earlier hour.

Mr FRASER (Coffs Harbour) [11.25 a.m.]: On behalf of the Opposition I commend the shadow minister for fisheries for the effort and time he has put into this legislation, given the short notice we have had to look at it. Consultation under this Government is absolutely farcical. Last night the Minister for Fisheries, the honourable member for Rockdale, and the honourable member for Bulli claimed that there had been consultation. The honourable member for Rockdale said that 30 per cent of the population of New South Wales are recreational fishermen and would be affected in some way by the legislation. He said that there had been extensive consultation and that 3,700 responses had been received. He also said that the responses showed that people were in favour of inland freshwater fishing licences. The percentage in favour at Coffs Harbour was 87 per cent. I believe that the figures the Minister has at his disposal for Murwillumbah show a 100 per cent response against the proposal. The Minister may care to table the figures but I believe the response at Murwillumbah was from only one person.

A response from 3,700 people out of an estimated 1.5 million fisher persons in New South Wales does not represent extensive consultation. The Coffs Harbour *Advocate* of Wednesday, 22 October contained an article on a press release from the Minister headed "Government says too many charter fishing boats". The charter boat fishermen in Coffs Harbour do not agree with that. But the decision has been made and is being enacted by this legislation purely as a knee-jerk reaction without consultation or facts to back up the claims.

There are 10 or 12 charter boats in Coffs Harbour. What used to be the Solitary Islands reserve is now a marine park. It was managed very well, as the Minister knows, but the Minister for the Environment decided to change the situation; and once again the decision was imposed on the people of Coffs Harbour without

Development Contributions – Practice Note

Planning agreements

The purpose of this practice note is to provide advice on the matters surrounding voluntary planning agreements. It provides an overview of current trends and practices, sets out the statutory framework for planning agreements and deals with issues such as the fundamental principles governing the use of planning agreements, as well as public interest and probity considerations. Some examples of the use of planning agreements are also provided, along with a template planning agreement and explanatory note.

Part 1 - Introduction

About planning agreements

The *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005* introduced Subdivision 2 of Division 4 of Part 6 providing for a statutory system of planning agreements.

It was not intended that the new system preclude other kinds of agreements in the planning process. For this reason, no transitional arrangements have been included in the new legislation. However, other kinds of agreements, whether made before or after the new system comes into force, must comply with the general law.

It was largely because of uncertainty surrounding the application of the general law to agreements in the planning process that the new system of planning agreements was enacted.

Furthermore there is uncertainty about the application of the Goods and Services Tax (GST) to other kinds of agreements. The intention of the planning agreements legislation was to overcome that uncertainty and remove the application of the GST to planning agreements as far as possible. However, independent advice should be sought on the GST implications of entering into any sort of agreement in the planning process and on a case specific basis.

About this practice note

This practice note is made for the purposes of clause 25B(2) of the *Environmental Planning and Assessment Regulation 2000*.

The purpose of this practice note is to assist planning authorities, developers, and others in the preparation of planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*, and to understand the role of planning agreements in the planning process.

Section 93F and other provisions in Subdivision 2 of Division 6 of Part 4 of the *EP&A Act* relating to planning agreements were inserted by the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*. Related provisions were inserted into the *Regulation* by the *Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2005.* The amendments to the *EP&A Act* and *Regulation* took effect on 8 July 2005. Those amendments, together with this practice note, form the broad planning agreements framework for NSW.

This practice note is not legally binding. In some cases it may advocate greater restrictions on the content and use of planning agreements than is provided for in the *EP&A Act* and *Regulation.* However, the *EP&A Act* and *Regulation* provide only a broad legislative framework for planning agreements, whereas this practice note seeks to provide best practice guidance in relation to their use. It also sets out various templates designed to standardise planning agreements documentation in order to foster efficient systems. It is intended, therefore, that planning authorities, developers, and others will follow this practice note to the fullest extent possible.

The remainder of this practice note is structured as follows:

- **Part 2** provides a brief overview of current practices relating to the use of agreements in the planning process in NSW and the recommendations of the Ministerial Taskforce that lead to amendments to the *EP&A Act* and *Regulation* to provide for a statutory system of planning agreements for the State,
- **Part 3** summarises the legislative framework for planning agreements established by the *EP&A Act* and *Regulation,*
- **Part 4** provides best practice guidelines in relation to planning agreements by identifying and explaining key public interest and probity considerations and fundamental principles relating to the use of planning agreements, and setting out a broad policy framework and basic statutory procedures for negotiating, entering into and administering planning agreements.
- **Part 5** provides examples of the possible use of planning agreements.

- **Attachments A to C** set out several template documents, including a template planning agreement for use in agreements between councils and developers.

Terminology

The introduction of new statutory processes, such as the new statutory system of planning agreements under Division 6 of Part 4 of the *EP&A Act*, invariably lead to the introduction of new terminology that can assist clear and efficient communication.

In this practice note, the following terminology is used to convey several key concepts in relation to planning agreements:

- **development contribution** means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit
- **planning benefit** means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community
- **public facilities** means public infrastructure, facilities, amenities and services
- **planning obligation** means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution
- **public** includes a section of the public
- **public benefit** is the benefit enjoyed by the public as a consequence of a development contribution.

Up-dates to this practice note
It is intended that this practice note will be periodically updated. More detailed information or guidance on specific matters in this practice note may also be the subject of future separate practice notes.

Part 2 - Overview of current trends and practices[1]

Negotiation and agreement between planning authorities and developers to exact public benefits from the planning process are now widespread. However, practices are largely unregulated. The negotiation process often occurs without the involvement of all interested stakeholders, and agreements are entered into without effective public participation.

The levying of s94 contributions and the imposition of conditions of development consent requiring works-in-kind also frequently involve significant negotiation between consent authorities and developers, despite the public impression that such contributions are obtained through strict adherence to the formal processes under the *EP&A Act* and *Regulation*.

There are a number of apparent reasons why the use of agreements in the planning process to exact public benefits has become widespread. These include:

- planning authorities are under increasing pressure from local communities to ensure that development produces targeted public benefits over and above measures to address the impact of development on the public domain,
- development consent conditions, including s94, are ill-equipped to produce such benefits as they are primarily designed to mitigate the external impacts of development on surrounding land and communities,
- as developers increasingly appreciate how their own developments benefit from the provision of targeted public facilities, they are seeking greater involvement in determining the type, standard and location of such facilities,
- negotiation tends to promote co-operation and compromise over conflict and can provide a more effective means for public participation in planning decisions,
- agreements provide a flexible means of achieving tailored development outcomes and targeted public benefits, including a means by which communities can agree to the redistribution of the costs and benefits of development in order to realise their specific preferences for the provision of public benefits,
- agreements can provide enhanced and more flexible infrastructure funding opportunities for planning authorities, subject always to good planning implementation.

Further, planning agreements provide a flexible framework under which the State and local government can share responsibility for the provision of infrastructure in new release areas or in major urban redevelopment projects. Planning agreements permit particular governance arrangements that suit particular cases and foster the provision of infrastructure by the different levels of government in an efficient, co-operative and co-ordinated way.

[1] This Part is taken from Taylor, L., *Bargaining for Developer Contributions in NSW*, A Research Thesis for the Degree of Doctor of Philosophy, Macquarie University 2000.

Part 3 - Outline of statutory framework

Nature of planning agreements

Subdivision 2 of Division 6 of Part 4 of the *EP&A Act* sets out a statutory system of planning agreements in NSW.

Section 93F(1) provides that a planning agreement is a voluntary agreement or other arrangement between one or more planning authorities and a developer under which the developer agrees to make development contributions towards a *public purpose*.

Who is a planning authority?

Section 93C defines a *planning authority* to mean a council, the Minister, the Ministerial corporation constituted under s8(1) of the *EP&A Act*, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974* or a public authority declared by the regulations to be a planning authority.

Clause 25A of the *EP&A Regulation* declares all public authorities to be planning authorities for this purpose.

Who is a developer?

A *developer* is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s93F(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

Additional parties to a planning agreement

Section 93F(7) provides that any Minister or public authority or other person approved by the Minister for Infrastructure and Planning is entitled to be an additional party to a planning agreement and to receive a benefit on behalf of the State.

Joint planning agreements

Planning authorities may enter into joint planning agreements.

Section 93F(8) provides that a council is not precluded from entering into joint planning agreements with another council or other planning authority merely because it applies to land not within, or any purposes not related to, the area of the council.

Types of development contributions authorised by planning agreements

Development contributions under a planning agreement can be monetary contributions, the dedication of land free of cost, any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

Section 93F(4) provides that a provision of a planning agreement is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid under the provision.

Definition of *public purpose*

Public purpose is defined in s93F(2) to include the provision of, or the recoupment of the cost of providing public amenities and public services (as defined in s93C), affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

Mandatory contents of planning agreements

Section 93F requires planning agreements to include provisions specifying:

(a) a description of the land to which the agreement applies,
(b) a description of the change to the environmental planning instrument, or the development, to which the agreement applies,
(c) the nature and extent of the development contributions to be made by the developer under the agreement, and when and how the contributions are to be made,
(d) whether the agreement excludes (wholly or in part) the application of s94 or s94A to particular development,
(e) if the agreement does not exclude the application of s94 to a development, whether benefits under the agreement may or may not be considered by the consent authority in determining a contribution in relation to that development under s94,
(f) a dispute resolution mechanism, and
(g) the enforcement of the agreement by a suitable means, such as the provision of a bond or bank guarantee, in the event of a breach by the developer. (Consideration should be given to the type of security which is appropriate to the circumstances of the particular development).

The *EP&A Act* does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except those provisions mentioned immediately below.

Limitations on the contents of planning agreements

Section 93F(9) precludes a planning agreement from imposing an obligation on a planning authority to grant development consent or to exercise a function under the *EP&A Act* in relation to a change to an environmental planning instrument.

Section 93F(10) provides that a planning agreement is void to the extent, if any, to which it authorises anything to be done in breach of the *EP&A Act*, or an environmental planning instrument or a development consent applying to the land to which the agreement applies.

Provisions of planning agreements relating to s94 or s94A

A planning agreement may wholly or partly exclude the application of s94 or s94A to development that is the subject of the agreement.

Section 93F(5) provides that, in such a case, a consent authority is precluded from imposing a condition of development consent in respect of that development under s94 or s94A except to the extent that any part of those sections are not excluded by the agreement.

A planning agreement may exclude the benefits under the agreement from being considered under s94 in its application to development.

Section 93F(6) provides that in such a case, s94(6) does not apply to any such benefit. Section 94(6) provides that if a consent authority proposes to impose a condition under s94 in respect of development, it must take into consideration any land, money or other material public benefit that the applicant for development consent has elsewhere dedicated free of cost to the consent authority or previously paid to the consent authority, other than a benefit provided as a condition of development consent granted under the *EP&A Act,* or a benefit excluded from consideration under s93F(6).

Application of development contributions obtained under a planning agreement

Sections 93E(1) and (4) require that a planning authority is to hold any monetary contribution paid in accordance with a planning agreement, together with any additional amount earned from its investment, for the purpose for which the payment was required and apply it towards that purpose within a reasonable time.

Section 93E(3) contains a similar requirement in respect of land dedicated in accordance with a planning agreement.

Limitation on provisions of environmental planning instruments

Section 93I(1) invalidates any provision of an environmental planning instrument made after the commencement of that section that *expressly* requires a planning agreement to be entered into before a development application can be made, considered or determined, or that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into.

However, s93D provides that Division 6 of Part 4 of the *EP&A Act* (other than s93I) does not derogate from or otherwise affect any provision of an environmental planning instrument, whether made before or after the commencement of the section, that requires satisfactory arrangements to be made for the provision of particular kinds of public infrastructure, facilities or services before development is carried out.

Determination of development applications

Section79C(1)(a)(iiia) of the *EP&A Act* requires a consent authority, when determining a development application, to take into consideration, so far as is relevant to the proposed development, any planning agreement that has been entered into under s94F or any such draft agreement offered by a developer. Section 79C(1)(d) requires the consent authority to take into consideration any public submissions made in respect of the planning agreement or draft planning agreement.

Section 93I(2) precludes a consent authority from refusing to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.

Section 93I(3) authorises a consent authority to require a planning agreement to be entered into as a condition of a development consent but only if it requires an agreement that is in the terms of an offer made by the developer in connection with the development application or a change to an environmental planning instrument sought by the developer for the purposes of making the development application.

Public notice of planning agreements

Section 93G(1) precludes a planning agreement from being entered into, amended or revoked unless public notice is given of the proposed agreement, amendment or revocation.

Clause 25D of the *EP&A Regulation* makes provision for public notice to be given of an agreement to enter, amend or revoke a planning agreement together with any public notice required under the *EP&A Act* for the relevant proposed change to a local or regional environmental plan or development application.

Clause 25E(1) of the *EP&A Regulation* requires the preparation of an explanatory note by a planning authority which proposes to enter into a planning agreement or an agreement to amend or revoke a planning agreement.

Clause 25E(3) provides that the explanatory note must be prepared jointly with the other parties proposing to enter into the planning agreement.

Clause 25E(4) makes provision for separate explanatory notes in certain circumstances if there are two or more planning authorities involved in the agreement.

Clause 25E(7) provides that a planning agreement may provide that the explanatory note may not be used to assist in construing the agreement.

Provision of information about planning agreements

Sections 93G(3) and (4) apply where the Minister and a council, respectively, are not party to a planning agreement and require the relevant planning authority that is party to the agreement to give certain information to the Minister or the council as relevant within 14 days after the agreement is entered into, amended or revoked.

Clause 25D(6) of the *EP&A Regulation* provides that if a council is not a party to a planning agreement that applies to its area, a copy of the explanatory note must be provided to the Council at the same time as the material under s93G(4) is provided.

Section 93G(5) requires a planning authority that has entered into a planning agreement, while the agreement is in force, to include in its annual report certain particulars relating to the planning agreement during the year to which the report relates.

Clauses 25F and 25G of the *EP&A Regulation* make provision for the keeping and public inspection of planning agreement registers. A council must keep a planning agreement register of any planning agreements that apply to the area of the council. The Director-General must keep a planning agreement register of any planning agreements entered into by the Minister.

Clause 25H of the *EP&A Regulation* makes provision for planning authorities other than the Minister or a council to make planning agreements to which those authorities are party available for public inspection.

Registration of planning agreements

Sections 93H(1) and (4) permit a planning agreement or any amendment or revocation of a planning agreement to be registered if each person with an estate or interest in the land agrees to its registration.

Section 93H(2) requires the Registrar-General to register a planning agreement on its lodgement by a planning authority in a form approved by the Registrar-General.

Section 93H(3) provides that a planning agreement that has been registered under s93H is binding on and enforceable against the owner of the land from time to time as if each owner for the time being had entered into the agreement.

No appeals to the Land and Environment Court

Section 93J(1) expressly excludes a person from appealing to the Land and Environment Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement.

Jurisdiction of the Land and Environment Court to enforce planning agreements

Section 93J(2) provides that the removal by s93J(1) of an appeal to the Land and Environment Court does not affect the jurisdiction of the Court under section 123 of the *EP&A Act*. Section 123(1) provides that any person may bring proceedings in the Court for an order to remedy or restrain a breach of '*this Act*', whether or not any right of that person has been or may be infringed by or as a consequence of that breach. Section 122(b)(v) provides that in s123 a reference to *this Act* includes a reference to a planning agreement referred to in s93F.

Determinations or directions by the Minister

Section 93K authorises the Minister for Infrastructure and Planning, generally or in any particular case or class of cases, to determine or direct any other planning authority as to the procedures to be followed in negotiating a planning agreement, the publication of those procedures, or any standard requirements with respect to planning agreements.

Commencement and amendment

A planning agreement will take effect in accordance with its terms. Ordinarily, the obligation to perform an agreement will arise, in accordance with the terms of the agreement, when the development to which it relates is commenced.

Clause 25C(2) of the *EP&A Regulation* authorises a planning agreement to specify that a planning agreement does not take effect until the happening of certain particular events.

Clause 25C(3) of the *EP&A Regulation* provides that a planning agreement can be amended or revoked by further agreement in writing signed by the parties (including by a subsequent planning agreement).

Form of planning agreements

A planning agreement must be in writing and signed by all of the parties to the agreement. A planning agreement is not entered into until it is so signed.

Part 4 - Best practice guidelines

Public interest and probity considerations[2]

This section discusses the public interest and probity issues that arise in connection with the use of planning agreements. It aims to lift the general level of awareness of these issues, and to inform the principles, policies and procedures contained in the best practice guidelines relating to planning agreements discussed later in this Part.

Problems inherent in the use of development agreements concern whether an agreement is in the public interest. Generally speaking, the public interest is directed towards securing the fair imposition of planning control for the benefit of the community and as between one developer and another. For this reason, the parties to a planning agreement do not enjoy the same bargaining freedom as do the parties to a commercial contract.

In particular cases, the public interest implicated by a planning agreement may be measured in terms of the need to mitigate any adverse impacts of development on the public domain or the desirability of providing a planning benefit to the wider community. Benefit to the developer is not a primary consideration.

The statutory bargaining framework for planning agreements raises the fundamental issue of what is an appropriate planning agreement. The bargaining process involves the exercise of discretion on both sides, giving planning authorities and developers room to accommodate subjective values and varying concepts of the public interest, private interests and other standards.

The ability for a planning agreement to wholly or partly exclude the application of s94 or s94A to development gives a planning authority scope for limited trade-offs under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through an agreement. However, there is no guarantee that the costs and benefits of development will be equitably distributed within the community. Planning agreements may facilitate the provision of public benefits that do not relate to development. Further, what may be a specific benefit to one group in the community may be a loss to another group or the remainder of the community.

Safeguards in the form of a system of principles, policies and procedures relating to planning agreements are needed to protect the public interest and the integrity of the process, and to guard against misuse of planning discretions and processes. Such misuse has the potential to seriously undermine good comprehensive planning, and public confidence in the planning system.

A system that ensures that planning discretions are exercised openly, honestly, freely and fairly in any given case and fairly and consistently across the board will serve to protect planning agreements from the natural suspicion that changes to environmental planning instruments and development consents can be bought by the highest bidder through planning agreements.

Misuse of planning agreements can occur for a variety of reasons and produce a variety of unwelcome results. Some examples are:

- where a planning authority seeks inappropriate public benefits because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.
- where insufficient analysis of the likely planning impacts of proposed development by a planning authority determined to enter into, or to give effect, to a planning agreement.
- where a planning authority allows the interests of individuals or small groups to outweigh the public interest.
- because of an imbalance of bargaining power between the planning authority and developer. For example, abuse would occur if a planning authority sought to improperly rely on its peculiar statutory position in order to extract unreasonable public benefits under a planning agreement.

On the other hand, misuse can also occur if the planning authority's bargaining power is compromised or its decision-making freedom is somehow fettered through a planning agreement.

The potential for misuse also exists where a planning authority, acting as consent authority or in another regulatory capacity in respect of development, is both party to a planning agreement and also a development joint venture partner under the agreement. Special safeguards, such as the

[2] This section is taken from Taylor, L., *Bargaining for Developer Contributions in NSW*, A Research Thesis for the Degree of Doctor of Philosophy, Macquarie University 2000.

intervention of a disinterested third party in the development assessment process, would be needed in such circumstances.

For these reasons, the safeguards applying to the use of planning agreements should:

- provide for a generally applicable test for determining the acceptability of a planning agreement, which embraces amongst other things concepts of reasonableness,
- contain specific measures to protect the public interest and prevent misuse of planning agreements and,
- be open with published rules and accessible procedures,
- provide for effective formalised public participation,
- extend fairness to all parties affected by a planning agreement,
- guarantee regulatory independence of the planning authority.

The generally applicable *acceptability test* referred to above should require that planning agreements:

- are directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development,
- provide for public benefits that bear a relationship to development that is not *de minimis* (that is benefits that are not wholly unrelated to development),
- produce outcomes that meet the general values and expectations of the public and protect the overall public interest,
- provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits, and
- protect the community against planning harm.

Formal public participation in a planning agreements system as referred to above is fundamental as it is the tool which legitimates the redistribution of the costs and benefits of development through planning agreements. That is, it is the means by which the community can express its preference to bear some of the costs of particular development on the public domain in order to share in wider community benefits provided under an agreement.

Fundamental principles

Planning agreements provide a facility for planning authorities and developers to negotiate flexible outcomes in respect of development contributions. They are a means to enable the NSW planning system to deliver sustainable development, through which key economic, social and environmental objectives of the State and local government can be achieved.

Planning agreements authorise development contributions for a variety of public purposes, some of which extend beyond the scope of s94 or s94A of the *EP&A Act*. These additional purposes include the recurrent funding of public facilities provided by councils, the capital and recurrent funding of transport and other State infrastructure and affordable housing, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

As such, the objective of planning agreements is not limited to internalising the potential costs of development on the public domain. Rather, they facilitate the provision of planning benefits by developers. A planning agreement that provides for a planning benefit involves an agreement by the developer to contribute part of the development profit for a public purpose.

Planning agreements are negotiated between planning authorities and developers in the context of applications by developers for changes to environmental planning instruments or for consent to carry out development. In many cases, the planning authority will be a person charged with the exercise of statutory functions in respect of the subject-matter of the agreement, such as the Minister or a council having functions relating to the making, amendment or repeal of an instrument or the determination of a development application.

Accordingly, planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold. This means that contributions made by developers towards public purposes that are wholly unrelated to their development should be discouraged, and that unacceptable development should not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.

That is not to say that development contributions provided for in a planning agreement must bear the same nexus with development as required by s94. The nexus principle applies to s94 because development contributions can be compulsorily exacted under that section. Because planning agreements, by contrast, are voluntary and facilitate planning benefits, they can allow for a redistribution of the costs and benefits of development subject to the above fundamental principles.

Agreements between planning authorities and developers should not be put in place outside the planning system to secure development contributions that are wholly unrelated to development or that do not make development acceptable.

Fundamental principles governing the participation by planning authorities in planning agreements include:

- planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold,
- planning authorities should never allow planning agreements to improperly fetter the exercise of statutory functions with which they are charged,
- planning authorities should not use planning agreements as a means to overcome revenue-raising or spending limitations to which they are subject or for other improper purposes,
- planning authorities should not be party to planning agreements in order to seek public benefits that are unrelated to particular development,
- planning authorities should not, when considering applications to change environmental planning instruments or development applications, take into consideration planning agreements that are wholly unrelated to the subject-matter of the application, nor should they attribute disproportionate weight to a planning agreement[3],
- planning authorities should not allow the interests of individuals or interest group to outweigh the public interest when considering planning agreements,
- planning authorities should not improperly rely on their peculiar statutory position in order to extract unreasonable public benefits from developers under planning agreements,
- planning authorities should ensure that their bargaining power is not compromised or their decision-making freedom is not fettered through a planning agreement, and
- planning authorities should avoid, wherever possible, being party to planning agreements where they also have a stake in the development the subject of the agreements.

[3] See *Tesco Stores v Secretary of State for the Environment & Ors*. [1995] 1 WLR 759, where the House of Lords held in relation to planning agreements under s106 of the *Town and Country Planning Act 1991* (UK) that if a planning obligation is completely unrelated to the development, it could not be a material consideration in the determination of an application and could be regarded only as an attempt to buy development consent. But if it has some connection with the proposed development which is not *de minimis*, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker, who, in exercising that discretion, was entitled to have regard to established planning policy.

Policy and practice framework

This section sets out a best practice policy and practice framework on the use of planning agreements. Planning agreements should comply with the specific requirements in this section to the fullest extent possible.

Acceptability test. It is of paramount importance that all planning agreements should meet the acceptability test set out in the previous Part. Whether a particular planning agreement is acceptable and reasonable is a matter of planning judgement to be exercised in the circumstances of the case in the light of particular State, regional or local planning considerations, as appropriate.

Efficient negotiation systems. Planning authorities, particularly councils, should implement measures that aim to create fast, predictable, transparent and accountable negotiation systems of planning agreements. Such systems should ensure that the negotiation of planning agreements do not unnecessarily delay ordinary planning processes. The systems should contain measures to ensure that the negotiation of planning agreements run in parallel with applications to change environmental planning instruments or development applications, including through pre-application negotiation in appropriate cases. Negotiation systems should be based on principles of co-operation, full disclosure, early warning, and agreed working practices and timetables.

Planning agreements policies and procedures. Planning authorities, particularly councils, should publish policies and procedures concerning their use of planning agreements. These should set out:

- the circumstances in which the planning authority would ordinarily consider entering into a planning agreement,
- the matters ordinarily covered by a planning agreement,
- the form of development contributions ordinarily sought under a planning agreement,
- the kinds of public benefits ordinarily sought and, in relation to each kind of benefit, whether it involves a planning benefit,
- the method for determining the value of public benefits and whether that method involves standard charging,
- whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate,
- when, how and where public benefits will be provided,
- the procedures for negotiating and entering into planning agreements,
- the planning authority's policies on other matters relating to planning agreements, such as their review and modification, the discharging of the developer's obligations

under agreements, the circumstances, if any, in which refunds may be given, dispute resolution and enforcement mechanisms, and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

More detailed policies and procedures can be prepared by planning authorities to supplement the high level policies and procedures.

Planning agreements or conditions of development consent? There are no general policy restrictions on the circumstances in which planning agreements may be used, including whether they may be used instead of conditions of development consent. Planning authorities and developers must make a judgement in each particular case about whether the use of a planning agreement is beneficial and otherwise appropriate. However, planning agreements should never be used to require compliance with or re-state obligations imposed by conditions of development consent. This entails unnecessary duplication and could frustrate the developer's right of appeal to the Land and Environment Court against the conditions.

GST considerations. The parties to planning agreements should obtain advice in every case on whether a potential GST liability attaches to the agreement. An agreement potentially involves two taxable supplies: the supply of development rights from the planning authority to the developer and the supply of public benefits by the developer to the planning authority. In other words, both parties may have a GST liability. The imposition of a condition under s93I requiring a planning agreement to be entered into may overcome the potential GST liability attaching to a planning agreement, but legal advice should still be obtained in every case.

Objectives of planning agreements. The objectives of planning agreements will be dictated by the circumstances of individual cases and the policies of planning authorities in relation to their use. However, as a general indication, planning agreements may be directed towards achieving the following broad objectives:

- meeting the demands created by development for new public infrastructure, amenities and services,
- prescribing the nature of development to achieve specific planning objectives,
- securing off-site planning benefits for the wider community so that development delivers a net community benefit,
- compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.

Planning benefits. The provision of planning benefits for the wider community through planning agreements necessarily involves capturing part of development profit for that purpose. The value of planning benefits should always be restricted to a reasonable share of development profit. Planning benefits should never be obtained through planning agreements as a form of taxation on development. Accordingly, planning benefits, though primarily directed to the wider community, must never be wholly un-related to development contributing the benefit.

Competing proposals to provide planning benefits. Situations may arise where planning authorities are faced with competing applications each accompanied by offers to enter into planning agreements providing planning benefits. In such cases, provided the planning benefits offered are not wholly unrelated to development, they may be considered in connection with the applications and it may be perfectly rational for the planning authority to approve the proposal which offers the greatest planning benefit in terms of both the development itself and related external public benefits[4].

Relationship between planning agreements and SEPP No.1. The benefits provided under planning agreements should never be used to justify a dispensation with applicable development standards under *State Environmental Planning Policy No.1 – Development Standards* in relation to development.

Past deficiencies in infrastructure provision. Planning agreements may be used to overcome past deficiencies in infrastructure provision that would otherwise prevent development from occurring. This may frequently involve the conferring of a planning benefit under the agreement.

Standard charges. Planning authorities are encouraged to standardise development contributions sought under planning agreements in order to streamline negotiations and provide predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Standard-form planning agreements. Planning authorities are also encouraged to publish and use standard forms of planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency. Councils are encouraged to use the template planning agreement at Attachment A, wherever suitable.

[4] See the decision of the House of Lords in *Tesco Stores v Secretary of State for the Environment & Ors*. [1995] 1 WLR 759.

Development Contributions – Practice Note

Involvement of independent third parties. Independent third parties can be potentially used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them. The situations include:

- where an independent assessment of a proposed change to an environmental planning instrument or development application is necessary or desirable,
- where factual information requires validation in the course of negotiations,
- where sensitive financial or other confidential information must be verified or established in the course of negotiations,
- where facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved,
- where dispute resolution is required under a planning agreement.

Recurrent costs and maintenance payments. Planning agreements may require developers to make contributions towards the recurrent costs of facilities that primarily serve the development to which the planning agreement applies or neighbouring development in perpetuity. However, where the facilities are intended to serve the wider community, planning agreements should only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

Pooling of monetary contributions. Planning authorities should disclose to developers, and planning agreements should specifically provide, that monetary contributions paid under different planning agreements are to be pooled and progressively applied towards the provision of public benefits that relate to the various agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

Refunds. Planning agreements may provide that refunds of monetary development contributions made under the agreement are available if public benefits are not provided in accordance with the agreement.

Documentation of planning agreements. The parties to a planning agreement should agree on which party is to draft the agreement so as to avoid duplication of resources and costs.

Monitoring and review of planning agreements. Planning authorities should use standardised systems to monitor the implementation of planning agreements in a systematic and transparent way. This may involve co-operation by different parts of planning authorities. Monitoring systems should enable information about the implementation of planning agreements to be made readily available to public agencies, developers and the community. Planning agreements should contain a mechanism for their periodic review that should involve the participation of all parties.

Modification and discharge of developer's obligations. Planning agreements should not impose obligations on developers indefinitely. Planning agreements should set out the circumstances in which the parties agree to modify or discharge the developer's obligations under the agreement. The modification or discharge should be effected by an amendment to the agreement. The circumstances that may require planning agreements to be modified or discharged may include the following:

- material changes to the planning controls applying to the land to which the agreement applies,
- a material modification to the development consent to which an agreement relates,
- the lapsing of the development consent to which an agreement relates,
- the revocation or modification of a development consent to which an agreement relates by the Minister,
- other material changes in the overall planning circumstances of an area affecting the operation of the planning agreement.

Costs. There is no comprehensive policy on the extent to which planning authorities may recover their costs of preparing, negotiating, executing, monitoring and otherwise administering planning agreements. However, cost recovery should be based on reasonable charges and generally should be shared equally with the developer.

Basic statutory procedure for entering into a planning agreement

The nature of planning agreements and requirements for their public notification and consideration in determining applications dictate the basic procedures for entering into planning agreements.

Planning agreements may be entered into between planning authorities and developers (and associated persons) in relation to changes sought by developers to environmental planning instruments (includes the making, amendment or repeal of instruments), or development applications or proposed development applications.

Planning agreements must be publicly notified and made available for public inspection before they can be entered into.

Planning agreements and public submissions relating to them must be considered, so far as relevant, when deciding to make changes to environmental planning instruments to which they

relate or when determining development applications to which planning agreements relate.

Planning agreements should be negotiated between planning authorities and developers before applications are made so that applications may be accompanied by copies of draft agreements. The basic procedures relating to planning agreements are therefore as follows:

Step 1. Before the making of an application, the planning authority and developer decide whether to negotiate a planning agreement. The parties consider whether other planning authorities and other persons associated with the developer should be additional parties to the agreement. If the developer is not the owner of the relevant land, the landowner should be an additional party to the agreement.

Step 2. If an agreement is negotiated, it is documented as a draft planning agreement and the parties agree on the terms of the accompanying explanatory note required by the *EP&A Regulation*. The parties also agree on the content of the application to which the draft agreement relates.

Step 3. The developer makes the application to the relevant authority, accompanied by the draft planning agreement and the explanatory note. The application must clearly record the developer's offer to enter into the planning agreement if the application is approved. Preferably, the draft agreement should be executed by the developer to indicate the developer's commitment to enter into the agreement if the application is approved. In the case of an application to change an environmental planning instrument, the application may record the developer's offer as being to enter into the planning agreement if consent is subsequently granted to a development application relating to the change to the instrument.

Step 4. Relevant public authorities are consulted in relation to the application and draft planning agreement and any consequential amendments required to the application and draft agreement are made.

Step 5. The application, draft planning agreement and explanatory note are publicly notified and exhibited in accordance with the *EP&A Act* and *Regulation.* Any consequential amendments required to the application and draft agreement are made and, if necessary, the amended application, draft planning agreement and explanatory note are re-exhibited.

Step 6. The draft planning agreement and public submissions are considered in the determination of the application so far as relevant to the application. The weight given to the draft agreement and public submissions is a matter for the relevant authority acting reasonably.

Step 7. If the application, being a change to an environmental planning instrument, is approved, the agreement may be entered into immediately. Alternatively, it can be entered into if consent is subsequently granted to a development application relating to the change to the instrument. If the application, being a development application, is granted consent, a condition may be imposed requiring the planning agreement to be entered into but only in terms of the developer's offer made in connection with the application. The planning authority would resolve to execute the agreement when approving the application. If the application is approved on terms different to the developer's offer, the agreement could not be required to be entered.

Part 5 - Examples of the use of planning agreements

Planning agreements have the potential to be used in a wide variety of planning circumstances and to achieve many different planning outcomes. Their use will be dictated by the circumstances of individual cases and the policies of planning authorities in relation to their use. Accordingly, it is not possible to prescribe their use, nor would this be appropriate.

The examples given in this section serve only to provide an indication of the potential breadth of their scope and application.

Compensation for loss or damage caused by development
Planning agreements can provide for development contributions that compensate for the loss of or damage to a public amenity, service, resource or asset that will or is likely to result from the carrying out of development the subject of the agreement.

For example, development may result in the loss of or adversely affect public open space, public car parking, public access, water and air quality, bushland, wildlife habitat and other natural areas and the like.

The planning agreement could impose planning obligations directed towards replacing, substituting, or restoring the public amenity, service, resource or asset to an equivalent standard to that existing before the development is carried out.

In this way, planning agreements can assist in ameliorating development impacts that may otherwise be unacceptable.

Meeting demand created by development
Planning agreements can also provide for development contributions that meet the demand for new public infrastructure, amenities and services created by development the subject of the agreement. For example, development may create a demand for public transport, drainage services, public roads, public open space, streetscape and

other public domain improvements, community and recreational facilities and the like.
The public benefit provided under the agreement could be the provision, extension or augmentation of public infrastructure, amenities and services to meet the additional demand created by the development.

Prescribing inclusions in development
Planning agreements can be used to secure the implementation of particular planning policies by requiring development to incorporate particular elements that confer a public benefit.

Examples include agreements that require the provision of open space, community or recreational facilities or the retention of urban bushland, or agreements that require development, in the public interest, to meet aesthetic standards, such as design excellence.

Providing planning benefits to the wider community
Planning agreements can be used to secure the provision of planning benefits from development. That is, through a planning agreement, development may provide an overall net benefit to the wider community rather than merely address the more direct impacts of the development on surrounding land or the wider community.

The provision of planning benefits through planning agreements necessarily involves an agreement between a developer and a planning authority to allow the wider community to share in part of the development profit to achieve specified public benefits.

The planning benefit may be provided in conjunction with planning obligations or other measures that address the impacts of particular development on surrounding land or the wider community.

Alternatively, the planning benefit could wholly or partly replace such measures if the developer and the planning authority agree to a redistribution of the costs and benefits of development the subject of a planning agreement in order to allow the wider community, the planning authority and the developer to realise their specific preferences for the provision of public benefits in connection with the development.

Planning benefits may take the form of additional or better quality public facilities than is required to meet particular development. Alternatively, planning benefits may involve the provision of public facilities that, although not strictly required to make the development acceptable in planning terms, are not wholly unrelated to the development. An example of the latter might be development contributions towards the provision or retention of off-site affordable housing.

Recurrent funding
Planning agreements may provide for public benefits that take the form of development contributions towards the recurrent costs of infrastructure, facilities and services.
Such benefits may relate to the recurrent costs of items that primarily serve the development to which the planning agreement applies or neighbouring development. In such cases, the planning agreement may establish an endowment fund managed by a trust, to pay for the recurrent costs of the relevant item in perpetuity. In addition, it may bind future owners in a development to make periodic payment to the fund or otherwise in respect of the recurrent costs of the item.

For example, a planning agreement may fund the recurrent costs of habitat protection in respect of development that will have a demonstrated impact on sensitive habitat which is nearby to the development. Further, a planning agreement may fund the recurrent costs of water quality management in respect of development that will have a demonstrated impact on a natural watercourse that flows through or nearby to the development.

Planning benefits may also take the form of interim funding of the recurrent costs of infrastructure, facilities and services that will ultimately serve the wider community. The planning agreement would only require the developer to make such contributions until a public revenue stream is established to support the on-going costs of the facility.

Development Contributions – Practice Note

Attachment A

Template planning agreement

(Between Council and Developer)

PLANNING AGREEMENT

Parties

of ##, New South Wales (**Council**)

and

of ##, New South Wales (**Developer**).

Background

(For Development Applications)

A. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development consent was granted.

(For Changes to Environmental Planning Instruments)

A. On, ##, the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.

B. The Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities that Development Consent was granted.

C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.

D. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

Operative provisions

1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2 Application of this Agreement

[*Drafting Note* 2: Specify the land to which the Agreement applies and the development to which it applies]

3 Operation of this Agreement

[*Drafting Note* 3: Specify when the Agreement takes effect and when the Parties must execute the Agreement]

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means ##

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Instrument Change means ## Local Environmental Plan ##.

Land means Lot ## DP ##, known as ##.

Party means a party to this agreement, including their successors and assigns.

Public Facilities means ##.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

(a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.

(b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.

(c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.

(d) A reference in this Agreement to dollars or $ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

(e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.

(f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.

(g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

(h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

(i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

(j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.

(k) References to the word 'include' or 'including are to be construed without limitation.

(l) A reference to this Agreement includes the agreement recorded in this Agreement.

(m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.

(n) Any schedules and attachments form part of this Agreement.

5 Development Contributions to be made under this Agreement

[*Drafting Note* 5: Specify the development contributions to be made under the agreement; when they are to be made; and the manner in which they are to be made]

6 Application of the Development Contributions

6.1 [Specify the times at which, the manner in which and the public purposes for which development contributions are to be applied]

7 Application of s94 and s94A of the Act to the Development

[*Drafting Note* 7: Specify whether and to what extent s94 and s94A apply to development the subject of this Agreement]

8 Registration of this Agreement

[*Drafting Note* 8: Specify whether the Agreement is to be registered as provided for in s93H of the Act]

9 Review of this Agreement

[*Drafting Note* 9: Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur].

10 Dispute Resolution

[*Drafting Note* 10*:* Specify an appropriate dispute resolution process]

11 Enforcement

[*Drafting Note* 11*:*Specify the means of enforcing the Agreement]

12 Notices

12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

(a) Delivered or posted to that Party at its address set out below.

(b) Faxed to that Party at its fax number set out below.

(c) Emailed to that Party at its email address set out below.

Council

Attention: ##

Address: ##

Fax Number: ##

Email: ##

Developer

Attention: ##

Address: ##

Fax Number: ##

Email: ##

12.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

(a) If it is delivered, when it is left at the relevant address.

(b) If it is sent by post, 2 business days after it is posted.

(c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

12.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

13 Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 Assignment and Dealings

[*Drafting Note* 14: Specify any restrictions on the Developer's dealings in the land to which the Agreement applies and the period during which those restrictions apply]

15 Costs

[*Drafting Note* 15: Specify how the costs of negotiating, preparing, executing, stamping and registering the Agreement are to be borne by the Parties]

16 Entire agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

17 Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

18 Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19 Joint and individual liability and benefits

Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

20 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21 Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

22 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

23 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

24 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25 GST

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

Execution

Dated: ##

Executed as an Agreement: ##

Attachment B

Template explanatory note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

1. Parties

(Planning Authority)

(Developer)

2. Description of Subject Land

3. Description of Proposed Change to Environmental Planning Instrument/Development Application

Development Contributions – Practice Note

4. Summary of Objectives, Nature and Effect of the Draft Planning Agreement

5. Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979

How the Draft Planning Agreement Promotes the Public Interest

For Planning Authorities:

(a) Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

(b) Other Public Authorities - How the Draft Planning Agreement Promotes the Objects (if any) of the Act under Which it is Constituted

(c) Councils – How the Draft planning Agreement Promotes the Elements of the Council's Charter

Development Contributions – Practice Note

(d) All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program

The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

Other Matters

Signed and Dated by All Parties

Development Contributions – Practice Note

Attachment C

Template condition of development consent

(Where planning agreement accompanied a development application)

##. Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the planning agreement that relates to the development application the subject of this consent must be entered into before [*Insert Requirement*].

(Where planning agreement accompanied an application to change an environmental planning instrument)

##. Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the planning agreement that accompanied the application made by [*Insert Name of Developer*] to [*Insert Name of Planning Authority*] dated [*Insert Date*] relating to [*Specify Name of Environmental Planning Instrument*] for the purpose of the making of the development application the subject of this consent.

ITEM **CITY OF CANADA BAY PLANNING AGREEMENTS POLICY**

Department **Planning & Environment**

Author Initials: MF

EXECUTIVE SUMMARY

On 17 October 2006 Council resolved to publicly exhibit the City of Canada Bay Planning Agreements Policy for 28 days. The Policy will assist in the promotion of good practice in the operation of the development contributions systems and ensure public and financial accountability within the system.

Following exhibition Council received one submission, details of which are outlined in the body of the report.

It is recommended that the City of Canada Bay Planning Agreements Policy be adopted by Council. The Policy is provided as an attachment to this report.

REPORT

Planning agreements are not new as such but have now been codified under legislation to ensure transparency and accountability.

The reforms to the Environmental Planning & Assessment Act 1979 (the Act) allow for voluntary planning agreements (PA) for making development contributions (Section 93F of the Planning and Assessment Act 1979). A PA is entered into in connection with an instrument change (eg rezoning) or a development application and are between a developer and a planning authority. PAs provide a facility for planning authorities and developers to negotiate flexible outcomes in respect of development contributions. A PA that provides for a planning benefit can involve an agreement by the developer to contribute part of the development profit for a public purpose. PAs are governed by the fundamental principle that planning approvals cannot be bought or sold.

PAs authorise development contributions for a variety of public purposes, some of which extend beyond the scope of s94 or s94A of the Act. These additional purposes include the recurrent funding of transport and other State infrastructure and affordable housing, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

The Department of Planning has published Practise Notes aiming to promote good practice in the operation of the development contributions systems and ensure public and financial accountability within the system. Planning Authorities are being encouraged to prepare Planning Agreement Policies concerning the use of planning agreements.

As Council is increasingly being approached to enter into PAs, a City of Canada Bay Planning Agreements Policy has been prepared which is provided as an attachment to this report under separate cover. The purposes of the Policy are:

1. To establish a framework governing the use of planning agreements by the Council,
2. To ensure that the framework so established is efficient, fair, transparent and accountable,
3. To enhance planning flexibility in Council's area through the use of planning agreements,
4. To enhance the range and extent of development contributions made by development towards public facilities in the Council's area,
5. To set out the Council's specific policies on the use of planning agreements, and
6. To set out procedures relating to the use of planning agreements within the Council's area.

The Policy is not legally binding. However, it is intended that the Council and all persons dealing in relation to PAs will follow this Policy to the fullest extent possible.

Public Exhibition

The draft Policy was placed on public exhibition for a period of 28 days from Wednesday 25 October 2006 until Wednesday 22 November 2006 at the Civic Centre Drummoyne, all Council libraries and on Council's web site. An advertisement was placed in the Inner West Courier.

One submission was received from Shelter NSW. The issue raised in the submission is summarised below.

- The draft policy does not indicate that affordable housing is one of the specific purposes of planning agreements that Council might consider negotiating with a developer about.

  It is clear from s93F(2) of the EP&A Act that a public amenity or public service does not include or comprise affordable housing, because affordable housing is indicated as a separate public purpose to public amenities and public services in Section 93F(2)(b).

  Shelter NSW requests that Clause 2.4 be amended to include a specific reference to affordable housing.

  Comment: It is considered that this is a reasonable request to include a reference to affordable housing in Clause 2.4. The latter merely states that Council 'may consider negotiating a planning agreement with a developer to' and does not bind Council into one particular area of negotiation. It will though, indicate that affordable housing is a public purpose that

Council may choose to achieve when negotiating a particular planing agreement.

Council is presently preparing an Affordable Housing Policy for Council's consideration in the New Year which will indicate more detail on when and where Council may enter into affordable housing provision utilising the planning system.

The following, point (c) has been inserted in to **Clause 2.4 Specific Purposes of Planning Agreements**

(c) achieve the provision of affordable housing.

The draft Policy makes mention of a 'standard-form planning agreement' (clause 2.28) contained in the Annexure to the Policy. This standard-form is being finalised and will be attached to the Policy.

Conclusion

The Policy will assist in the promotion of good practice in the operation of the development contributions systems and ensure public and financial accountability within the system.

Following public exhibition the draft Policy has been modified as detailed in the body of the report to include the provision of affordable housing, which may be negotiated through a planning agreement.

It is recommended that the draft Policy be adopted by Council

RECOMMENDATION

1. THAT the draft City of Canada Bay Planning Agreements Policy as modified be adopted by Council.

2. THAT the City of Canada Bay Planning Agreements Policy be placed on Council's web site.

Attachments:
1. Submission from Shelter NSW

Planning agreements policy - Concerns th…

ITEM **CITY OF CANADA BAY PLANNING AGREEMENTS POLICY**

RESOLVED
(Crs Kenzler/McCaffrey)

1. THAT the draft City of Canada Bay Planning Agreements Policy as modified be adopted by Council.

2. THAT the City of Canada Bay Planning Agreements Policy be placed on Council's web site.

City of Canada Bay Council

Planning Agreements Policy 2006

Contents

Prepared on behalf of the Council by:

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Adopted by Council on 5 December, 2006

City of Canada Bay Council

Planning Agreements Policy 2006

1. Introduction

1.1 This Policy sets out Canada Bay Council's policy, principles and procedures relating to planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*.

1.2 This Policy was adopted by resolution of the Council on 5th December, 2006.

1.3 In this Policy, the following terminology is used:

Act means the *Environmental Planning and Assessment Act 1979*,

affordable housing has the same meaning as in the Act,

development application has the same meaning as in the Act,

development contribution means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit,

instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a planning agreement,

planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community,

planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution,

Practice Note means the *Practice Note on Planning Agreements* published by the Department of Infrastructure Planning and Natural Resources (July 2005),

public includes a section of the public,

public benefit is the benefit enjoyed by the public as a consequence of a development contribution,

public facilities means public infrastructure, facilities, amenities and services,

public purpose means any purpose that benefits the public, including but not limited to a purpose specified in s93F(2) of the Act.

Regulation means the *Environmental Planning and Assessment Regulation 2000*,

surplus value means the value of the developer's provision under a planning agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s80A(1) of the Act and the value of development contributions that are or could have been required to be made under s94 or s94A of the Act in respect of the development the subject of the agreement.

1.4 The purposes of this Policy are:

(a) to establish a framework governing the use of planning agreements by the Council,

(b) to ensure that the framework so established is efficient, fair, transparent and accountable,

(c) to enhance planning flexibility in the Council's area through the use of planning agreements,

(d) to enhance the range and extent of development contributions made by development towards public facilities in the Council's area,

(e) to set out the Council's specific policies on the use of planning agreements, and

(f) to set out procedures relating to the use of planning agreements within the Council's area.

1.5 The Council's planning agreements framework consists of the following:

(a) the provisions of Subdivision 2 of Division 6 of Part 4 of the Act,

(b) the provisions of Division 1A of Part 4 of the Regulation, and

(c) this Policy.

1.6 This Policy is not legally binding. However, it is intended that the Council and all persons dealing with the Council in relation to planning agreements will follow this Policy to the fullest extent possible.

1.7 It is intended that this Policy will be periodically updated. The updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

2 Policy on the Use of Planning Agreements

Council's strategic objectives for the use of planning agreements

8.1 The Council's strategic objectives with respect to the use of planning agreements include:

(a) to provide an enhanced and more flexible development contributions system for the Council, which achieves net planning benefits from development wherever possible and appropriate,

(b) more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development,

(c) to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits,

(d) to allow the public, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise public preferences for the provision of public benefits,

(e) to adopt innovative and flexible approaches to the provision of infrastructure in a manner that is consistent with the Council's adopted management plan,

(f) to provide or upgrade infrastructure to appropriate levels that reflect and balance environmental standards (including, without limitation, the principles of ecologically sustainable development), public expectations and funding priorities,

(g) to ensure that developers make appropriate development contributions towards the cost of the provision and management of public facilities within the Council's area,

(h) to provide certainty for the public, developers and Council in respect to infrastructure and development outcomes, and

(i) where applicable, to achieve outcomes from development which ensure that the public has full access to that part of the Sydney Harbour foreshore which is within the Council's area.

Fundamental principles governing the use of planning agreements

2.2 The Council's use of planning agreements will be governed by the following principles:

(a) planning decisions may not be bought or sold through planning agreements,

(b) development that is unacceptable on planning grounds (including, without limitation, environmental grounds) will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms,

(c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,

(d) the Council will not use planning agreements for any purpose other than a proper planning purpose,

(e) the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,

(f) the Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable public benefits from developers under planning agreements, and will ensure that all parties involved in the planning agreement process are dealt with fairly, and

(g) if the Council has a commercial stake in development the subject of agreements, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

Circumstances in which Council will consider negotiating a planning agreement

2.3 The Council, in its complete discretion, may negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in the Council's area.

Specific purposes of planning agreements

2.4 The Council may consider negotiating a planning agreement with a developer to:

(a) compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration,

(b) meet the demands created by the development for new public infrastructure, amenities and services,

(c) achieve the provision of affordable housing,

(d) address a deficiency in the existing provision of public facilities in the Council's area,

(e) achieve recurrent funding in respect of public facilities,

(f) prescribe inclusions in the development that meet specific planning objectives of the Council,

(g) monitor the implementation of development,

(h) ensure that public access to that part of the Sydney Harbour foreshore which is within the Council's area is preserved or enhanced,

(i) secure planning benefits for the public.

Acceptability test to be applied to all planning agreements

2.5 The Council will apply the following test in order to assess the desirability of a proposed planning agreement:

(a) is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?

(b) does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose?

(c) can the proposed planning agreement be taken into consideration in the assessment of the relevant rezoning application or development application?

(d) will the planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?

(e) does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?

(f) does the proposed planning agreement conform to the fundamental principles governing the Council's use of planning agreements?

(g) are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

Consideration of planning agreements in relation to instrument changes and development applications

2.6 When exercising its functions under the Act in relation to an application by a developer for an instrument change or a development consent to which a proposed planning agreement relates, the Council will consider to the fullest extent permitted by law:

(a) whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application, and

(b) if so, the proper planning weight to be given to the proposed planning agreement.

Application of s94 and s94A to development to which a planning agreement relates

2.7 The Council has no general policy on whether a planning agreement should exclude the application of s94 or s94A of the Act to development to which the agreement relates. This is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.

2.8 However, where the application of s94 of the Act to development is not excluded by a planning agreement, the Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under s94.

Form of development contributions under a planning agreement

2.9 The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates. Without limitation, development contributions by a developer under a proposed planning agreement may include:

(a) the dedication of foreshore land to the Council,

(b) the provision of particular public facilities, or

(c) the making of a monetary contribution towards the cost of the provision of infrastructure.

Standard charges

2.10 Wherever possible, the Council will seek to standardise development contributions sought under planning agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Recurrent charges

2.11 The Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. However, where the public facility or public benefit is intended to serve the public, the planning agreement will only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the ongoing costs of the facility.

Pooling of development contributions

2.12 Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

Methodology for valuing public benefits under a planning agreement

2.13 Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer of at least 10 years' experience in valuing land in New South Wales (and who is acceptable to the Council), on the basis of a scope of work which is prepared by the Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

2.14 Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor of at least 10 years' experience (and who is acceptable to the Council), on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor. The scope of work for this independent quantity surveyor will be prepared by the Council. All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.

2.15 Where the benefit under a planning agreement is the provision of a material public benefit, the Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

Credits and refunds

2.16 The Council generally will not agree to a planning agreement providing for the surplus value under a planning agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the Council's area.

Time when developer's obligations arise under a planning agreement

2.17 The Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement, and will operate progressively, in accordance with its terms, as the relevant development proceeds from the issue of the first construction certificate in respect of that development until the grant of the final occupation certificate.

Implementation agreements

2.18 In appropriate cases, the Council may require a planning agreement to provide that before the development the subject of the agreement is commenced, the parties are to enter into an *implementation agreement* that provides for matters such as:

(a) the times at which and, if relevant, the period during which, the developer is to make provision under the planning agreement,

(b) the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer,

(c) the manner in which a work is to be handed over to the Council,

(d) the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement,

(e) the management or maintenance of land or works following hand-over to the Council.

Monitoring and review of a planning agreement

2.19 The Council will continuously monitor the performance of the developer's obligations under a planning agreement. This may include the Council requiring the developer (at its cost) to report periodically to the Council on its compliance with obligations under the planning agreement.

2.20 The Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the

involvement of all parties. This will include a review of the developer's performance of the agreement.

2.21 The Council will require the planning agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

Modification or discharge of the developer's obligations under a planning agreement

2.22 The Council will generally only agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

(a) the developer's obligations have been fully carried in accordance with the agreement,

(b) the developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement,

(c) the development consent to which the agreement relates has lapsed,

(d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties,

(e) the Council and the developer otherwise agree to the modification or discharge of the agreement.

2.23 Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

Assignment and dealings by the developer

2.24 The Council will require every planning agreement to provide that the developer may not assign its rights or obligations under the planning agreement nor have any dealing in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

(a) the Council has given its consent to the proposed assignment or dealing,

(b) the developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council

by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and

(c) the developer is not in breach of this planning agreement.

Provision of security under a planning agreement

2.25 The Council generally will require a planning agreement to make provision for security by the developer of the developer's obligations under the planning agreement.

2.26 Unless otherwise agreed by the parties in a particular case, the form of security required by the Council will generally be the unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's provision under the planning agreement and on terms otherwise acceptable to the Council.

Preparation and form of the planning agreement

2.27 Unless otherwise agreed by the parties in a particular case, a planning agreement will be prepared by the Council.

2.28 The Council will generally require the planning agreement to be in or to the effect of the standard-form planning agreement.

Council's costs of negotiating, entering into, monitoring and enforcing a planning agreement

2.29 The Council will generally require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to:

(a) negotiating, preparing and entering into the agreement,

(b) enforcing the agreement.

2.30 The amount to be paid by the developer will be determined by negotiation in each case. However as a general rule, the Council considers that whether the planning agreement relates to an application by the developer for an instrument change, or relates to a development application, in each case it is fair and reasonable that the developer will pay the whole of the Council's costs.

2.31 In particular cases, the Council may require the planning agreement to make provision for a development contribution by the developer towards the ongoing administration of the agreement.

Notations on Certificates under s149(5) of the Act

2.32 The Council will generally require a planning agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under s149(5) of the Act about a planning agreement on any certificate issued under s149(2) of the Act relating to the land the subject of the agreement or any other land.

Registration of planning agreements

2.33 The Council and the developer will negotiate in each particular case whether a planning agreement is to contain a provision requiring the developer to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

Dispute resolution

2.34 The Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement, at their own cost, before the parties may exercise any other legal rights in relation to the dispute. Unless the parties agree otherwise, the planning agreement will provide that such mediation will be conducted pursuant to the Mediation Rules published by the Law Society of New South Wales current at the time the agreement is entered into.

Hand-over of works

2.35 The Council will generally not accept the hand-over of a public work carried out under a planning agreement unless the developer furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent (which certificate may, at the Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to the Council, the work is also certified as complete by a Council building surveyor or engineer.

2.36 The Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense.

Management of land or works after hand-over

2.37 If a planning agreement provides for the developer, at the developer's cost, to manage or maintain land that has been dedicated to the Council or works that have been handed-over to the Council, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).

2.38 The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

Public use of privately-owned facilities

2.39 If a planning agreement provides for the developer to make a privately-owned facility available for public use, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).

2.40 Such an agreement may, subject to the Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.

3. Procedures Relating to the Use of Planning Agreements

Council's negotiation system

3.1 The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable.

3.2 The system seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.

3.3 The system is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

When should a planning agreement be negotiated?

3.4 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.

3.5 The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.

3.6 The Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

Who will negotiate a planning agreement on behalf of the Council?

3.7 The Council's General Manager, or another Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council.

3.8 The councillors will not be involved in the face to face negotiation of the agreement.

Separation of the Council's commercial and planning assessment roles

3.9 If the Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, the Council will ensure that the person who assesses the application to which a planning agreement relates is not the same person or a subordinate of the person who negotiated the terms of the planning agreement on behalf of the Council in its capacity as landowner, developer or financier.

Role of the governing body of the Council in relation to development applications to which planning agreements relate

3.10 The governing body of the Council will, in all cases, determine development applications to which planning agreements relate.

Involvement of independent third parties in the negotiation process

3.11 The Council may encourage the appointment of an independent person to facilitate or otherwise participate in the negotiations or aspects of it, such as where:

(a) an independent assessment of a proposed instrument change or development application is necessary or desirable,

(b) factual information requires validation in the course of negotiations,

(c) sensitive financial or other confidential information must be verified or established in the course of negotiations,

(d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved, or

(e) dispute resolution is required under a planning agreement.

3.12 The costs of the independent person will be borne by the developer.

Key steps in the negotiation process

3.13 The negotiation of a planning agreement will generally involve the following key steps:

(a) before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a planning agreement,

(b) the parties will then appoint a person to represent them in the negotiations,

(c) the parties may also appoint a third person to attend and take minutes of all negotiations,

(d) the parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it,

(e) the parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations,

(f) the parties will then identify the key issues for negotiation and undertake the negotiations,

(g) if agreement is reached, the Council will prepare the proposed planning agreement and provide a copy of it to the developer,

(h) the parties will undertake further negotiation on the specific terms of the proposed planning agreement,

(i) once agreement is reached on the terms of the proposed planning agreement, the developer will be required to execute the agreement,

(j) the developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement,

(k) the parties may be required to undertake further negotiations and, hence, a number of the above steps as a result of the public notification and inspection of the planning agreement or its formal consideration by the Council in connection with the relevant application.

Public notification of planning agreements

3.14 A planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days.

3.15 As mentioned, the Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.

3.16 Where the application to which a planning agreement relates is required by or under the Act or Regulation to be publicly notified and available for public inspection for a period

exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.

3.17 Where the application to which a planning agreement relates is permitted by or under the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.

3.18 The Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

When is a planning agreement required to be entered into?

3.19 A planning agreement is entered into when it is signed by all of the parties.

3.20 A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

3.21 The Council will usually require a planning agreement to be entered into as a condition of granting development consent to the development to which the agreement relates.

3.22 Generally the Council will sign the planning agreement on the same day, or as soon as possible after the day, that the development consent or instrument change to which the agreement relates, is granted or made.

Planning Agreement Register

3.23 The Council is required keep a register of planning agreements applying to land within the Council's area, whether or not the Council is a party to a planning agreement. The Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

3.24 The Council will make the following available for public inspection (free of charge) during ordinary office hours:

(a) the planning agreement register kept by the Council,

(b) copies of all planning agreements (including amendments) that apply to the area of the Council,

(c) copies of the explanatory notes relating to those agreements or amendments.

3.25 The Council will also make its planning agreement register available to the public on its website.

THE MODEL CODE OF CONDUCT FOR LOCAL COUNCILS IN NSW

June 2008

NSW Department of Local Government

ACCESS TO SERVICES

The Department of Local Government is located at:

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5 O'Keefe Avenue
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NOWRA NSW 2541

Phone 02 4428 4100
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OFFICE HOURS

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TABLE OF CONTENTS

PART 1: CONTEXT

This Part of the Model Code establishes the purpose and principles that are used to interpret the standards in the Code. This Part does not constitute separate enforceable standards of conduct.

1 INTRODUCTION

This Model Code of Conduct for Local Councils in NSW ("the Model Code of Conduct") is made for the purposes of section 440 of the *Local Government Act 1993* ("the Act"). Section 440 of the Act requires every council to adopt a code of conduct that incorporates the provisions of the Model Code. For the purposes of section 440 of the Act, the Model Code of Conduct comprises all Parts of this document.

The Code is made in three Parts: Context, Standards of Conduct and Procedures.

- Part 1: Context, establishes the purpose and principles that are used to interpret the standards in the Code. This Part does not constitute separate enforceable standards of conduct.
- Part 2: Standards of Conduct, set out the conduct obligations required of council officials. These are the enforceable standards of conduct.
- Part 3: Procedures, contains the complaint handling procedures, complaint assessment criteria and the operating guidelines for the conduct review committee/reviewer. This Part should be used to guide the management of complaints about breaches of the Code.

Councillors have two distinct roles under the *Local Government Act 1993*: as a member of the governing body of the council; and as an elected person. Councillors, as members of the governing body, should work as part of a team to make decisions and policies that guide the activities of the council. The role as an elected person requires councillors to represent the interests of the community and provide leadership. The Model Code sets the standard of conduct that is expected when council officials exercise these roles.

Councillors, administrators, members of staff of council, independent conduct reviewers, members of council committees including the conduct review committee and delegates of the council must comply with the applicable provisions of council's code of conduct in carrying out their functions as council officials. It is the personal responsibility of council officials to comply with the standards in the code and regularly review their personal circumstances with this in mind. Council contractors and volunteers will also be required to observe the relevant provisions of council's code of conduct.

Failure by a councillor to comply with Part 2, the standards of conduct, of council's code of conduct constitutes misbehaviour. The *Local Government Act 1993* provides for suspension of councillors from civic office for up to six months for proven misbehaviour. For further information on misbehaviour refer to Sections 11 and 12 of this Code.

Failure by a member of staff to comply with council's code of conduct may give rise to disciplinary action.

A set of guidelines has also been developed to assist councils to review and enhance their codes of conduct. The guidelines support this Code and provide further information and examples on the provisions in this Code.

2 DEFINITIONS

In the Model Code of Conduct the following definitions apply:

the Act	the Local Government Act 1993
act of disorder	see the definition in clause 256 of the *Local Government (General) Regulation 2005*
conduct review committee	a committee of three or more persons independent of council who are selected from those appointed by council to review allegations of breaches of the code of conduct by councillors or the general manager in accordance with the procedures set out in Sections 12, 13 and 14.
conduct reviewer	a person independent of council who is solely selected from those appointed by council to review allegations of breaches of the code of conduct by councillors or the general manager in accordance with the procedures set out in Sections 12, 13 and 14.
conflict of interests	a conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.
council official	includes councillors, members of staff of council, administrators appointed under section 256 of the Act, members of council committees, conduct reviewers and delegates of council
delegate of council	a person or body, and the individual members of that body, to whom a function of council is delegated
designated person	see the definition in section 441 of the Act
misbehaviour	see the definition in section 440F of the Act
personal information	information or an opinion about a person whose identity is apparent, or can be determined from the information or opinion

person independent of council	a person who is not an employee of the council, has no current or ongoing contractual relationship with council in the nature of a contract for services, retainer or contract for the provision of goods of any kind, or is not an employee of any entity with such a contractual relationship.

The term "you" used in the Model Code of Conduct refers to council officials.

3 PURPOSE OF THE CODE OF CONDUCT

The Model Code of Conduct sets the minimum requirements of conduct for council officials in carrying out their functions. The Model Code is prescribed by regulation.

The Model Code of Conduct has been developed to assist council officials to:

- understand the standards of conduct that are expected of them
- enable them to fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence (section 439)
- act in a way that enhances public confidence in the integrity of local government.

4 KEY PRINCIPLES

This Model Code of Conduct is based on a number of key principles. It sets out standards of conduct that meets these principles and statutory provisions applicable to local government activities. The principles underpin and guide these standards and may be used as an aid in interpreting the substantive provisions of the Code, but do not themselves constitute separate enforceable standards of conduct.

4.1 Integrity

You must not place yourself under any financial or other obligation to any individual or organisation that might reasonably be thought to influence you in the performance of your duties.

4.2 Leadership

You have a duty to promote and support the key principles by leadership and example and to maintain and strengthen the public's trust and confidence in the integrity of the council. *This means promoting public duty to others in the council and outside, by your own ethical behaviour.*

4.3 Selflessness

You have a duty to make decisions in the public interest. You must not act in order to gain financial or other benefits for yourself, your family, friends or business interests. *This means making decisions because they benefit the public, not because they benefit the decision maker.*

4.4 Impartiality

You should make decisions on merit and in accordance with your statutory obligations when carrying out public business. This includes the making of appointments, awarding of contracts or recommending individuals for rewards or benefits. *This means fairness to all; impartial assessment; merit selection in recruitment and in purchase and sale of council's resources; considering only relevant matters.*

4.5 Accountability

You are accountable to the public for your decisions and actions and should consider issues on their merits, taking into account the views of others. *This means recording reasons for decisions; submitting to scrutiny; keeping proper records; establishing audit trails.*

4.6 Openness

You have a duty to be as open as possible about your decisions and actions, giving reasons for decisions and restricting information only when the wider public interest clearly demands. *This means recording, giving and revealing reasons for decisions; revealing other avenues available to the client or business; when authorised, offering all information; communicating clearly.*

4.7 Honesty

You have a duty to act honestly. You must declare any private interests relating to your public duties and take steps to resolve any conflicts arising in such a way that protects the public interest. *This means obeying the law; following the letter and spirit of policies and procedures; observing the code of conduct; fully disclosing actual or potential conflict of interests and exercising any conferred power strictly for the purpose for which the power was conferred.*

4.8 Respect

You must treat others with respect at all times. *This means not using derogatory terms towards others, observing the rights of other people, treating people with courtesy and recognising the different roles others play in local government decision-making.*

5 GUIDE TO ETHICAL DECISION MAKING

5.1 If you are unsure about the ethical issues around an action or decision you are about to take, you should consider these five points:

- Is the decision or conduct lawful?
- Is the decision or conduct consistent with council's policy and with council's objectives and the code of conduct?
- What will the outcome be for the employee or councillor, work colleagues, the council, persons with whom you are associated and any other parties?
- Do these outcomes raise a conflict of interest or lead to private gain or loss at public expense?
- Can the decision or conduct be justified in terms of the public interest and would it withstand public scrutiny?

Conflict of interests

5.2 If you are unsure as to whether or not you have a conflict of interests in relation to a matter, you should consider these six points:

- Do you have a personal interest in a matter you are officially involved with?
- Is it likely you could be influenced by a personal interest in carrying out your public duty?
- Would a reasonable person believe you could be so influenced?
- What would be the public perception of whether or not you have a conflict of interests?
- Do your personal interests conflict with your official role?
- What steps do you need to take and that a reasonable person would expect you to take to appropriately manage any conflict of interests?

Political donations and conflict of interests

5.3 Councillors should take all reasonable steps to identify circumstances where political contributions may give rise to a reasonable perception of influence in relation to their vote or support.

Seeking advice

5.4 Remember – you have the right to question any instruction or direction given to you that you think may be unethical or unlawful. If you are uncertain about an action or decision, you may need to seek advice from other people. This may include your supervisor or trusted senior officer, your union representatives, the Department of Local Government, the Ombudsman's Office and the Independent Commission Against Corruption.

Independent Commission Against Corruption	8281 5999
NSW Ombudsman	9286 1000
NSW Department of Local Government	4428 4100

PART 2: STANDARDS OF CONDUCT

This Part of the Model Code sets out the conduct obligations required of council officials. These are the enforceable standards of conduct.

Failure by a councillor to comply with Part 2, the standards of conduct, of council's code of conduct constitutes misbehaviour and may constitute a substantial breach for the purposes of section 9 of the ICAC Act 1988. The Local Government Act 1993 provides for suspension of councillors from civic office for up to six months for proven misbehaviour. For further information on misbehaviour refer to Sections 11 and 12 of this Code.

Failure by a member of staff to comply with council's code of conduct may give rise to disciplinary action.

6 GENERAL CONDUCT OBLIGATIONS

General conduct

6.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute. Specifically, you must not act in a way that:

a) contravenes the Act, associated regulations, council's relevant administrative requirements and policies
b) is detrimental to the pursuit of the charter of a council
c) is improper or unethical
d) is an abuse of power or otherwise amounts to misconduct
e) causes, comprises or involves intimidation, harassment or verbal abuse
f) causes, comprises or involves discrimination, disadvantage or adverse treatment in relation to employment
g) causes, comprises or involves prejudice in the provision of a service to the community. *(Schedule 6A)*

6.2 You must act lawfully, honestly and exercise a reasonable degree of care and diligence in carrying out your functions under the Act or any other Act. *(section 439)*

6.3 You must treat others with respect at all times.

6.4 Where you are a councillor and have been found in breach of the code of conduct, you must comply with any council resolution requiring you to take action as a result of that breach.

Fairness and equity

6.5 You must consider issues consistently, promptly and fairly. You must deal with matters in accordance with established procedures, in a non-discriminatory manner.

6.6 You must take all relevant facts known to you, or that you should be reasonably aware of, into consideration and have regard to the particular merits of each case. You must not take irrelevant matters or circumstances into consideration when making decisions.

Harassment and discrimination

6.7 You must not harass, discriminate against, or support others who harass and discriminate against colleagues or members of the public. This includes, but is not limited to harassment and discrimination on the grounds of sex, pregnancy, age, race, responsibilities as a carer, marital status, disability, homosexuality, transgender grounds or if a person has an infectious disease.

Development decisions

6.8 You must ensure that development decisions are properly made and that parties involved in the development process are dealt with fairly. You must avoid any occasion for suspicion of improper conduct in the development assessment process.

6.9 In determining development applications, you must ensure that no action, statement or communication between yourself and applicants or objectors conveys any suggestion of willingness to provide improper concessions or preferential treatment.

7 CONFLICT OF INTERESTS

7.1 A conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.

7.2 You must avoid or appropriately manage any conflict of interests. The onus is on you to identify a conflict of interests and take the appropriate action to manage the conflict in favour of your public duty.

7.3 Any conflict of interests must be managed to uphold the probity of council decision-making. When considering whether or not you have a conflict of interests, it is always important to think about how others would view your situation.

7.4 Private interests can be of two types: pecuniary or non-pecuniary.

What is a pecuniary interest?

7.5 A pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person. *(section 442)*

7.6 A person will also be taken to have a pecuniary interest in a matter if that person's spouse or de facto partner or a relative of the person or a partner or employer of the person, or a company or other body of which the person, or a nominee, partner or employer of the person is a member, has a pecuniary interest in the matter. *(section 443)*

7.7 Pecuniary interests are regulated by Chapter 14, Part 2 of the Act. The Act requires that:

a) councillors and designated persons lodge an initial and an annual written disclosure of interests that could potentially be in conflict with their public or professional duties *(section 449)*
b) councillors and members of council committees disclose an interest and the nature of that interest at a meeting, leave the meeting and be out of sight of the meeting and not participate in discussions or voting on the matter *(section 451)*
c) designated persons immediately declare, in writing, any pecuniary interest. *(section 459)*

7.8 Designated persons are defined at section 441 of the Act, and include, but are not limited to, the general manager and other senior staff of the council.

7.9 Where you are a member of staff of council, other than a designated person (as defined by section 441), you must disclose in writing to your supervisor or the general manager, the nature of any pecuniary interest you have in a matter you are dealing with as soon as practicable.

What is a non-pecuniary conflict of interests?

7.10 Non-pecuniary interests are private or personal interests the council official has that do not amount to a pecuniary interest as defined in the Act. These commonly arise out of family, or personal relationships, or involvement in sporting, social or other cultural groups and associations and may include an interest of a financial nature.

7.11 The matter of a report to council from the conduct review committee/reviewer relates to the public duty of a councillor or the general manager. Therefore, there is no requirement for councillors or the general manager to disclose a conflict of interests in such a matter.

7.12 The political views of a councillor do not constitute a private interest.

Managing non-pecuniary conflict of interests

7.13 Where you have a non-pecuniary interest that conflicts with your public duty, you must disclose the interest fully and in writing, even if the conflict is not significant. You must do this as soon as practicable.

7.14 If a disclosure is made at a council or committee meeting, both the disclosure and the nature of the interest must be recorded in the minutes. This disclosure constitutes disclosure in writing for the purposes of clause 7.13.

7.15 How you manage a non-pecuniary conflict of interests will depend on whether or not it is significant.

7.16 As a general rule, a non-pecuniary conflict of interests will be significant where a matter does not raise a pecuniary interest but it involves:

a) a relationship between a council official and another person that is particularly close, for example, parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the person or of the person's spouse, current or former spouse or partner, de facto or other person living in the same household
b) other relationships that are particularly close, such as friendships and business relationships. Closeness is defined by the nature of the friendship or business relationship, the frequency of contact and the duration of the friendship or relationship
c) an affiliation between the council official and an organisation, sporting body, club, corporation or association that is particularly strong.

7.17 If you are a council official, other than a member of staff of council, and you have disclosed that a significant non-pecuniary conflict of interests exists, you must manage it in one of two ways:

a) remove the source of the conflict, by relinquishing or divesting the interest that creates the conflict, or reallocating the conflicting duties to another council official
b) have no involvement in the matter, by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in section 451(2) of the Act apply

7.18 If you determine that a non-pecuniary conflict of interests is less than significant and does not require further action, you must provide an explanation of why you consider that the conflict does not require further action in the circumstances.

7.19 If you are a member of staff of council, the decision on which option should be taken to manage a non-pecuniary conflict of interests must be made in consultation with your manager.

7.20 Despite clause 7.17(b), a councillor who has disclosed that a significant non-pecuniary conflict of interests exists may participate in a decision to delegate council's decision-making role to council staff, or appoint another person or body to make the decision in accordance with the law. This applies whether or not council would be deprived of a quorum if one or more councillors were to manage their conflict of interests by not voting on a matter in accordance with clause 7.17(b) above.

Political donations exceeding $1,000

7.21 Councillors should note that matters before council involving political or campaign donors may give rise to a non-pecuniary conflict of interests.

7.22 Councillors should take all reasonable steps to ascertain the source of any political contributions that directly benefit their election campaigns. For example, councillors should have reasonable knowledge of contributions received by them or their "official agent" (within the meaning of the *Election Funding Act 1981*) that directly benefit their election campaign.

7.23 Where a councillor or the councillor's "official agent" has received "political contributions" or "political donations", as the case may be, within the meaning of the *Election Funding Act 1981* exceeding $1,000 which directly benefit their campaign:

a) from a political or campaign donor or related entity in the previous four years; and
b) where the political or campaign donor or related entity has a matter before council,

then the councillor must declare a non-pecuniary conflict of interests, disclose the nature of the interest, and manage the conflict of interests in accordance with clause 7.17(b).

7.24 Councillors should note that political contributions below $1,000, or political contributions to a registered political party or group by which a councillor is endorsed, may still give rise to a non-pecuniary conflict of interests. Councillors should determine whether or not such conflicts are significant and take the appropriate action to manage them.

7.25 If a councillor has received a donation of the kind referred to in clause 7.23, that councillor is not prevented from participating in a decision to delegate council's decision-making role to council staff or appointing another person or body to make the decision in accordance with the law (see clause 7.20 above).

Other business or employment

7.26 If you are a member of staff of council considering outside employment or contract work that relates to the business of the council or that might conflict with your council duties, you must notify and seek the approval of the general manager in writing. *(section 353)*

7.27 As a member of staff, you must ensure that any outside employment or business you engage in will not:

a) conflict with your official duties
b) involve using confidential information or council resources obtained through your work with the council
c) require you to work while on council duty
d) discredit or disadvantage the council.

Personal dealings with council

7.28 You may have reason to deal with your council in your personal capacity (for example, as a ratepayer, recipient of a council service or applicant for a consent granted by council). You must not expect or request preferential treatment in relation to any matter in which you have a private interest because of your position. You must avoid any action that could lead members of the public to believe that you are seeking preferential treatment.

8 PERSONAL BENEFIT

For the purposes of this section, a reference to a gift or benefit does not include a political donation or contribution to an election fund that is subject to the provisions of the relevant election funding legislation.

Token gifts and benefits

8.1 Generally speaking, token gifts and benefits include:

a) free or subsidised meals, beverages or refreshments provided in conjunction with:
   i) the discussion of official business
   ii) council work related events such as training, education sessions, workshops
   iii) conferences
   iv) council functions or events
   v) social functions organised by groups, such as council committees and community organisations.
b) invitations to and attendance at local social, cultural or sporting events
c) gifts of single bottles of reasonably priced alcohol to individual council officials at end of year functions, public occasions or in recognition of work done (such as providing a lecture/training session/address)
d) ties, scarves, coasters, tie pins, diaries, chocolates or flowers.

Gifts and benefits of value

8.2 Notwithstanding clause 8.1, gifts and benefits that have more than a token value include, but are not limited to, tickets to major sporting events (such as state or international cricket matches or matches in other national sporting codes (including the NRL, AFL, FFA, NBL)), corporate hospitality at a corporate facility at major sporting events, discounted products for personal use, the frequent use of facilities such as gyms, use of holiday homes, free or discounted travel.

Gifts and benefits

8.3 You must not:

a) seek or accept a bribe or other improper inducement
b) seek gifts or benefits of any kind
c) accept any gift or benefit that may create a sense of obligation on your part or may be perceived to be intended or likely to influence you in carrying out your public duty
d) accept any gift or benefit of more than token value
e) accept an offer of money, regardless of the amount.

8.4 Where you receive a gift or benefit of more than token value that cannot reasonably be refused or returned, this must be disclosed promptly to your supervisor, the Mayor or the general manager. The recipient, supervisor, Mayor or general manager must ensure that any gifts or benefits of more than token value that are received are recorded in a Gifts Register. The gift or benefit must be surrendered to council, unless the nature of the gift or benefit makes this impractical.

8.5 You must avoid situations giving rise to the appearance that a person or body, through the provision of gifts, benefits or hospitality of any kind, is attempting to secure favourable treatment from you or from the council.

8.6 You must take all reasonable steps to ensure that your immediate family members do not receive gifts or benefits that give rise to the appearance of being an attempt to secure favourable treatment. Immediate family members ordinarily include parents, spouses, children and siblings.

Improper and undue influence

8.7 You must not use your position to influence other council officials in the performance of their public or professional duties to obtain a private benefit for yourself or for somebody else. A councillor will not be in breach of this clause where they seek to influence other council officials through the appropriate exercise of their representative functions.

8.8 You must not take advantage (or seek to take advantage) of your status or position with or of functions you perform for council in order to obtain a private benefit for yourself or for any other person or body.

9 RELATIONSHIP BETWEEN COUNCIL OFFICIALS

Obligations of councillors and administrators

9.1 Each council is a body corporate. The councillors or administrator/s are the governing body of the council. The governing body has the responsibility of directing and controlling the affairs of the council in accordance with the Act and is responsible for policy determinations, for example, those relating to industrial relations policy.

9.2 Councillors or administrators must not:

a) direct council staff other than by giving appropriate direction to the general manager in the performance of council's functions by way of council or committee resolution, or by the Mayor or administrator exercising their power under section 226 of the Act *(section 352)*
b) in any public or private forum, direct or influence or attempt to direct or influence, any other member of the staff of the council or a delegate of the council in the exercise of the functions of the member or delegate *(Schedule 6A of the Act)*
c) contact a member of the staff of the council on council related business unless in accordance with the policy and procedures governing the interaction of councillors and council staff that have been authorised by the council and the general manager
d) contact or issue instructions to any of council's contractors or tenderers, including council's legal advisers, unless by the Mayor or administrator exercising their power under section 226 of the Act. This does not apply to council's external auditors who, in the course of their work, may be provided with information by individual councillors.

Obligations of staff

9.3 The general manager is responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation of the decisions of the council without delay.

9.4 Members of staff of council must:

a) give their attention to the business of council while on duty
b) ensure that their work is carried out efficiently, economically and effectively
c) carry out lawful directions given by any person having authority to give such directions
d) give effect to the lawful decisions, policies, and procedures of the council, whether or not the staff member agrees with or approves of them.

Obligations during meetings

9.5 You must act in accordance with council's Code of Meeting Practice, if council has adopted one, and the *Local Government (General) Regulation 2005* during council and committee meetings.

9.6 You must show respect to the chair, other council officials and any members of the public present during council and committee meetings or other formal proceedings of the council.

Inappropriate interactions

9.7 You must not engage in any of the following inappropriate interactions:

a) Councillors and administrators approaching staff and staff organisations to discuss individual staff matters and not broader industrial policy issues.
b) Council staff approaching councillors and administrators to discuss individual staff matters and not broader industrial policy issues.
c) Council staff refusing to give information that is available to other councillors to a particular councillor.
d) Councillors and administrators who have lodged a development application with council, discussing the matter with council staff in staff-only areas of the council.
e) Councillors and administrators being overbearing or threatening to council staff.
f) Councillors and administrators making personal attacks on council staff in a public forum.
g) Councillors and administrators directing or pressuring council staff in the performance of their work, or recommendations they should make.
h) Council staff providing ad hoc advice to councillors and administrators without recording or documenting the interaction as they would if the advice was provided to a member of the community.
i) Council staff meeting with developers alone AND outside office hours to discuss development applications or proposals.
j) Councillors attending on-site inspection meetings with lawyers and/or consultants engaged by council associated with current or proposed legal proceedings unless permitted to do so by council's general manager or, in the case of the Mayor or administrator, exercising their power under section 226 of the Act.

9.8 It is appropriate that staff and staff organisations have discussions with councillors in relation to matters of industrial policy.

10 ACCESS TO INFORMATION AND COUNCIL RESOURCES

Councillor and administrator access to information

10.1 The general manager and public officer are responsible for ensuring that members of the public, councillors and administrators can gain access to the documents available under section 12 of the *Local Government Act 1993*.

10.2 The general manager must provide councillors and administrators with information sufficient to enable them to carry out their civic office functions.

10.3 Members of staff of council must provide full and timely information to councillors and administrators sufficient to enable them to carry out their civic office functions and in accordance with council procedures.

10.4 Members of staff of council who provide any information to a particular councillor in the performance of their civic duties must also make it available to any other councillor who requests it and in accordance with council procedures.

10.5 Councillors and administrators who have a private (as distinct from civic) interest in a document of council have the same rights of access as any member of the public.

Councillors and administrators to properly examine and consider information

10.6 Councillors and administrators must properly examine and consider all the information provided to them relating to matters that they are dealing with to enable them to make a decision on the matter in accordance with council's charter.

Refusal of access to documents

10.7 Where the general manager and public officer determine to refuse access to a document sought by a councillor or administrator they must act reasonably. In reaching this decision they must take into account whether or not the document sought is required for the councillor or administrator to perform their civic duty (see clause 10.2). The general manager or public officer must state the reasons for the decision if access is refused.

Use of certain council information

10.8 In regard to information obtained in your capacity as a council official, you must:

a) only access council information needed for council business
b) not use that council information for private purposes
c) not seek or obtain, either directly or indirectly, any financial benefit or other improper advantage for yourself, or any other person or body, from any information to which you have by virtue of your office or position with council
d) only release council information in accordance with established council policies and procedures and in compliance with relevant legislation.

Use and security of confidential information

10.9 You must maintain the integrity and security of confidential documents or information in your possession, or for which you are responsible.

10.10 In addition to your general obligations relating to the use of council information, you must:

a) protect confidential information
b) only release confidential information if you have authority to do so
c) only use confidential information for the purpose it is intended to be used
d) not use confidential information gained through your official position for the purpose of securing a private benefit for yourself or for any other person
e) not use confidential information with the intention to cause harm or detriment to your council or any other person or body
f) not disclose any information discussed during a confidential session of a council meeting.

Personal information

10.11 When dealing with personal information you must comply with:

a) the Privacy and Personal Information Protection Act 1998,
b) the Health Records and Information Privacy Act 2002,
c) the Information Protection Principles and Health Privacy Principles,
d) council's privacy management plan,
e) the Privacy Code of Practice for Local Government

Use of council resources

10.12 You must use council resources ethically, effectively, efficiently and carefully in the course of your official duties, and must not use them for private purposes (except when supplied as part of a contract of employment) unless this use is lawfully authorised and proper payment is made where appropriate.

10.13 Union delegates and consultative committee members may have reasonable access to council resources for the purposes of carrying out their industrial responsibilities, including but not limited to:

a) the representation of members with respect to disciplinary matters
b) the representation of employees with respect to grievances and disputes
c) functions associated with the role of the local consultative committee.

10.14 You must be scrupulous in your use of council property, including intellectual property, official services and facilities, and must not permit their misuse by any other person or body.

10.15 You must avoid any action or situation that could create the appearance that council property, official services or public facilities are being improperly used for your benefit or the benefit of any other person or body.

10.16 The interests of a councillor in their re-election is considered to be a private interest and as such the reimbursement of travel expenses incurred on election matters is not appropriate. You must not use council letterhead, council crests and other information that could give the appearance it is official council material for these purposes.

10.17 You must not convert any property of the council to your own use unless properly authorised.

10.18 You must not use council's computer resources to search for, access, download or communicate any material of an offensive, obscene, pornographic, threatening, abusive or defamatory nature.

Councillor access to council buildings

10.19 Councillors and administrators are entitled to have access to the council chamber, committee room, mayor's office (subject to availability), councillors' rooms, and public areas of council's buildings during normal business hours and for meetings. Councillors and administrators needing access to these facilities at other times must obtain authority from the general manager.

10.20 Councillors and administrators must not enter staff-only areas of council buildings without the approval of the general manager (or delegate) or as provided in the procedures governing the interaction of councillors and council staff.

10.21 Councillors and administrators must ensure that when they are within a staff area they avoid giving rise to the appearance that they may improperly influence council staff decisions.

11 REPORTING BREACHES

11.1 Any person, whether or not a council official, may make a complaint alleging a breach of the code of conduct.

11.2 For the purposes of Chapter 14, Part 1, Division 3 of the Act, failure by a councillor to comply with an applicable requirement of this code of conduct constitutes misbehaviour. *(section 440F)*

Protected disclosures

11.3 The *Protected Disclosures Act 1994* aims to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector.

11.4 The purpose of that Act is to ensure that public officials who wish to make disclosures under the legislation receive protection from reprisals, and that matters raised in the disclosures are properly investigated.[1]

11.5 If a complaint under this code is or could be a protected disclosure, you must ensure that in dealing with the complaint, you comply with the confidentiality provisions of the Protected Disclosures Act set out in section 22:

'An investigating authority or public authority (or officer of an investigating authority or public authority) or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:

(a) the person consents in writing to the disclosure of that information, or

(b) it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern, or

(c) the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.'

Reporting breaches of the code of conduct

11.6 You should report suspected breaches of the code of conduct by councillors, members of staff of council (excluding the general manager) or delegates to the general manager in writing.

11.7 Where you believe that the general manager has breached the code of conduct, you should report the matter to the Mayor in writing.

[1] Protected Disclosures Guidelines, 5th Edition, NSW Ombudsman, May 2004, Annexure 2.

11.8 Where you believe that an administrator has breached the code of conduct, you should report the matter to the Minister for Local Government in writing.

11.9 Councillors should not make allegations of suspected breaches of the code at council meetings or in other public forums.

PART 3: PROCEDURES

This Part of the Model Code contains the complaint handling procedures, complaint assessment criteria and the operating guidelines for the conduct review committee/reviewer. This Part should be used to guide the management of complaints about breaches of the Code.

12 COMPLAINT HANDLING PROCEDURES & SANCTIONS

12.1 Complaints about the conduct of councillors, members of staff of council, members of council committees and delegates of council should be addressed in writing to the general manager.

12.2 Complaints about the conduct of the general manager should be addressed in writing to the Mayor.

Complaint handling procedures – staff, delegate and council committee member conduct (excluding the general manager)

12.3 The general manager is responsible for making enquiries, or causing enquiries to be made, into complaints alleging breach of the code of conduct regarding members of staff of council, delegates of council and/or members of council committees (other than councillors), and will determine such matters.

12.4 Where the general manager has determined not to enquire into the matter, the general manager will give the complainant the reason/s in writing as provided in clause 13.1 of this Code, and those reasons may include, but are not limited to, the fact that the complaint is trivial, frivolous, vexatious or not made in good faith.

12.5 Enquiries made into staff conduct that might give rise to disciplinary action must occur in accordance with the relevant industrial instrument and make provision for procedural fairness including the right of an employee to be represented by their union.

12.6 Sanctions for staff depend on the severity, scale and importance of the breach and must be determined in accordance with any relevant industrial instruments or contracts.

12.7 Sanctions for delegates and/or members of council committees depend on the severity, scale and importance of the breach and may include:

a) censure
b) requiring the person to apologise to any person adversely affected by the breach
c) counselling
d) prosecution for any breach of the law
e) removing or restricting the person's delegation
f) removing the person from membership of the relevant council committee
g) revising any of council's policies, procedures and/or the code of conduct.

Complaint handling procedures – councillor conduct

12.8 The general manager is responsible for assessing complaints, made under Section 11.1, alleging breaches of the code of conduct by councillors, in accordance with the assessment criteria provided at Section 13 of this Code, in order to determine whether to refer the matter to the conduct review committee/reviewer.

12.9 The general manager must determine either to:

a) take no further action and give the complainant the reason/s in writing as provided in clause 13.1 of this Code, and those reasons may include, but are not limited to, the fact that the complaint is trivial, frivolous, vexatious or not made in good faith, or
b) resolve the complaint by use of alternative and appropriate strategies such as, but not limited to, mediation, informal discussion or negotiation and give the complainant advice on the resolution of the matter in writing, or
c) discontinue the assessment in the circumstances where it becomes evident that the matter should be referred to another body or person, and refer the matter to that body or person as well as advising the complainant in writing, or
d) refer the matter to the conduct review committee/reviewer.

Complaint handling procedures – general manager conduct

12.10 The Mayor is responsible for assessing complaints, made under clause 11.1, alleging breaches of the code of conduct by the general manager, in accordance with the assessment criteria provided at Section 13 of this Code, in order to determine whether to refer the matter to the conduct review committee/reviewer.

12.11 The Mayor must determine either to:

a) take no further action and give the complainant the reason/s in writing as provided in clause 13.1 of this Code, and those reasons may include, but are not limited to, the fact that the complaint is trivial, frivolous, vexatious or not made in good faith, or
b) resolve the complaint by use of alternative and appropriate strategies such as, but not limited to, mediation, informal discussion or negotiation and give the complainant advice on the resolution of the matter in writing, or
c) discontinue the assessment in the circumstances where it becomes evident that the matter should be referred to another body or person, and refer the matter to that body or person as well as advising the complainant in writing, or
d) refer the matter to the conduct review committee/reviewer.

Conduct review committee/reviewer

12.12 Council must resolve to appoint persons independent of council to comprise the members of a conduct review committee and/or to act as sole conduct reviewers.

12.13 The members of the conduct review committee and/or the persons acting as sole conduct reviewers should be appropriately qualified persons of high standing in the community. These persons do not need to be residents of the local government area of the council that has appointed them.

12.14 The conduct review committee, members of such committee and sole conduct reviewers may act in that role for more than one council.

12.15 The general manager, or in the case of complaints about the general manager, the Mayor, will undertake the following functions in relation to the conduct review committee/reviewer:

- provide procedural advice when requested
- ensure adequate resources are provided, including providing secretariat support
- attend meetings of the conduct review committee if so requested by the committee, and then in an advisory capacity only
- provide advice about council processes if requested to do so but not so as to take part in the decision making process
- if attending the conduct review committee meeting to provide advice, must not be present at, or in sight of, the meeting when a decision is taken.

12.16 Where a matter is to be considered by the conduct review committee/reviewer, then in each case, the general manager, or Mayor in the case of complaints about the general manager, acting in their capacity as advisor, will either convene a conduct review committee and select its members from those appointed by council or alternatively select a sole conduct reviewer from those appointed by council.

12.17 The conduct review committee/reviewer will operate in accordance with the operating guidelines at Section 14 of this code.

12.18 The conduct review committee/reviewer operating guidelines (Section 14) are the minimum requirements for the operation of conduct review committees/reviewers. Council may supplement the guidelines, but any additional provisions should not be inconsistent with the guidelines.

12.19 The conduct review committee/reviewer is responsible for making enquiries into complaints made under clause 11.1 alleging breaches of the code of conduct by councillors and/or the general manager and must determine either to:

a) not make enquiries into the complaint and give the complainant the reason/s in writing as provided in clause 13.1 of this Code, and those reasons may include, but are not limited to, the fact that the complaint is trivial, frivolous, vexatious or not made in good faith, or
b) resolve the complaint by use of alternative and appropriate strategies such as, but not limited to, mediation, making recommendations to the general manager, informal discussion or negotiation and give the complainant advice on the resolution of the matter in writing, or
c) make enquiries into the complaint, or

d) engage another appropriately qualified person to make enquiries into the complaint, or
e) not make enquiries or discontinue making enquiries where it becomes evident that the matter should be referred to another body or person, and refer the matter to that body or person as well as advising the complainant in writing. Despite any other provision of this code, this will constitute finalisation of such matters and no further action is required.

12.20 Where the conduct review committee/reviewer conducts enquiries or causes enquiries to be conducted, the conduct review committee/reviewer must make findings on whether, in its view, the conduct referred to it comprises a breach of the code of conduct.

12.21 Where the conduct review committee/reviewer makes findings, the conduct review committee/reviewer may recommend that council take any actions provided for in this code of conduct that it considers reasonable in the circumstances.

12.22 Where the conduct review committee/reviewer makes findings, the conduct review committee/reviewer will report its findings, and the reasons for those findings, in writing to the council, the complainant and the person subject of the complaint.

12.23 The conduct review committee/reviewer will report its findings and any recommendations to council only when it has completed its deliberations.

Sanctions

12.24 Before a council can impose a sanction it must make a determination that a councillor or the general manager has breached the code of conduct.

12.25 Where the council finds that a councillor or general manager has breached the code, it may decide by resolution to:
a) censure the councillor for misbehaviour in accordance with section 440G of the Act
b) require the councillor or general manager to apologise to any person adversely affected by the breach
c) counsel the councillor or general manager
d) make public findings of inappropriate conduct
e) prosecute for any breach of law.

Councillor misbehaviour

12.26 Under section 440G a council may by resolution at a meeting formally censure a councillor for misbehaviour.

12.27 Under section 440H, the process for the suspension of a councillor from civic office can be initiated by a request made by council to the Director General of the Department of Local Government.

12.28 The first ground on which a councillor may be suspended from civic office is where the councillor's behaviour has been disruptive over a period, involving more than one incident of misbehaviour during that period, and the pattern of behaviour during that period is of such a sufficiently serious nature as to warrant the councillor's suspension.

12.29 Council cannot request suspension on this ground unless during the period concerned the councillor has been:

- formally censured for incidents of misbehaviour on two or more occasions, or
- expelled from a meeting of the council or a committee of the council for an incident of misbehaviour on at least one occasion.

12.30 The second ground on which a councillor may be suspended from civic office is where the councillor's behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.

12.31 Council cannot request suspension on this ground unless the councillor has been:

- formally censured for the incident of misbehaviour concerned, or
- expelled from a meeting of the council or a committee of the council for the incident of misbehaviour concerned.

12.32 Under section 440H, the process for the suspension of a councillor can also be initiated by the Department of Local Government, the Independent Commission Against Corruption or the NSW Ombudsman.

Reporting on complaints

12.33 The general manager must report annually to council on code of conduct complaints. This report should include, as a minimum, a summary of the:

a) number of complaints received,
b) nature of the issues raised by complainants, and
c) outcomes of complaints.

13 COMPLAINT ASSESSMENT CRITERIA

13.1 The general manager or Mayor, in the case of a complaint about the general manager, will assess a complaint alleging a breach of the code of conduct to determine if the matter should be referred to the conduct review committee/reviewer. In assessing the complaint, the general manager and Mayor will have regard to the following grounds:

a) whether there is any prima facie evidence of a breach of the code of conduct
b) whether the subject matter of the complaint relates to conduct that is associated with the carrying out of the functions of civic office or duties as general manager
c) whether the complaint is trivial, frivolous, vexatious or not made in good faith
d) whether the conduct the subject of the complaint could reasonably constitute a breach of the code of conduct
e) whether the complaint raises issues that require investigation by another person or body, such as referring the matter to the Department of Local Government, the NSW Ombudsman, the Independent Commission Against Corruption or the NSW Police
f) whether there is an alternative and satisfactory means of redress
g) how much time has elapsed since the events the subject of the complaint took place
h) how serious the complaint is and the significance it has for council
i) whether the complaint is one of a series indicating a pattern of conduct.

13.2 Complaints that are assessed as not having sufficient grounds to warrant referral to the conduct review committee/reviewer or that are to be referred to a more appropriate person or body can be finalised by the general manager or the Mayor, in the case of complaints about the general manager.

13.3 If a matter is referred to the conduct review committee/reviewer, then the conduct review committee/reviewer should use the above criteria in clause 13.1 for its initial assessment of the complaint and determination of the course to follow in dealing with the complaint.

14 CONDUCT REVIEW COMMITTEE/REVIEWER OPERATING GUIDELINES[2]

14.1 Jurisdiction of the conduct review committee/reviewer

The complaint handling function of the conduct review committee/reviewer is limited to consideration of, making enquiries into and reporting on complaints made under clause 11.1, about councillors and/or the general manager.

Complaints regarding pecuniary interest matters should be reported to the Director General of the Department of Local Government and will not be dealt with by the conduct review committee/reviewer.

Sole reviewers and members of the conduct review committee are subject to the provisions of this code of conduct.

14.2 Role of the general manager and Mayor

The general manager, or in the case of complaints about the general manager, the Mayor, will undertake the following functions in relation to the conduct review committee/reviewer:

- provide procedural advice when requested
- ensure adequate resources are provided, including providing secretariat support
- attend meetings of the conduct review committee if so requested by the committee, and then in an advisory capacity only
- provide advice about council processes if requested to do so but not so as to take part in the decision making process
- if attending the conduct review committee meeting to provide advice, must not be present at, or in sight of, the meeting when a decision is taken.

Where the general manager, or in the case of complaints about the general manager, the Mayor, is unable to act as advisor to the conduct review committee/reviewer due to a conflict of interests in relation to a complaint, they are to nominate a senior council officer or councillor (in the case of complaints about the general manager) to perform this role.

14.3 Composition of the conduct review committee

Where council has a conduct review committee it will comprise three or more appropriately qualified persons of high standing in the community who are independent of the council, convened and selected as provided in clause 12.16.

In the circumstances where a member of the conduct review committee cannot participate in a matter, the general manager, or Mayor in the case of complaints about the general manager, should select another person as provided in clause 12.16.

[2] The operating guidelines have been adapted from the Ku-ring-gai Council Conduct Committee Guidelines – 25 October 2006

The chairperson is to be elected by the members of the conduct review committee.

The general manager, or in the case of complaints about the general manager, the Mayor, will act in an advisory capacity to the committee when requested.

14.4 Quorum of the conduct review committee

A quorum for a meeting of the conduct review committee is the majority of the members of the conduct review committee.

If a quorum is not present at a meeting of the conduct review committee it must be adjourned to a time and date that is specified.

Business is not to be conducted at any meeting of the conduct review committee unless a quorum is present.

Business may be conducted by video-conference or teleconference.

14.5 Voting of the conduct review committee

Each member of the conduct review committee shall be entitled to one vote in respect of any matter. In the event of equality of votes being cast, the chairperson shall have the casting vote.

If the vote on a matter is not unanimous, then this should be noted in any report to council on its findings.

In relation to any procedural matters relating to the operation of the conduct review committee, the ruling of the chairperson shall be final.

14.6 Procedures of the conduct review committee/reviewer

The general manager or Mayor, in the case of a complaint about the general manager, will be responsible for convening the initial meeting of the conduct review committee when there is a complaint to be referred to it.

The conduct review committee/reviewer will conduct business in the absence of the public.

The conduct review committee/reviewer will keep proper records of deliberations.

The conduct review committee shall determine the procedures governing the conduct of its meetings provided such procedures are consistent with these operating guidelines.

14.7 Procedural fairness

In conducting enquiries, the conduct review committee/reviewer or the person engaged to do so should follow the rules of procedural fairness and must -

a) provide the person the subject of the complaint with a reasonable opportunity to respond to the substance of the allegation
b) provide the person the subject of the complaint with an opportunity to place before the conduct review committee/reviewer or person undertaking the enquiry any information the person considers relevant to the enquiry
c) provide the person the subject of the complaint with an opportunity to address the conduct review committee/reviewer in person
d) hear all parties to a matter and consider submissions before deciding the substance of any complaint
e) make reasonable enquiries before making any recommendations
f) act fairly and without prejudice or bias
g) ensure that no person decides a case in which they have a conflict of interests
h) conduct the enquiries without undue delay.[3]

Where the person the subject of the complaint declines or fails to take the opportunity provided to respond to the substance of the allegation against them, the conduct review committee/reviewer should proceed to finalise the matter.

14.8 Complaint handling procedures

In addition to complying with these operating guidelines, the conduct review committee/reviewer will ensure it deals with all complaints in accordance with the provisions of Section 12 of this Code.

All persons who are the subject of complaints that are referred to the conduct review committee/reviewer will receive written information about the process being undertaken to deal with the matter.

The conduct review committee/reviewer will only deal with matters that are referred to it by the general manager or the Mayor.

Where the conduct review committee/reviewer determines to make enquiries into the matter, such enquiries should be made without undue delay.

In circumstances where the person the subject of the complaint meets with the conduct review committee/reviewer, they are entitled to bring a support person or legal adviser. That person will act in an advisory and support role to the person affected. They will not speak on behalf of the subject person.

[3] NSW Ombudsman, Investigating complaints, A manual for investigators, June 2004.

14.9 Findings and recommendations of the conduct review committee/reviewer

Where the conduct review committee/reviewer determines, in its view that the conduct referred to it comprises a breach of this code of conduct it may, in its report to the council, make recommendations, that the council take any of the following actions:

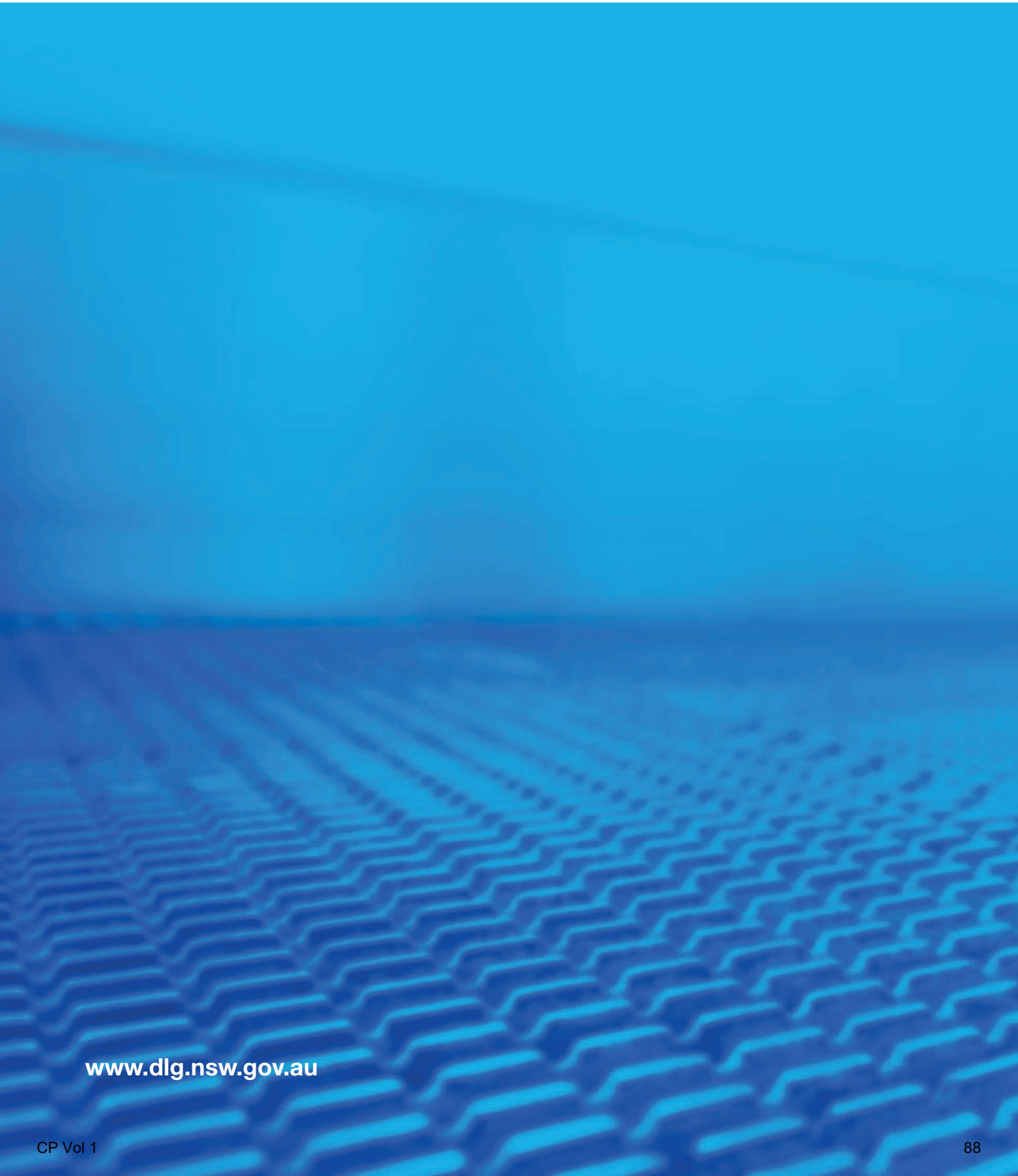
a) censure the councillor for misbehaviour
b) require the councillor or general manager to apologise to any person adversely affected by the breach
c) counsel the councillor or general manager
d) make public findings of inappropriate conduct
e) prosecute for any breach of the law
f) revise any of council's policies, procedures and/or the code of conduct.

Before making any such recommendations, the conduct review committee/reviewer shall have regard to the following:

a) the seriousness of the breach
b) whether the breach can be easily remedied or rectified
c) whether the subject has remedied or rectified their conduct
d) whether the subject has expressed contrition
e) whether the breach is technical or trivial only
f) whether the breach represents repeated conduct
g) the age, physical or mental health or special infirmity of the subject
h) the degree of reckless intention or negligence of the subject
i) the extent to which the breach has affected other parties or the council as a whole
j) the harm or potential harm to the reputation of local government and of the council arising from the conduct
k) whether the findings and recommendations can be justified in terms of the public interest and would withstand public scrutiny
l) whether an educative approach would be more appropriate than a punitive approach
m) the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action
n) what action or remedy would be in the public interest
o) where to comply with a councillor's obligations under this code of conduct would have had the effect of depriving the council of a quorum or otherwise compromise the capacity of council to exercise its functions

14.10 Amendment of the operating guidelines

The conduct review committee/reviewer guidelines may be added to and any additional requirements may be further amended or repealed by resolution of the council.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Meetings Practice Note

Practice Note No 16 **August 2009**

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INTRODUCTION

This Practice Note was made to help councils run their meetings. It is not meant to be a complete guide to meeting procedures, but it does cover frequently asked questions.

As part of their Charter, councils are to involve councillors, council staff, members of the public and others in the development, improvement and co-ordination of local government (s.8 of the Act). How meetings are managed is an important part of achieving this goal.

Meeting procedures contribute to good public decision-making and increase council's transparency and accountability to its community. Councillors are accountable to their communities for the decisions that they make. Those decisions should be based on sound and adequate information. The conduct of effective meetings is an indicator of good governance. Well run meetings reflect an effective partnership and relationship between the governing body of council and council administration. (sections 232 and 439 of the Act)

While legislation sets out certain procedures that must be followed in council and committee meetings, beyond this meetings procedures vary between councils. These differences usually reflect local cultural practices and priorities.

Rules and suggestions on holding council meetings are in the *Local Government Act 1993* (the Act); the *Local Government (General) Regulation 2005* (the Regulation); the (former) Department of Local Government's 2008 "Model Code of Conduct for Local Councils in NSW" (the Model Code) and the "Guidelines for the Model Code of Conduct for Local Councils in NSW" (the Model Code Guidelines); and the relevant council's adopted Code of Meeting Practice (Meeting Code).

While publications such as Joske's *Law and Procedures at Meetings in Australia* give general guidance on running meetings, a council's meetings procedures must follow the Act, Regulation, Model Code and council's Meeting Code. Where there are any differences in what is said or required, the Act, Regulation and Model Code must be followed.

The Meeting Code is made by the council after public consultation. The Meeting Code cannot be inconsistent with the Act, the Regulation or the Model Code, but it can 'fill in the gaps'. Under section 440 of the Act, all councils must adopt a Code of Conduct that includes the provisions of the Model Code. The Model Code sets out minimum standards of behaviour (set down in the Regulations) for council officials in carrying out their duties (Part 2, Model Code).

All councillors, staff and community members participating in council meetings must act with good intentions and behave to the standard of conduct expected by

the community. The principles upon which the Model Code is based include integrity; leadership; selflessness; impartiality, accountability; openness; honesty and respect (Section 4, Model Code). Meetings must be run fairly and the procedures used should improve decision-making, not personal or political advantage.

Local councils are largely independent bodies, mainly responsible to their residents and ratepayers (rather than to the Minister for Local Government or the Division of Local Government, Department of Premier and Cabinet), for the way in which they operate. This includes the running of meetings. It is not the role of the Minister or the Division to direct councils on the day-to-day administration of their affairs.

This Practice Note has been made as a guide for councils, councillors and members of the public. It does not give legal advice. You should seek your own legal advice on issues of concern.

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PART 1 - BEFORE THE MEETING

1.1 Holding Meetings

1.1.1 When are ordinary council meetings held?

Ordinary council meetings are held on a regular basis, as decided by the council. Each council must meet at least ten (10) times a year, with each meeting being in a different month (s.365 of the Act). It is up to the council to decide when and where to have the meeting.

1.1.2 When is an extraordinary meeting held?

At least two (2) councillors can make a written request to the mayor to hold an extraordinary council meeting. The mayor can be one of the two councillors, but the mayor cannot call extraordinary meetings by him or herself without having a written request with another councillor's signature. The mayor must then 'call' the meeting, which is to be held as soon as practical but within fourteen (14) days after the request is made (s.366 of the Act).

Extraordinary meetings are not only held in 'extraordinary' circumstances. These meetings are usually held to deal with special business or where there is so much business to be dealt with that an additional meeting is required (cl.242 of the Regulation).

1.1.3 Where are council meetings held?

This is not covered by the Act or Regulation. Council may determine for itself the venue for its meetings. It may wish to hold its meetings in different locations from time to time.

In selecting a venue council should ensure that it:

- is accessible for people with disabilities;
- is adequate in size;
- has adequate facilities for the convenience and comfort of councillors, staff, and members of the public;
- has suitable acoustic properties.

1.2 Notice of Meetings

1.2.1 What notice has to be given to the public of ordinary council and committee meetings?

Councils must give public notice of the time and place of ordinary council and committee meetings (s.9 of the Act). The notice must be published in a local newspaper, indicating the time and place of the meeting (cl.232 of the Regulation). Notice can also be given in other ways if it is likely to come to the public's attention — for example, by a list or poster at the council's office or the library. More than one meeting may be advertised in a public notice.

Although no time period has been set between giving public notice and holding the meeting, it is expected that enough notice would be given so that the public can find out when and where the council is meeting.

1.2.2 What notice has to be given to councillors of ordinary council and committee meetings?

At least three (3) calendar days before a council or committee meeting, council's general manager must send each councillor a notice of the time, place and business on the agenda of the meeting (s.367 of the Act; cl.262 of the Regulation).

1.2.3 What notice has to be given of extraordinary council and committee meetings?

Public notice must be given of the time and place of extraordinary council and committee meetings (s.9 of the Act), but this does not have to be by publication in a local newspaper (cl.232 of the Regulation).

If an extraordinary meeting is called in an emergency, less than the usual three (3) days notice can be given to councillors (s.367 of the Act). The Act does not define 'emergency'. It could cover things other than natural disasters, states of emergency, or urgent deadlines that must be met. Initially the general manager would decide what is an 'emergency'.

1.2.4 Is a council decision invalid if proper notice was not given for that meeting?

A council decision will still be valid even if proper notice had not been given for the meeting in which the decision was made (s.374 of the Act), provided a quorum was present. If the meeting does not follow the Act, the Regulation, the Model Code or council's Meeting Code there may be a breach of the Act (s.672), but this does not mean that the decision is invalid (s.374 of the Act).

Any person concerned about the running of a meeting can apply to the Land and Environment Court to stop or fix a breach of the Act (s.674(1) of the Act).

1.3 Times of Meetings

1.3.1 What time should council meetings start?

This is not covered in the Act or the Regulation. Council could set the time of its meetings in the council's Meeting Code, but this should be flexible enough to allow meetings to be held at other times in special circumstances.

In setting the times for its meetings council's foremost consideration should be the convenience of councillors. Matters to be taken into account may include:

- employment or business commitments;
- carer responsibilities;
- safety issues (eg long travel distances at night).

There are good arguments for daytime meetings, for example, in large rural areas where councillors may have to travel long distances to attend meetings. There are also good arguments for early evening meetings, allowing councillors and members of the public with daytime jobs to attend the meetings.

There may be occasions where council may set the time and place of a meeting to suit a particular interest group which may be expected to attend.

1.4 Agendas and Business Papers

1.4.1 What must be in a meeting agenda?

The general manager must send each councillor notice of the business to be dealt with at the upcoming meeting (the agenda) (s.367 of the Act). Copies of the agenda must be available for the public at the council's offices and at the meeting, free of charge (s.9 of the Act). In addition councils should consider placing agendas on their websites.

The agenda must indicate all business arising from a former meeting; any matter that the mayor intends to put to the meeting; and any business of which 'due notice' has been given (cl.240 of the Regulation). The amount of time that is 'due notice' should be set under council's Meeting Code.

The general manager must include in the agenda for a meeting of the council any business of which due notice has been given (eg notice of motion, question on notice) except business that is unlawful (cl.240 of the Regulation).

1.4.2 What must be in the meeting business papers?

Business papers are documents relating to business to be dealt with at a meeting, for example, correspondence and reports from staff. Business papers should be provided as early before the meeting as possible. This gives councillors time to consider the issues and prepare for debate.

Council staff should, when preparing business papers which will be open to inspection by the public, avoid including personal identifiers such as names and addresses unless such information is required by legislation. An example of when such information would be required is a development application, in which case the name and address of the applicant must be provided.

1.4.3 Can payments made by council be included in council's business papers?

These payments are often called 'cheque warrants' and will list the names of persons and amounts paid by council for various reasons.

Cheque warrants do not have to be included in council's business paper. The requirement in the *Local Government Act* 1919 that cheque warrants be included in council's business paper was removed in the *Local Government Act* 1993.

Cheque warrants usually contain 'personal information' covered by the *Privacy and Personal Information Protection Act 1998* (PPIPA). As a result, the Local Government and Shires Associations of NSW and Privacy NSW (the agency that looks after the PPIPA) believe that cheque warrants should not be included in business papers. The Division agrees with this position and covers this issue in our Circular to Councils No. 01/14 "Public Access to Council Documents", available from the Division's website at www.dlg.nsw.gov.au.

Payments made by councils can be found in council's quarterly review of the management plan (s.407 of the Act). You may request access to warrants outside of council meetings, but may be refused on privacy grounds.

1.4.4 Should development plans be included in the business paper?

Applications for development consent, called 'development applications', must come with different types of plans under the *Environmental Planning and Assessment Act 1979*.

The Act does not require a council to make copies of these plans available in its business papers. Because of privacy and copyright issues, development plans should not be included in the business papers. Instead, interested members of the public should be allowed to view these plans at the council's office. The plans could also be brought to council and committee meetings by council staff.

Copyright raises some very complex issues for councils, particularly in the area of development applications. Copyright in development plans ('a work') is usually held by the person who drew them. Copyright may be breached when a document is copied and distributed, but not when it is viewed or placed on public exhibition.

The *Environmental Planning and Assessment Act 1979* and other State legislation does not allow a council to ignore copyright law when it is dealing with development plans. It would be unwise for a council to give out copies of plans unless the copyright owner has given permission to do so.

1.4.5 Can additional information to that in the business papers be provided to councillors?

Yes. A council may direct its general manager to provide its councillors with additional information. If this is done, it is suggested that the additional papers be marked separately from the business papers so as to avoid any confusion. Additional information won't be automatically available to the public like the business papers.

Any information given to a particular councillor in the performance of that councillor's duties must also be available to any other councillor who requests it in accordance with council procedures (Clause 10.4 Model Code).

1.4.6 Can Staff Reports be included in the business paper?

The only reference to staff reports in the Regulation is in clause 243(3), which states that a recommendation made in a report by a council employee is, so far as it is adopted by the council, a resolution of the council. The procedure for presenting staff reports at council meetings is not covered by the Regulation - it is a matter for council's Meeting Code. Councils might consider requiring staff reports to be prepared on each agenda item before the meeting is held.

Staff reports are expected to contain sufficient information to enable the council to reach an informed decision.

1.4.7 Can council staff change the wording of a committee recommendation when including it in the agenda?

The general manager has to make sure that certain information is in the agenda (cl.240 of the Regulation). He or she can decide how this information is to be expressed.

Committee recommendations to the council are usually in the form of -

"The Committee recommends to the Council that...".

The recommendation shown in the agenda should be the same as the one decided by the committee. When the council discusses the recommendation at the council meeting, it can adopt, amend and adopt, or reject the recommendation (cl.269 of the Regulation). A council amendment could alter the meaning or intention of the recommendation, or simply correct its wording.

1.4.8 How should a matter be treated if its subject is confidential and the motion will probably be discussed in the closed part of a meeting?

Certain matters, because of their confidential nature, may be considered in closed meetings. Parts of council meetings may be closed to the public to discuss the types of matters referred to in section 10A(2) of the Act. Although a council decides whether the public is to be excluded from part of a meeting, the general manager must first decide whether an item of business is *likely* to be discussed in a closed part of a meeting.

Section 9(2A) of the Act directs the general manager to indicate on the agenda (without details) that an item of business is likely to be discussed in a closed part of the meeting. For example:

"Item 5: Annual tenders for goods and services"

The agenda should also indicate the reason the item will be dealt with in the closed part of the meeting. For example:

"Item 5: Annual tenders for goods and services
Reason: Information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business (section 10A(2)(c))."

The general manager must make sure that any details of this item are put in a confidential business paper (cl.240(4) of the Regulation). A council can disagree that an item should be discussed in a closed part of the meeting. In this case, the item would be discussed during the open part of the meeting.

Sections 9, 10A and 664 of the Act and Section 10 of the Model Code deal with confidential information.

1.4.9 Can a council decide that notices of motion on its agenda will not have any supporting notes or comments from staff?

Yes. While clause 240 of the Regulation sets out what must be included in the agenda, each council can decide how its business is to be stated in the agenda and whether supporting notes or comments should come with notices of motion.

A council may wish to consider the benefits for making well-informed decisions of having extra information or expert views provided in the notes or in the comments. This additional information would be publicly available and may assist community members in understanding the reasons for, and effects of, council decisions. Council should alter its Meeting Code if it decides to change its position on what is to be included in its agendas.

(See also 5.2.3 of this Practice Note)

1.4.10 Can an agenda include provision for questions from councillors?

Yes. Council agendas could contain an item "questions on notice". Councillors would provide questions to the general manager to be asked at the meeting and included on the agenda, in accordance with the notice provisions of the Regulation (cl 241(1)).

Questions provided in this way, and responses to those questions, would be considered council business and as such council's Meeting Code could cover this issue. As responses to questions on notice would be considered council business, responses could form the basis for further motions on the same topic at that meeting.

Agendas and business papers (other than business papers for a confidential item) must be available for the public to look at or take away (s9 of the Act). Any non-confidential questions included in the agenda or business papers would also need to be available to the public.

For information relating to asking questions about matters on the agenda during the meeting, see 2.5 of this Practice Note.

1.4.11 Is it appropriate to have as an agenda item "Questions Without Notice"?

Having an agenda item, "questions without notice" is inconsistent with the provisions of the Regulation that require notice to be given of matters to be discussed at council meetings (cl 241).

Allowing questions without notice would avoid the notice provisions of clause 241 of the Regulation. That clause enables all councillors and the public to be aware, by reading the agenda, of matters that will be raised at each meeting. It also enables councillors to give careful thought to any pecuniary interest or conflict of interest they might have in a matter, rather than having to hastily confront an issue during the meeting.

However, questions can be proposed by giving notice to the general manager in the usual way (see 1.4.10) and can be asked during the meeting in relation to business already before council (see 2.5). If the matter is genuinely urgent, and the matter is not on the agenda, it could be dealt with under clause 241(3) of the Regulation.
For information relating to asking questions about matters on the agenda during the meeting, see 2.5 of this Practice Note.

Further information on questions is contained in clause 5.2.8 of this Practice Note.

1.4.12 Can an item of business which is on the agenda be removed from the agenda prior to the meeting?

No. Once the agenda for a meeting has been sent to councillors an item of business on the agenda should not be removed from the agenda prior to the meeting.

If it is proposed that an item of business which is on the agenda not be dealt with at the meeting council should resolve to defer that business to another meeting or resolve not to consider the matter, as the case may be.

1.5 Order of Business

The order of business for meetings (except for extraordinary meetings) is generally fixed by council's Meeting Code (cl.239(1) of the Regulation). If the Council does not have a Meeting Code, then the order of business can be decided by council resolution (cl.239 (1) of the Regulation).

The order of business can be changed by the passing of a motion (with or without notice). Unlike other motions, only the mover of a motion to change the order of business can speak for or against it in the meeting (cl.239 (1) of the Regulation).

1.6 Public Access to Agendas and Business Papers

1.6.1 Who can access information that is available publicly?

Section 12(1) of the Act gives a right of access to certain documents to any interested person, not just people who are residents or ratepayers of the council area. Access does not depend upon the reasons for the request being made.

1.6.2 Which council documents can a person have access to and inspect?

Access for inspection of all council documents referred to in sections 12(1), 12(2) and 12(5) of the Act must be provided unless the particular document is exempt under section 12(1A). Some of the documents listed under section 12(1) of the Act are:

- The Code of Conduct
- The Meeting Code
- Agendas and business papers
- Minutes
- Annual reports and annual financial reports
- Policy concerning payment of expenses and the provision of facilities to councillors

Access for inspection must also be provided to all other council documents. However inspection of a particular document can be refused if the council believes that allowing the inspection would be contrary to the public interest (s.12(6) of the Act).

The requirement to allow inspection does not apply to any part of a document exempt under sections 12(1A) and 12(7) of the Act, including certain building plans; certain commercial information; personnel matters concerning particular individuals; the personal hardship of any resident or ratepayer; trade secrets; or a matter the disclosure of which would constitute an offence or give rise to an action for breach of confidence.

After determining whether the document would be generally available, the Public Officer must also consider whether restrictions under the *Privacy and Personal Information Protection Act 1998* and *Copyright Act 1968* (Cth) apply.

1.6.3 Is a person entitled to inspect the agenda and minutes of an advisory council committee that includes staff members or the public?

The agenda and minutes of an advisory council committee would come within the category of 'other council documents' (s.12(6) of the Act). These documents can be inspected unless inspection would be contrary to the public interest. Inspection can also be refused if the documents deal with personnel matters concerning particular individuals, information supplied in confidence, etc (s.12(6) to (8) of the Act).

1.6.4 Can a council charge a reasonable copying fee or postage for providing copies of its agenda and business papers?

Copies of the current agenda and associated business papers must be available to the public to look at or take away, and must be free of charge (s.9 of the Act).
However, sections 12B(3) and 608 of the Act, when read together, allow a council to charge for the copying of agendas and business papers in other circumstances, such as for papers from a previous meeting. It also allows council to charge reasonable postage

and handling fees for agendas and business papers posted either on a single occasion or regularly to persons on a mailing list. Multiple copies mailed to a person could have an additional fee. Fees may be charged in advance or afterwards, as decided by the council.

For more information see Circular to Councils No.08-15 LGMA (NSW) Governance Network – Access to Information Policies and Template Documents, accessible on the Division's website at www.dlg.nsw.gov.au.

1.6.5 Are papers created or received by councillors classified as council documents?

Council documents include those created or received in the course of the official duties by councillors. Information generated by, in the possession of, or under the control of the councillors that concerns their civic or council duties under any Act is considered by the Division to be a document of the council. These documents may include information that does not form part of the council's official filing system.

1.6.6 Can councillors copy information additional to the business papers (such as plans and legal opinions from council files) and give it to the public?

Section 664(1) of the Act states that "a person must not disclose any information obtained in connection with the administration or execution of the Act unless that disclosure is made:

(a) with the consent of the person from whom the information was obtained; or
(b) in connection with the administration or execution of the Act; or
(c) for the purposes of any legal proceedings arising out of the Act or of any report of any such proceedings; or
(d) in accordance with a requirement imposed under the *Ombudsman* Act 1974 or the *Freedom of Information Act* 1989; or
(e) with other lawful excuse."

There is a maximum penalty of $5500 for breach of this provision.
Provided the additional information is not part of the business paper and is made publicly available, it can only be given out in accordance with section 664(1) of the Act. It is also important to remember copyright law when making copies of information.

Council should have documented procedures for public access to documents as provided under the Act (s.12) and the *Freedom of Information Act 1989*, subject to the *Privacy and Personal Information Protection* Act *1998*.

Section 10 of the Model Code talks about access to and use of personal, council and confidential information. The general manager or public officer, rather than individual councillors, would be the appropriate people to assist members of the public to access documents.

PART 2 - AT THE MEETING: GENERAL

2.1 Coming Together

2.1.1 How may council open its meetings?

A council may open its meetings with a prayer if it chooses. This decision should be made after considering the religious beliefs and views of the councillors and the community. This issue could be included in council's Meeting Code.

A council may also choose to include an Acknowledgement of Country. Acknowledgement of Country is where people acknowledge and show respect for the Aboriginal Traditional Custodians of the land upon which the event is taking place. It is a sign of respect.

2.1.2 Who can sit at the meeting tables?

The general manager can attend, but not vote at, council meetings. The only exception to this is when the meeting is dealing with the general manager's employment or standard of performance — then the council may resolve to exclude the general manager from the meeting (s.376 of the Act).

There are no rules on who can sit at a meeting table during a council meeting, or where people should sit. These issues could be covered in council's Meeting Code. If it is not stated in the Meeting Code, the chairperson can decide who sits at the meeting table and where. Examples of the other people who might sit at the meeting table are the directors of the relevant council departments or council's solicitor (if required at the meeting to provide advice).

It is important to remember that if a councillor is anywhere in the room where the council meeting is being held, they are considered to be 'present' for the purposes of voting (cl.251(1) of the Regulation). This means that if they are in the room but do not vote on an issue (for example, by staying silent) their vote is taken as against the motion (cl.251(1) of the Regulation).

2.2 Addressing Councillors

2.2.1 How should councillors be addressed at council meetings?

Councillors are usually addressed as "Councillor [surname]", whether the councillor is male or female; whether or not the councillor has a title (for example the Honourable or the Reverend); and whether or not the councillor has a qualification (for example, Doctor of Philosophy).

A council could decide that a councillor's title or qualification will be included when addressing them (for example, 'Councillor Doctor X'). As this matter is not covered in the legislation, it could be covered in council's Meeting Code. If it is not covered in the Meeting Code, it would be a matter for the chairperson to decide on, remembering to treat people with respect, dignity and equality.

2.2.2 How should the chairperson be addressed at council meetings?

If the chairperson is the mayor they are usually addressed as 'Mr Mayor' or 'Madam Mayor'. When the chairperson is not the mayor, they would be addressed as 'Mr/Madam Chair' or 'Mr/Madam Chairperson'. This matter could be covered in council's Meeting Code. If it is not covered in the Meeting Code, it would be a matter for the chairperson to decide on.

2.3 Councillor Accountability - Open Decision-making

Open decision-making is an important part of local government and should be the rule rather than the exception. The ability of the public and media to attend and watch council and committee meetings — seeing the deliberations and decisions of elected representatives — is essential for councillor accountability. This is recognised by the legislation, which encourages open decision-making at council meetings.

Councillors should be prepared to state their views publicly on both controversial and routine issues. Informed voting by electors is best achieved when they can observe the speeches, debate and voting patterns of their councillors.

Council decisions should be based on fairness, impartiality, objectivity and consideration of all the issues (Sections 4 and 6 of the Model Code). Open decision-making helps achieve this, as well as preventing misunderstanding and unfounded criticisms from the public.

2.4 Business at Council Meetings

2.4.1 What business can be discussed and dealt with at council meetings?

- Business which a councillor has given written notice of within the required time before the meeting (cl.241(1)(a) of the Regulation), and of which notice has been given to councillors (s.367 of the Act);

- Business that is already before the council or directly relates to a matter that is already before the council (cl.241(2)(a) of the Regulation). For example, business that was discussed at the last council meeting, or business in a report made by council staff in response to an earlier council request for a report;

- The election of a chairperson for the meeting (cl.241(2)(b) of the Regulation);
- A matter raised in a mayoral minute (cl.241(2)(c) of the Regulation);
- A motion to adopt committee recommendations (cl.241(2)(d) of the Regulation);
- Business ruled by the chairperson to be of great urgency (cl.241(3) of the Regulation) but only after a motion is passed to allow this particular business to be dealt with. This motion can be moved without notice.

Business which does not fall within any of the above categories should not be transacted at a meeting.

2.4.2 What business can be discussed at extraordinary council meetings?

In general, only matters stated in the meeting agenda may be dealt with at an extraordinary council meeting. Other business ruled by the chairperson to be of great urgency may also be dealt with at the meeting, but only after the business in the agenda is finished (cl.242 of the Regulation).

2.5 Questions at council meetings

Can Questions be asked of councillors or staff concerning a matter on the council agenda?

A councillor may ask a question of another councillor or a staff member. A question to a councillor must be put through the chairperson. A question to a staff member must be put through the general manager.

Any person to whom a question is put is entitled to be given reasonable notice of the question so as to allow that person time to research the matter, for example by referring to documents or making enquiries of other persons.

Questions must be put succinctly and without argument. The chairperson must not allow any discussion on any reply or refusal to reply to such questions (cl 249 of the Regulation). It is considered that staff refusal to reply would be in circumstances where they require further time to research the response to the question. In this case, it would be good practice for council and/or the general manager to identify a timeframe for the response so that the period to respond is not open-ended.

When further time is required to respond to a question asked during a council meeting, it would be good practice to record the question and responses in the minutes.

2.6 Committee of the Whole

2.6.1 What is the committee of the whole?

During the course of a council meeting a council may resolve itself into the 'committee of the whole' under section 373 of the Act. That part of the council meeting then becomes a committee meeting. The only advantage of a council forming a committee of the whole is that by reason of clause 259 of the Regulation the limits on the number and duration of councillor speeches referred to in clause 250 of the Regulation do not apply.

If at the time council resolves itself into the "committee of the whole" the meeting was open to the public then the meeting will remain open to the public unless council resolves to exclude the public under section 10A of the Act. (see also 7.3.3 of this Practice Note)

2.6.2 May council resolutions be made by the committee of the whole?

No. The committee of the whole may not pass a council resolution. It makes recommendations to council in the same way as any other committee of council. Once the committee has completed its business and the council meeting has resumed council considers any recommendations made by the committee of the whole.

2.7 Mayoral Minutes

2.7.1 What is a mayoral minute?

The mayor may put to a meeting (without notice) any matter which the council is allowed to deal with or which the council officially knows about (cl.243(1) of the Regulation). This would cover any council function under the Act or other legislation, or any matter that has been brought to the council's attention, for example, by letter to the mayor or the general manager.

This power to make mayoral minutes recognises the special role of the mayor. A mayoral minute overrides all business on the agenda for the meeting, and the mayor may move that the minute be adopted without the motion being seconded.

Mayoral minutes should not be used to introduce, without notice, matters that are routine, not urgent, or need research or a lot of consideration by the councillors before coming to a decision. These types of matters would be better placed on the agenda, with the usual period of notice being given to the councillors.

2.7.2 Can mayoral minutes be introduced at council committee meetings?

A council committee consisting entirely of councillors must run its meetings as set out in the Meeting Code (s.360(3) of the Act). Each council committee can decide on its own procedure (cl.265 of the Regulation) and these could be adopted in the Meeting Code. This includes procedures on mayoral minutes.

2.7.3 Can a mayoral minute be amended?

While not addressed in the Regulation, mayoral minutes may be altered in practice. This could be covered in council's Meeting Code. Changes to mayoral minutes should avoid making changes that will introduce, without notice, matters which need research or a lot of consideration by the councillors before coming to a decision.

2.8 Voting

2.8.1 What are the voting entitlements of councillors?

Each councillor has one (1) vote (s.370 of the Act). A councillor must be present (in person) at the council or committee meeting to vote (cl.235 of the Regulation).

2.8.2 How is voting conducted?

Voting at a council meeting is to be by 'open means', for example, by voices or show of hands (cl.251(5) of the Regulation). The only exception is voting on the position of mayor or deputy mayor.

Councils may use an electronic device to record the votes cast by councillors, but the requirement that voting take place by 'open means' still applies. It will depend on the type of device used as to whether it is voting is by 'open means'. Votes in writing are not permitted.

2.8.3 Can voting be by proxy or other means?

A councillor must be present (in person) at the council or committee meeting to vote (cl.235 of the Regulation). Councillors cannot participate in a meeting by video-conferencing or tele-conference. There are no 'proxy' votes at council or committee meetings. A 'proxy' is a system where an absent councillor can cast his or her vote by giving their vote to another councillor.

2.8.4 Can a councillor choose not to vote on a motion?

Although a councillor does not have to vote, voting at council meetings is one of the responsibilities of a councillor and should be regarded seriously.
Councillors who are not present for the vote are not counted as having voted. You will be absent from voting if you have physically left the meeting room. If you are in the room, but choose not to vote or say that you abstain from voting, you are taken to have voted against the motion (cl.251(1) of the Regulation). This will be the case even if you are sitting away from the meeting table, such as in the public forum.

Councillors with a pecuniary interest in a matter cannot be present at, or in sight of, the meeting that is considering the matter or voting on it (s.451(2) of the Act). The only exception to this is where the Minister has given permission for such a councillor to be present in the meeting and to vote on the issue (s.458 of the Act).

2.8.5 Can a councillor who votes against a motion have that vote recorded?

Yes. You can request to have your name recorded in the minutes to show that you have voted against a motion (cl.251(2) of the Regulations).

2.8.6 Can a council record votes on matters in its minutes?

Yes. Council can choose to record the voting on all matters in its minutes. Where a council makes this decision, this should be provided for in its code of meeting practice. Where councils are required by the Act or Regulation to record voting by way of a division, see section 2.9 below.

It would be good practice for councils to consider the recording of voting on important matters, such as tendering.

2.9 Divisions

2.9.1 What is a Division?

A ‘division’ is a means by which the support or objection to a motion is easily seen and is recorded.

Two councillors may rise and call for a division on a motion. The chairman must then ensure that a division takes place immediately (cl.251(3) of the Regulations).

2.9.2 Are there any other occasions when a division is required?

Yes. A division is always required whenever a motion for a planning decision is put to the vote at a meeting of council or a meeting of a council committee (section 375A of the Act).

2.9.3 How is a division conducted?

There is no set procedure by which a division must be conducted. Whatever procedure is adopted at a meeting, the general manager must ensure that the names of those who voted for the motion and the names of those who voted against it are recorded in the minutes (cl.251(4) of the Regulation).

A common method of conducting a division is for the Chairperson to declare that a division is called and then to ask for a show of hands of those voting in favour of the motion and call the names. The Chairperson would then ask for a show of hands for those voting against the motion and call the names. In this way, the meeting can both see and hear how councillors are voting on the matter. This also enables the general manager to ensure that all councillors who are present at the meeting have their vote recorded.

2.10 Casting Vote of Chairperson

2.10.1 When can the chairperson exercise a casting vote?

Each councillor is entitled to one vote (s.370 of the Act). If the voting on a matter is equal, the chairperson has a second or ‘casting’ vote (s.370 of the Act). This is in addition to any vote the chairperson has as a councillor.

The Act uses the word ‘second’ vote, which indicates that the chairperson has already voted once before using their casting vote. Usually the chairperson casts a vote, and if the votes are tied, the chairperson then uses a casting vote to decide the matter.

2.10.2 How should a casting vote be exercised?

There is nothing in the legislation saying how a casting vote is to be used. It is a matter for the chairperson as to how they will vote, after taking into consideration all relevant information. They do not need to vote the same way on their first and second vote.

Should the chairperson fail to exercise a casting vote the motion being voted upon would be lost.

2.11 Decisions of Council

2.11.1 What is a decision of a council?

Once a motion is passed by a majority of votes at a meeting at which a quorum is present, the motion becomes a decision of the council (s.371 of the Act). This is sometimes termed a 'resolution'. A quorum is the minimum number of councillors necessary to conduct a meeting.

2.11.2 Are council decisions affected when councillors change?

In legal terms, a local council is a body politic of the State with perpetual succession and the legal capacity and powers of an individual (s.220 of the Act). This means that the council is legally separate from the councillors on it, and that council decisions are not affected by changes in its councillors.

2.11.3 Are there any limits on the decisions a council can make before an ordinary election is held?

The Act does not impose such limits.

While the Act does not impose such limits, like Commonwealth and State Governments, councils are expected to assume a "caretaker" role during election periods to ensure that major decisions are not made which limit the actions of an incoming council.

It is the Division's practice, prior to ordinary elections, to issue a circular to councils reminding them of this caretaker convention. Circular to Councils No. 08-37 *"Council Decision-making Prior to Ordinary Elections"* was issued prior to the 2008 ordinary elections and is available on the Division's website at www.dlg.nsw.gov.au.

2.11.4 Are there any restrictions on a council making decisions after an ordinary election?

No. Although the decisions of a council do not lapse after an election is held, there will be some opportunities for the new council to review earlier decisions.

2.11.5 When do the councillors, including the mayor, start and finish holding office?

All councillors start holding office on the day the person is declared to be elected (s.233(2) of the Act). All councillors, other than the mayor, stop holding office on the day of the ordinary election (s.233(2) of the Act).

The mayor holds office until his or her successor is declared elected (s.230(3) of the Act). This applies to both a mayor elected by the public (popularly elected) and a mayor elected by councillors, even if the (outgoing) mayor has not been re-elected as a councillor. It is expected that the outgoing mayor would only exercise the powers that can be exercised by the mayor during such periods. For guidance on this issue, see Circular to Councils No. 08-46 Mayors Role After Ordinary Election" available on the Division's website at www.dlg.nsw.gov.au.

It is the opinion of the Division that if the council fails to elect a mayor as required under section 290 of the Act, the office of the mayor will become vacant. In these circumstances, the deputy mayor will act as mayor until the Governor appoints a mayor (s.290(2) of the Act).

Council should treat its responsibility for electing a mayor seriously. It should make sure that annual mayoral elections will be held as required under the Act. This can be done through the early fixing (through a council resolution) of a date for mayoral elections, to ensure quorum.

An election of the mayor by councillors must be held within three (3) weeks after an ordinary election (s.290(1)(a) of the Act). The outgoing mayor would be entitled to chair the meeting until the new mayor is elected. The outgoing mayor can do this even if he or she has not been re-elected as a councillor.

The procedure for electing a new mayor is set out in schedule 7 of the Regulation (cl.394 of the Regulation)

If the outgoing mayor chooses not to chair the meeting to elect the new mayor, the chairperson should be a councillor elected by the council (cl.236 of the Regulation).

2.12 Defamatory Statements

2.12.1 Can a councillor make defamatory statements at a council meeting?

The NSW Ombudsman publication *Better Service and Communication for Councils*, available at www.ombo.nsw.gov.au , provides information about defamation. It states:

> "A statement may be defamatory of a person if it is likely to cause an ordinary reasonable member of the community to think less of a person or to shun or avoid the person".

Councillors, staff and members of the public can seek legal compensation, apology etc if they are defamed.

Councillors acting within their official capacity at meetings of council or council committees have a defence of 'qualified privilege' to actions in defamation. This recognises that you may need to speak freely and publicly in carrying out your duties. However qualified privilege needs to be treated with great caution. It only covers statements made at a council or committee meeting when you are carrying out your duties and on business relevant to the council. Statements also need to be made with good intentions, not malice.

A statement made outside a council or committee meeting will not be protected by qualified privilege, but may be protected under the *Defamation Act 1974*. You should be guided by your own legal advice on defamation issues.

2.12.2 What happens if a councillor makes a possibly defamatory statement at a council meeting?

The chairperson of a council meeting is responsible for making sure that the council carries out its meetings in line with its Meeting Code and any relevant legislation. One part of this is maintaining order at meetings. This would include requiring a councillor to apologise for insults, personal comments, or implying improper motives with respect to another councillor.

The chairperson may call you to order whenever he or she believes it is necessary to do so. The chairperson may ask you to take back the statement and apologise. If you refuse to do this, you may be expelled from the meeting for an act of disorder (cl.256(3) of the Regulation and s.10(2) of the Act). This does not prevent legal action from being taken against you by the council or by another councillor, a member of council staff or a member of the public under the *Defamation Act 1974* or the common law.

2.13 Formalising Mayoral Actions

When necessary, the mayor may exercise the policy-making functions of the council between meetings (s.226 of the Act). It is not necessary for the council to formalise this, but it would be good practice for the mayor to report his or her actions to the next council meeting. This could be included in council's Meeting Code.

2.14 Petitions

2.14.1 What procedure applies to petitions from members of the public?

The Act and the Regulation do not refer to the submission or tabling of petitions to a council. It is a matter for each council to decide what to do with petitions and to set this out in its Meeting Code. Procedures could cover the format of the petition, the inclusion of petition details in council business papers; the tabling of petitions; and/or petitioners addressing council meetings.

2.14.2 What details of petitions should be included in agendas and business papers?

Care should be taken to follow the *Privacy and Personal Information Protection Act 1998* (PPIPA) with respect to the use and communication of personal information contained in petitions. Section 18 of PPIPA provides that a council may not communicate personal information unless it is directly related to the reason why the information was collected, and the council has no reason to believe that the person concerned would object.

Communication of the information can also take place if a person is likely to have been aware (or has been made aware in line with section 10 of PPIPA) that this type of information is usually told to another person or organisation.

The question of whether a petition may be published in council's business papers can only be decided by reference to the subject matter and wording of the petition; how council advertises matters in its business papers; and what instructions council staff provide to people making a petition to council.

2.15 Public Questions and Addresses

2.15.1 Can the public ask questions or address the council at council meetings?

There is no automatic right under the Act or the Regulation for the public to participate in a council meeting, either by written submission or oral presentation. This includes being able to ask questions or address council meetings, or to comment on matters during meetings.

However, providing some form of public participation in council meetings is good practice. If participation is permitted, councils should consider giving basic guidance to potential speakers on meeting processes and practices. This could be done in council's Meeting Code, at the front of council's meetings business papers and on council's website.

Each council can decide whether its Meeting Code should provide for public participation and how that is to occur. This would include how and when any questions are to be tabled and discussed at the council meetings. It would also include deciding if and when members of the public are allowed to speak, and any limitation on the number of speakers or time for speeches.

Some councils have a set period during the meeting for members of the public to speak on any matter; others allow the opportunity to speak as the various items of business are debated. There is no single correct procedure and members of the public should be guided by the advice of the council.

Speakers should be asked not to make insulting or defamatory statements, and to take care when discussing other people's personal information (without their consent).

2.15.2 Can a councillor speak to the council as a resident or ratepayer in the public access section of a meeting?

Residents or ratepayers can speak to council if allowed under council's Meeting Code or by the chairperson of the meeting. Given the opportunities for a councillor to raise matters at a meeting through notices of motion and questions, it would be unusual for a Meeting Code to allow a councillor to speak to the council from the public access section.

Councillors who aren't allowed to take part in a discussion because of a pecuniary interest cannot escape this by addressing the meeting as a 'resident' or 'ratepayer'. Section 451(2) of the Act states that a councillor must not be present at or in the sight of the meeting of council at any time during which the matter (for which the councillor has declared a pecuniary interest) is being considered, discussed or voted on. This has been interpreted as excluding councillors in both their official capacity and as a member of the public.

Exclusion from speaking to a matter which is the subject of conflict goes beyond discussions on a formulated motion or resolution - see (former) Department of Local Government Circular to Councils No. 05/17 "Codes of Meeting Practice - Councillors Invited To Speak After Declaring A Pecuniary Interest In A Matter" available from www.dlg.nsw.gov.au.

2.16 Audio or Visual Recording of Meetings

A person may only use a recording device to record the meeting of a council or its committees with permission (cl.273 of the Regulation). A council could decide to record its meetings to ensure the accuracy of its minutes or for some other council function.

In coming to this decision, the council would need to consider section 8 of the *Privacy and Personal Information Protection Act 1998* (PPIPA). This section states that personal information must not be collected unless it is reasonably necessary for a lawful purpose directly related to council's function. Further, a council would need to have regard to section 18 of PPIPA, which requires:

- that personal information must not be disclosed unless it is directly related to the reason why the information was collected; and
- council has no reason to believe that the person concerned would object; or
- the person concerned is likely to have been aware or has been made aware (in line with section 10 of PPIPA) that information of that kind is usually disclosed.

Section 10 of PPIPA also requires a council, where reasonable, to make a person aware of certain matters before their information is collected or as soon as practical after collection.

As with any request to access council documents that may contain personal information, requests for access to tape recordings should be treated with caution.

PART 3 - CONFLICTS OF INTERESTS (PECUNIARY AND NON-PECUNIARY)

3.1 Pecuniary Conflicts of Interests

3.1.1 What is a pecuniary conflict of interests?

The Act, the Regulation, the Model Code and the Model Code Guidelines provide guidance on pecuniary (or money-related) conflicts of interests. These place obligations on councillors, council delegates and council staff to act honestly and responsibly in carrying out their functions. They require that the pecuniary interests of councillors, council delegates and other people involved in making decisions or giving advice on council matters be publicly recorded. They also require councillors and staff not to deal with matters in which they have a pecuniary interest.

Section 442 of the Act defines pecuniary interest as:

> "… an interest that a person has in a matter because of the reasonable likelihood or expectation of appreciable financial gain or loss to the person."

Section 443 of the Act provides that a person has a pecuniary interest in a matter if the pecuniary interest is that of any of the persons listed in that section. Those persons include spouses, de facto partners, relatives, partners and employers.

A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it is unlikely to influence that person's decision-making (see s.442 of the Act), or if the interest is of a kind described in section 448 of the Act.

If a person is not aware of the relevant pecuniary interests of the other persons listed in section 443 then that person is not taken to have a pecuniary interest in the matter (s.443(3) of the Act). Similarly, just because someone is a member of, or is employed by, a council, a statutory body or the Crown, they are not considered to have a pecuniary interest (s.443(3) of the Act). This principle also applies to someone who is a member of a council, a company or other body that has or may have a pecuniary interest in the matter, so long as that person has no beneficial interest in any share of the company or body (s.443(3) of the Act).

3.1.2 What procedure must be followed if a councillor has a pecuniary interest in a matter before council?

A councillor or a member of a council committee who has a pecuniary interest in any matter before the council, and who is present at a meeting where the matter is being considered, must disclose and identify the nature of the interest to the meeting as soon as practical (s.451 of the Act).

A councillor must not be present at or in the sight of the meeting of council at any time during which a matter to which they have declared a pecuniary interest is being considered (s.451(2) of the Act). This has been interpreted as excluding councillors in both their official capacity and as a member of the public. Councillors barred from taking part in a discussion because of a pecuniary interest cannot escape this by addressing the meeting as a 'resident' or 'ratepayer'.

This exclusion is from all discussions on the matter, not just discussions on a formulated motion or a resolution on the matter — see (former) Department of Local Government Circular to Councils No. 05/17 "Codes of Meeting Practice — Councillors Invited To Speak After Declaring A Pecuniary Interest In A Matter" available from www.dlg.nsw.gov.au.

A disclosure made at a meeting of a council or council committee must be recorded in the minutes of that meeting (s.453 of the Act). However, proceedings will not be invalid just because a councillor or committee member does not identify a pecuniary interest at the meeting in accordance with section 451 of the Act.

Sometimes it is difficult to tell when you have a pecuniary interest that must be disclosed. Judgments of the Pecuniary Interest and Disciplinary Tribunal specifically dealing with this issue are available from the Division's website at www.dlg.nsw.gov.au to help you in this process.

Part 4.2 of the Model Code Guidelines also provides guidance on conflicts of pecuniary interests. Example scenarios are given in the Guidelines for issues such as club/organisation membership.

3.2 Non Pecuniary Conflict of Interests

3.2.1 What is a non-pecuniary conflict of interests?

Part 4.2 of the Model Code Guidelines also gives examples of non-pecuniary conflicts between public duty and private interest. These conflicts exist where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty (Clause 7.1 of the Model Code).

The Model Code recognises that because of your official status, councillors have the power to make decisions or act in ways that can benefit their own private interests. Areas of potential conflict include: club/organisation membership, personal relationships, sponsorship, lobbying, caucus votes, dealings with former council officials, and political donations. The Model Code Guidelines provide information and examples to assist you in identifying conflicts of interests.

3.2.2 What procedure should be followed if a councillor has a non-pecuniary conflict of interests?

A non-pecuniary conflict of interests is a conflict between a councillor's private interest in a matter being considered by the council, and his or her interest as a civic official. The Model Code prescribes procedures to cover such conflicts, which need to be adopted and applied by councils.

There are three types of non-pecuniary conflicts of interests. They are 'significant', 'less than significant' and 'political donations'. Clauses 7.13 - 7.25 of the Model Code describes the procedures that need to be followed in respect of each type.

If you have a non-pecuniary interest that conflicts with your public duty you must disclose that interest fully in writing even if it is not significant. You must do this as soon as practicable (clause 7.13 of the Model Code).

The disclosure of your conflict must be recorded in the minutes of the meeting and a record kept by council. The disclosure recorded in the minutes constitutes written disclosure as required by clause 7.13 of the Model Code.

If you are aware in advance of a meeting of a possible non-pecuniary conflict of interests in a matter but remain in doubt, you are encouraged to seek legal or other appropriate advice.

The Model Code and Model Code Guidelines have been developed to assist councils implement, review and enhance their Meeting Code and Code of Conduct in regard to conflicts of interests. The Model Code Guidelines provide guidance, better practice suggestions, examples and a list of relevant resources.

PART 4 - QUORUM AND ATTENDANCE

4.1 Attendance at Meetings

4.1.1 Can a councillor participate in a council meeting by video or tele-conferencing?

No. A councillor must be personally present in order to participate in a council or committee meeting (cl.235 of the Regulation).

4.1.2 What happens if a councillor misses too many council meetings?

If a councillor is absent from three consecutive ordinary meetings of the council without the leave of the council having been granted then the councillor automatically vacates office (section 234(1)(d) of the Act). Leave can only be granted by council prior to the meeting or at the meeting concerned.

This does not apply if the councillor has been suspended from office by the Local Government Pecuniary Interest and Disciplinary Tribunal under section 482 of the Act.

4.1.3 I am a councillor and I can't attend a council meeting. What should I do?

You should seek leave of absence from the council. Leave of absence may be granted to councillors at the discretion of the council (s.234(1)(d) of the Act). It is expected that you will attend all council and relevant committee meetings. However it is acknowledged that sometimes there are good reasons why you may miss a meeting.

Leave of absence may be granted by the council prior to the meeting, or at the meeting. An application for leave does not need to be made in person and the council may grant the leave in your absence (s.234(2) of the Act).

It would be wise to make the application in writing and state the reasons for the leave so that the council may consider it. Written applications should be lodged with the general manager. You should identify (by date) the meetings from which you will be absent.

If you intend to attend a meeting from which you have been granted leave of absence you should if practicable give the general manager at least two days notice of your intention to attend (cl 235A of the Regulation).You should not assume that the council will grant you leave. The council has discretion whether or not to grant a leave of absence. It is expected that in considering such an application the council will act reasonably given that there are consequences for failing to attend council meetings. There may also be consequences in terms of the public's perception of both the council and the applicant.

4.1.4 Is tendering an apology the same as applying for a leave of absence ?

No. The tendering of an apology is an accepted convention by which those present at a meeting are notified that the person tendering the apology will not be attending the meeting. It is a form of courtesy to those attending the meeting. Its purpose is also to aid the efficient conduct of meetings by informing the chairperson as to who will not be attending. This avoids delaying the opening of a meeting pending the arrival of such persons.

The acceptance of an apology is a positive acknowledgement of the courtesy of the person who tendered it. It does not amount to a grant of a leave of absence.

Although the practice of tendering of apologies is recognised as a component of good meeting practice, it has no recognition in either the Act or the Regulations.

By contrast, a leave of absence is a formal permission granted by way of council resolution to a councillor excusing that councillor's attendance at a particular meeting. It is sought by way of application to the council. It is recognised in both the Act and in the Regulation.

4.1.5 Is a councillor required to remain at a council meeting while council business is conducted?

There is no requirement that a councillor remain at a council meeting while business is being conducted. However, it is expected that a councillor would attend and remain at council meetings (unless prevented by illness or pressing circumstances) in order to responsibly perform the role of a councillor (s.232 of the Act) and to assist the council in complying with its charter (s.8 of the Act).

Councillors must follow the council's Code of Conduct (s.440 of the Act). The Act requires councillors to act reasonably and responsibly in the performance of their duties (Section 6 Model Code). In addition, section 439 of the Act requires councillors to exercise reasonable care and diligence in carrying out their civic functions. Attending and remaining at meetings is an important part of this.

4.2 Quorum at Meetings

4.2.1 What is a quorum?

A quorum is the minimum number of councillors necessary to hold a meeting. This minimum is set so that decisions are made by an appropriate number of councillors. Provided a quorum of councillors is present, council business can go ahead. If a quorum is not reached and maintained, the meeting cannot be held.

4.2.2 What are the quorum requirements for council meetings?

A quorum is present if a majority of the councillors who hold office for the time being are present at the meeting (s.368 of the Act).

In determining the number of councillors for the purposes of calculating quorum any casual vacancies in councillor offices and any suspended councillors are not to be counted.

By way of example, in the case of a council with seven (7) councillors, four (4) councillors must be present to form a quorum. If one of those councillors has been suspended from office and another has resigned then five (5) councillors hold office for the time being and the quorum will be three (3).

4.2.3 How do pecuniary interests affect quorum?

The case of *Levenstrath Community Association Incorporated v Council of the Shire of Nymboida* [1999] NSWSC 989, confirmed that a councillor who is not capable of voting on the business before the council (by reason of having disclosed a pecuniary interest in a matter) is regarded as being absent from a meeting for the purpose of determining whether or not a quorum is present. In other words the councillor is regarded as holding office but not as being present at the meeting.

If so many councillors declare a pecuniary interest in a matter that the council is unable to form a quorum to deal with the business before it, the councillors concerned may apply to the Minister to allow them to participate in the discussion and vote on that matter (s.458 of the Act). This recognises that council business must sometimes proceed even though the decision is being made by councillors with pecuniary interests declared. The Minister does not grant such exemptions lightly.

4.2.4 What procedure must be followed if the meeting lacks a quorum

A meeting may lack a quorum either by an insufficient number of councillors turning up to the meeting or by a councillor or a number of councillors leaving the room during the course of the meeting.

If a quorum is not present the meeting must be adjourned to a time, date and place fixed by the chairperson, or (in the chairperson's absence) by a majority of the councillors present, or (failing that) by the general manager.

The general manager must record the absence of a quorum (including the reasons for the absence of a quorum) in the council's minutes. The names of the councillors present must also be recorded (cl.233 of the Regulation).

(See also paragraph 5.2.9 of this Practice Note)

4.2.5 What is the effect of councillors meeting without a quorum?

Without a quorum the meeting is not a meeting of the council. Resolutions cannot be made. Any action taken will have no legal validity.

4.2.6 Can a council later ratify a resolution made by councillors at a meeting without a quorum?

No. A quorum of councillors must be present before a council decision can be validly made (s.371 of the Act). If a resolution is purportedly passed when there is no quorum, it is invalid. It cannot be made valid at a later meeting. However the matter may be considered afresh at a later meeting with a quorum present.

4.2.7 What can a council do to maintain a quorum at meetings?

Sometimes councillors leave a meeting with the intention of removing the quorum so that business cannot proceed. This is a political misuse of the meeting procedure and should be avoided.

If a council is unable to maintain a quorum because of disputes between councillors, negotiating the matters in contention outside of the meeting forum is suggested. You should try to resolve your concerns (perhaps with the assistance of a mediator) and come to a position so that the business may be dealt with in the meeting.

Clause 239(2) of the Regulation allows for a procedural motion without notice to change the order of business at a meeting from that set out in the agenda. In this way, controversial issues can be dealt with last (to avoid losing quorum) and the remainder of the current business can be dealt with.

4.2.8 Can a council abandon a meeting before the time set for the meeting because of an anticipated lack of a quorum?

There is no provision in the Act or the Regulation for a council meeting to be abandoned or cancelled. If notice of a meeting has been given, it must be held or at least opened. While a meeting without a quorum can be opened, it cannot make any decisions (s.371 of the Act).

Clause 233(1)(a) of the Regulation provides that a council meeting must be adjourned if a quorum is not present within half an hour after the meeting is due to start.

4.3 Adjourning Meetings

4.3.1 What is the effect of adjourning a meeting?

If a meeting is adjourned because it cannot be held, for example because of a lack of a quorum, it is postponed to a later time or date and, possibly, to a different place.

If, part way through a meeting, the meeting is adjourned (for example because a quorum ceases to be present or because of time constraints) the meeting will recommence at the time and place that it is adjourned to.

An adjourned meeting is a continuation of the earlier part of the same meeting, not a new meeting.

4.3.2 What notice should be given of an adjourned meeting?

If a meeting is adjourned to a different date, time or place, each councillor and the public should be notified of the new date, time or place.

4.3.3 What business can be conducted at a meeting that has been adjourned?

As an adjourned meeting is a continuation of the same meeting (not a new meeting), council does not need to issue a new agenda and business papers for the adjourned meeting. The agenda and business papers already issued would be the proper documents from which you are to work. Business not already on the agenda could be dealt with only if the urgency procedure in clause 241(3) of the Regulation is followed.

If the adjourned meeting is held on the same date as another council meeting (for example, the next ordinary meeting), the meetings should be kept separate, with separate agendas and business papers. Which meeting is held first would depend on the circumstances. For example, the earlier meeting might have been adjourned because of a lack of a quorum after councillors walked out over a certain item. Because that item is still on the agenda, it is possible that the councillors might walk out again. In this case, it would be better to hold the next ordinary meeting (without the controversial item) first so that current business can be dealt with. The adjourned meeting could then follow.

PART 5 - MOTIONS AND AMENDMENTS

5.1 Terminology

5.1.1 What is a motion?

A motion is a proposal to be considered by council at a meeting. It is a request to do something or to express an opinion about something. A motion formally puts the subject of the motion as an item of business for the council.

5.1.2 What is an amendment?

An amendment is a change to the motion before the council, and takes place while that motion is being debated. An amendment to a motion must be put forward in a motion itself.

5.1.3 What is a resolution?

A resolution is a motion that has been passed by a majority of councillors at the meeting. While in practice it means the 'council decision', the word 'resolution' also indicates the process by which the decision was made.

5.2 Motions

5.2.1 How should motions be worded?

A motion should start with the word 'that', for example, *'That Road X be closed'*. Motions should be clear, brief and accurate. A councillor may use sub-sections, numbered paragraphs or the like to make sure that the motion is easy to understand. A councillor could submit more than one motion on the same topic.

Usually motions are written in a positive sense so that a 'yes' vote indicates support for action, and a 'no' vote indicates that no action should be taken. A motion should be full and complete, so that when the motion or resolution is read in the future, its intention is clear.

5.2.2 Can a councillor explain uncertainty in the wording of a motion before it is seconded?

There may be situations in which the person moving a motion might be given the opportunity to explain uncertainties in its wording. This is not covered by the legislation. This situation could be included in council's Meeting Code, otherwise it is a matter for the chairperson to decide.

Any explanation as to meaning should be limited to making clear the issue, not extending debate on the motion.

5.2.3 How does a councillor give notice of business for a council meeting?

A councillor gives notice of business for a council meeting by sending or giving a notice of motion to the general manager (cl.241(1) of the Regulation). The council's Meeting Code should set the timeframes for notice. The general manager must not include any business in the agenda that is, in his or her opinion, unlawful (cl.240(2) of the Regulation).

All councillors are entitled to submit notices of motion to be included on the agenda in accordance with clause 241(1).

It is good practice that a general manager only provide factual information on the motion to assist in the discussion of the motion if requested by the councillor. It is considered not appropriate for a general manager to comment on the merit of any notice of motion.

(See also 1.4.9 of this Practice Note)

5.2.4 Can the number of motions put forward by a councillor be limited?

No. As long as notice and other procedures are followed, you can put forward as many motions as you wish. When putting forward motions, you may need to balance your civic responsibility for representing the interests of your community with your obligation to use council's resources effectively and efficiently.

5.2.5 Can a councillor withdraw a notice of motion before it is put on the agenda?

Subject to any provision in council's Meeting Code, it would appear that a councillor could withdraw a notice of motion before it is placed on the agenda.

5.2.6 What is the usual order of dealing with motions?

A motion or an amendment cannot be debated unless there is a 'mover' and 'seconder' (cl.246 of the Regulation). The mover puts forward the motion and if a second person agrees with it, debate on the motion can begin.

The mover has the right to speak first, and a general 'right of reply' at the end of the debate (cl.250 of the Regulation). No new arguments or material should be argued during the 'right of reply'.

The seconder of the motion speaks after the mover, but may choose to hold over their speaking rights until later in the debate. However a procedural motion could be passed, putting an end to debate before the seconder has spoken.

Councillors are asked to speak for and against the motion, usually in the order of one speaker for the motion and one speaker against the motion. Debate may end by completing the list of speakers who want to speak for or against the motion, the time allowed for debate finishing, the (limited) number of speakers allowed to speak on the motion having been reached, or where a procedural motion 'that the question be put to the vote' has been successful.

At the end of the debate, the chairperson puts the motion to the meeting for vote. The chairperson will then declare the result of the vote. If passed by the majority, the motion becomes a formal resolution of council. The decision is final, unless it is immediately challenged by two (2) or more councillors who rise and demand a division on the motion (cl.251(3) of the Regulation). Further information on divisions is contained in section 2.9 of this practice note.

The above procedure is usual in formal meetings. However, councils may use different procedures so long as they are consistent with the Act and Regulation, and the procedure is properly adopted under council's Meeting Code.

5.2.7 Can the time a councillor has to speak to a motion be limited?

Yes. Clause 250(3) of the Regulation limits the length of speeches on each motion to five (5) minutes, unless the council gives extra time. Extra time to speak may also be granted by the chairperson of the meeting when there is a need to explain a misrepresentation or misunderstanding (cl.250(3) of the Regulation).

5.2.8 Can a motion be moved following a question on notice?

Where an answer has been provided to a question on notice and a councillor seeks to have a matter arising from that question and answer considered by the council, notice should be given to the general manager in the usual way. The general manager can include the item on the agenda for the next meeting, and make sure that the relevant

staff prepare any necessary background documents or reports. However if the matter is genuinely urgent, it could be dealt with under clause 241(3) of the Regulation.

Further information on questions is contained in paragraphs 1.4.10 and 2.5 of this Practice Note.

5.2.9 When a councillor moved a motion at a meeting, a number of councillors left the meeting and there was no longer a quorum. Should the motion be automatically placed on the agenda for the next meeting?

The Act and Regulation are silent as to the lapsing of motions. The council may debate a motion that has been properly submitted. If the lack of quorum continued and the meeting was adjourned, the motion could be debated later, when the meeting is reconvened.

If the motion was not put to the meeting, it would be dealt with at the reconvened meeting.

(See also paragraph 4.2.4 of this Practice Note.)

5.2.10 If a notice of motion is given before a council election and the proposed mover is not re-elected to the council, can or must the council consider the motion?

The council can debate a motion that has been properly submitted. What is important is that the motion was valid at the time it was put forward. Whether the motion is actually debated will depend on whether another councillor moves and seconds the motion at the meeting. If the motion does not have support at the council meeting, then it may lapse for failure to get a mover or seconder, or be defeated in a vote.

5.2.11 Are there any obligations on a councillor when considering a motion, amendment or resolution?

Councillors have an obligation to consider issues consistently, fairly and promptly (Clause 6.5 Model Code). All relevant facts known (or reasonably known) must be considered in terms of the merits of each issue (Clause 6.6 Model Code). Irrelevant matters or circumstances must not influence decision-making.

5.3 Amendments to Motions

5.3.1 How can a motion be amended?

An amendment to a motion requires a mover and a seconder to put it forward. The amendment must be dealt with before voting on the main motion takes place (cl.246 and cl.247 of the Regulation). Debate is allowed only in relation to the amendment and not the main motion — which is suspended while the amendment is considered.

If the amendment is passed, the motion is changed to include the amendment and this new motion is debated. If amendment is not supported, the main motion stays in its original form and debate resumes.

There should only be one amendment to a motion before the council at any time (cl.247 of the Regulation). If several amendments are proposed, each should be moved, seconded, debated and voted upon before the next. The amendments should be put forward and debated in the order in which they affect the original motion, not in the order in which they were put to the meeting.

5.3.2 How should an amendment to a motion be worded?

Amendments may be in the form of additional words to a motion and/or the removal of words from the motion. If the amendment is supported, the original motion is automatically changed by the addition and/or removal of words. This becomes the amended motion. If no further amendments are put forward, the amended motion is then put to the meeting. If passed, the amended motion becomes the resolution.

Any amendment to a motion must not alter the motion to the extent that it effectively reverses the motion.

5.3.3 Can the chairperson rule an amendment to be new business and therefore out of order when discussing the current motion?

Yes. While clause 238(1) of the Regulation requires a chairperson to put to a council meeting any lawful motion brought before the meeting, there is no requirement covering an amendment to a motion. The chairperson can therefore rule an amendment to be new business and out of order.

Nevertheless, clause 248(1) of the Regulation allows a councillor, without notice, to move to disagree with the ruling of the chairperson on a point of order. Only the mover of a ‘motion of dissent’ and the chairperson can speak to the motion before it is put. The mover of the motion does not have a right of general reply (cl.248(3) of the Regulation). It is then a matter for the councillors to decide by majority vote whether to carry the motion of dissent.

5.4 Foreshadowing Another Motion

5.4.1 Can another motion be foreshadowed?

It is possible to advise the council of an intention to put forward a motion that relates to a motion currently before the council. However, the chairperson cannot accept the new motion until the first motion is decided.

PART 6 - RESCISSION MOTIONS

6.1 Changing earlier decisions

6.1.1 How can councils change earlier decisions?

Councils are able to change their decisions by way of a later decision. A motion to rescind or alter a resolution is the usual means of changing a council resolution. These motions must be notified in accordance with the Act (s.372(1)) and council's Meeting Code. Section 372(4) of the Act requires notice of a rescission motion to have the signatures of three (3) councillors if less than three (3) months has passed since the original resolution was made.

However, the courts have held that it is not always essential that a council *expressly* alter or rescind a resolution prior to passing a later resolution which is inconsistent or in conflict with the earlier resolution. In other words, alteration or rescission can be implied - *Everall v Ku-ring-gai Municipal Council (1991) 72 LGRA 369.*

To make sure that council's intention is clear, it is considered best practice to expressly state that a later resolution is to replace an earlier one. In this way, the public, council staff and subsequent councillors can understand and act with certainty on council decisions.

6.1.2 Are there limits on when or how often decisions can be revisited?

Section 372(5) of the Act allows an original motion to be negatived (that is, lost) twice before a three (3) month ban is placed on any councillor putting forward another motion to the same effect. However, to even bring the motion forward the second time will require three (3) councillors' signatures if less than three (3) months has passed since the first time the motion was defeated (s.372(4) of the Act).

A motion to 'rescind' or undo an earlier resolution can only be lost *once* before a three (3) month ban is placed on any councillor 'bringing forward' another motion to the same effect (s.372(5) of the Act). 'Brought forward' means moved at a council or committee meeting. It is possible for notice of the motion to be given (but not for the motion to be moved) before the expiry of the three (3) month period referred to in section 372(5) of the Act.

6.1.3 Can a council rescind its decision not to pass a motion at an earlier meeting?

When a motion is not passed, this will result in no decision being made or no opinion being expressed by the council. It does not mean that the council takes the opposite view or position to that expressed in the motion.

A second motion to the same effect as the original motion may, however, be debated (subject to due notice being given and the signature requirements of section 372(4) of the Act being met). A third attempt cannot be made within three (3) months.

6.2 Lodging rescission motions

6.2.1 Can a council add extra time restrictions on the lodging of rescission motions?

No. Section 372 of the Act contains two (2) time restrictions on the lodging of rescission motions. The first, in section 372(1), requires notice of a rescission motion to be given in accordance with the council's Meeting Code. The second restriction, in section 372(5), stops a similar motion being brought within three (3) months after a rescission motion has been defeated.

Any additional restrictions within a council's Meetings Code that limit the lodging of rescission motions would be inconsistent with the Act and would have no effect.

6.2.2 Can a council require rescission motions to be lodged with, for example, five (5) supporting signatures?

Section 372(1) of the Act requires notice of a rescission motion to be given in accordance with the Act (s.360) and council's Meeting Code. Section 372(4) adds the requirement that the notice must be signed by three (3) councillors if less than three (3) months has passed since the resolution was made.

A council's Meeting Code cannot require notice of a rescission motion to be given in a manner that is inconsistent with section 372 of the Act (s.360). This would include requiring more than three (3) signatures on the notice. If a councillor moves a motion to require more than three (3) signatures on a notice of a rescission motion, the motion would be unlawful and the chairperson must rule it out of order.

However the signature requirements of section 372(4) of the Act only apply to notices of motion to rescind council resolutions. If a council wants to allow its committees to rescind their resolutions, it could put this in its Meeting Code.

While it is expected that rescission procedures for council committees would be similar to the procedures for council itself, there is nothing to stop a council from having a different rescission procedure for its committees.

For committees consisting entirely of councillors, it would be best for rescission procedures to be added to the council's Meeting Code, including consideration of any submissions received.

6.2.3 Can councillors avoid giving notice of a rescission motion by raising the motion without notice in a committee meeting and bringing it to the council meeting in a committee report?

Section 372 of the Act identifies procedures for lodging rescission motions. Its predecessor was clause 25 of former Ordinance No.1. It was generally thought, following the 1973 case of *Shanahan v Strathfield Municipal Council (1973) 2 NSWLR 740*, that clause 25(e) of the Ordinance provided an alternative to the rescission motion procedures where a recommendation was made as part of a report of a council committee.

However, section 372(6) of the Act is worded differently to clause 25(e) of the Ordinance. It is this different phrasing which throws into doubt the applicability of the reasoning used in the *Shanahan* case. The Division is of the view that section 372(6) of the Act does not provide an alternative to the rescission motion procedures. Council committees must follow the requirements in the same way as individual councillors. Until there is a court decision on this issue, all interpretation is a matter of opinion. Councils should be guided by their own legal advice.

6.3 Dealing with rescission motions at meetings

6.3.1 If council passes a resolution and a rescission motion is lodged at the same meeting, can the rescission motion be dealt with at that meeting?

Section 372(1) of the Act requires notice of a rescission motion to be given in accordance with council's Meeting Code. A rescission motion could be dealt with at the same meeting at which the resolution is passed if the Meeting Code states, for example, that thirty (30) minutes notice must be given.

However, clause 241(2)(a) and clause 241(3) of the Regulation allow business to be transacted when due notice has not been given. Some authorities believe that this clause should not be used for rescission motions. Clause 241(3) should be used only when a matter is genuinely urgent.

6.3.2 Can a council rescind a part of a resolution if the part is discrete from other parts of the resolution?

While not specifically covered in section 372 of the Act, it would appear that a council could rescind part of a resolution (without rescinding the whole resolution). This view would be subject to any determination of a court.

6.3.3 Can a councillor bring forward a motion and have it twice negatived (or lost) by the council so that it cannot be brought forward again within three (3) months?

The purpose of this action would be to prevent a motion being put forward again under more favourable circumstances. This procedure would be in accordance with section 372(5) of the Act, but would not be in the spirit of your obligations under the Model Code. This action would only be successful if the majority of the councillors were prepared to vote twice against the motion.

6.3.4 Can a resolution granting development consent be rescinded?

Under section 83 of the *Environmental Planning and Assessment Act* 1979 development consent has effect from the date endorsed on the written notification (subject to any appeal action). It would be possible for a council to rescind a resolution giving consent if the applicant has not been formally advised of the consent.

In *Townsend v Evans Shire Council [2000] NSWLEC 163*, it was held that there was no effective development consent until formal notice of a determination was issued to the applicant and that " … *it is necessary that the communication of the consent have some formal character as being authenticated on behalf of the council*". Verbal advice from the mayor at the council meeting that the consent had been given was not notice to the applicants so as to "*tie the council's hands*". In this case, the rescission motion had been lodged with the general manager before the time required in the planning regulations for issuing a notice of determination.

Once the applicant has been formally advised of council's decision, there may be issues of compensation to the applicant if consent is later rescinded.

6.3.5 Does a review of a development application (DA) determination under s.82A of the Environmental Planning and Assessment Act have to be accompanied by a rescission or variation motion?

Section 82A(9) of the *Environmental Planning and Assessment Act* 1979 states that if the council changes a determination, this will replace the earlier determination from the date of the review. It is the Division's view that a changed determination automatically replaces the earlier determination by virtue of section 82A(9) of that Act. Because of

this, there is no need for a council to also pass an alteration or rescission motion to change the earlier determination.

6.3.6 If a notice of a rescission motion is given before a council election and the proposed mover is not re-elected to the council, can or must the council consider the motion?

A rescission motion that has been correctly submitted under section 372 of the Act may be debated by the council, regardless of the current status of the signatories of the motion. What is important is that the motion was valid at the time of its submission.

Whether the motion is actually debated will depend on whether other councillors move and second the motion at the meeting (cl.245 and cl.246 of the Regulation). If the motion does not have support at the meeting, it may lapse for the want of a mover or seconder, or be defeated in a vote.

PART 7 - CLOSED PARTS OF MEETINGS

7.1 Who decides

7.1.1 Who decides that part of a council meeting is to be closed to the public?

It is up to council to decide whether a matter is to be discussed during the closed part of a meeting (s.10A(2) of the Act). In deciding this, the council would be guided by whether the item is in a confidential business paper. However, even if the item is in a confidential business paper, the council could disagree with this assessment and discuss the matter in an open part of the meeting.

Council may allow members of the public the opportunity to make a statement as to why part of a meeting should be closed (section 10A(4) of the Act and cl. 252 of the Regulation).

7.2 Subject matter of closed meetings

7.2.1 What part of a meeting may be closed to the public?

Parts of council and committee meetings may be closed to the public only in the circumstances provided under section 10A of the Act. Matters of a personal or confidential nature, which do not come within the grounds provided under section 10A, cannot be discussed in the closed part of a council or committee meeting. (This applies only to those committees that are made up of councillors only).

7.2.2 Can a council discuss confidential matters not referred to in s.10A(2) of the Act, eg nominations for Australia Day awards?

No. Such matters could be delegated to a committee made up of councillors and other persons. Such committees are not bound by section 10A of the Act.

7.2.3 Can a council close a meeting to consider whether or not to commence litigation?

Yes, provided that council has grounds for closing that part of the meeting under section 10A of the Act

In *Wykanak v Rockdale City Council and Anor* [2001] NSWLEC 65, the council closed its meeting to discuss a confidential business paper relating to the recovery of legal costs from a person, relying on the grounds of section 10A(2)(b) of the Act (the personal hardship of any ratepayer). The Court found that as the person was not a ‘resident’ at

the time of the council meeting, the council had gone beyond its powers in closing the meeting to the public. The Court noted "… *the public importance of councils conducting their affairs at meetings that are normally open to the public*". It ordered the council to reconsider the matter and provide the person from whom the legal costs were sought a reasonable opportunity to address the council at an open meeting.

7.2.4 Should the contractual conditions of senior staff be presented in an open or closed council meeting?

The annual reporting of contractual conditions of senior staff to council is required by section 339 of the Act. In addition, section 428 of the Act requires a council to include certain senior staff details in its published annual report.

The contractual conditions of senior staff is public information and should be presented in an open meeting. Following from this, if other information that is common to all senior staff employed by council is presented to the council, then it should also be presented in an open meeting. This could include information on common contractual conditions, apart from salary.

This approach is consistent with section 10A(2) of the Act that allows a council to close part of a meeting to discuss personnel matters concerning particular individuals. If a matter concerns the senior staff as a whole, section 10A of the Act does not apply. If the council wishes to discuss, for example, the salaries of particular employees or consider the performance of the general manager, then section 10A powers would be available to close part of a meeting.

Closing part of a meeting is discretionary. A council does not have to close part of a meeting even if the matters to be discussed fall within section 10A(2) of the Act.

In keeping with the general intent of the Act, and with the public nature of certain senior staff information (s.428 of the Act), a council should consider providing as much information as possible in open session. While the general manager is responsible for senior staff employment, discipline and performance, there may be certain contractual matters that relate to individual senior staff that justify closure of part of a meeting on the grounds of privacy.

7.3 Procedure

7.3.1 What does a motion to close a meeting look like?

Council is required to state the grounds for closing the meeting and the reasons why it is not in the public interest to discuss the matter in an open meeting (s.10D of the Act). A motion could look like —

"Moved Clr X, seconded Clr Y, that the meeting is closed during the discussion of the matter 'Item 1: Annual tenders for goods and services' in accordance with section 10A(2)(c) of the Local Government Act 1993 on the basis that —

- The discussion of the matter in an open meeting could prejudice the commercial position of tenderers; and

- On balance, the public interest in preserving the confidentiality of commercial information supplied by tenderers outweighs the public interest in openness and transparency in council decision-making by discussing the matter in open meeting."

7.3.2 How can the public find out what has been decided at a closed part of a meeting? Can the decisions be kept confidential?

Resolutions or recommendations made at a closed part of a council or committee meeting must be made public by the chairperson of the meeting as soon as practical after the closed part of the meeting has ended (cl.253 and cl.269 of the Regulation). This would usually be done by a verbal or written statement.

If the meeting is a committee meeting, the resolutions or recommendations must also be reported to the next meeting of the council (cl.269 of the Regulation). If the meeting is a closed meeting of the committee of the whole, its recommendations must be reported to open council, usually at the same meeting. The council must ensure that a report of the proceedings (including any recommendations of the committee) is recorded in the council's minutes.

While discussions in the closed part of a meeting remain confidential, the separate nature of a resolution or recommendation allows it to be made public immediately after the closed part of the meeting has ended.

The resolution or recommendation could be phrased in such a way as to protect a person's identity or other confidential details (for example, stating an assessment number instead of the person's name or giving the general locality of land to be purchased instead of the precise address). This allows the public to know what the council or committee has decided at the closed part of the meeting without revealing confidential information.

The minutes should record sufficient details of the resolution to indicate the nature of the decision. It is not sufficient, for example, to resolve to implement the committee's recommendation or the general manager's recommendation. More specific information is required.

The meaning of 'as soon as practical' will depend on the circumstances. In some cases, commercial or legal issues might effect how quickly a council makes public the details of

a resolution or recommendation. As a general rule, the public should be kept informed of closed session resolutions or recommendations in an adequate and prompt manner.

The latest time for informing the public of resolutions or recommendations made in the closed part of a meeting would be when the minutes containing the resolutions or recommendations are made available for public inspection (s.12 of the Act). Any person is entitled to inspect minutes containing resolutions or recommendations from the closed parts of meetings. While a council cannot keep its decisions or recommendations confidential, it should be possible to discuss matters in the minutes in such a way as not to reveal confidential details.

7.3.3 What is the difference between 'closed council' and 'committee of the whole'?

The closed part of a council meeting could be referred to as 'closed council' but not as a 'closed committee'. While the words 'meeting in committee' are sometimes used to refer to an organisational meeting in closed session, that is, with non-members and the public absent, this is not the case with councils.

Section 10A of the Act makes it clear that both councils and council committees (made up of councillors only) can close parts of their meetings. If a council closes part of its meeting, it still remains part of the council meeting - with the rules of debate being the same as for open meetings.

If a council resolves itself into the "committee of the whole" under section 373 of the Act the council meeting becomes a committee meeting (consisting of all the councillors). By reason of clause 259 of the Regulation this allows councillors to overcome the limits, set by clause 250 of the Regulation, on the number and duration of speeches. The meeting remains open to the public unless council closes it under section 10A(2) of the Act.

7.3.4 Do the decisions of the closed part of a council meeting need to be adopted in open council?

There is no need for the council to re-make a decision by adopting it in open council. The only matters a council would adopt are the recommendations made by the committee of the whole (cl.259 of the Regulation) or recommendations of another council committee (cl.269 of the Regulation).

7.3.5 Can a council invite a member of the public to be present at a closed part of a meeting?

There is nothing in the Act or Regulation to limit public attendance at closed parts of meetings if invited by the council. However, the non-disclosure provisions of section 664 of the Act would apply to a person attending a closed part of a meeting.

Similarly, there does not appear to be any direct breach of the Model Code, although such invitations may affect a council's appearance of impartiality and proper conduct in a matter. The better practice would be to invite only those people whose presence at the meeting is necessary for the provision of advice, such as council's solicitor.

7.3.6 What happens once business in a closed meeting has been completed?

Once council has finished business in a closed meeting it must formally resolve that the meeting be open to the public.

PART 8 - ORDER AT MEETINGS

8.1 Standards of conduct

8.1.1 How should councillors conduct themselves at meetings?

Councillors must act honestly and reasonably in carrying out council functions (s.439 of the Act). In addition, councils must adopt a Code of Conduct to provide guidance on acceptable and unacceptable conduct (s.440 of the Act). How councillors are to behave is outlined in the Model Code and Model Code Guidelines. Failure to comply with the Act, the Model Code or council's Code of Conduct forms misbehaviour under section 440F of the Act (see clause 11.2 of the Model Code).

Councillors have a responsibility to behave professionally in and out of council meetings. Councillors should maintain good working relationships with each other and act in a manner appropriate to their civic status. This would include orderly behaviour and complying with rulings from the chairperson at council meetings (Clauses 9.5 and 9.6 Model Code). The Meeting Code and council's Code of Conduct identify the standards and responsibilities imposed on councillors by the Act, the Regulation and the Model Code.

Acts of disorder committed by councillors during council or committee meetings may amount to misbehaviour, leading to censure by the council or suspension (Section 12 Model Code). Section 12 of the Model Code and part 5 of the Model Code Guidelines provide information for managing complaints about breaches of the code of conduct and how misbehaviour is to be dealt with by the council, the Division of Local Government, the Independent Commission Against Corruption and/or the NSW Ombudsman.

8.1.2 What should be the relationship between councillors and council staff?

The Act makes the general manager responsible for the efficient and effective operation of the council's organisation and for implementing decisions of the council (s.335 of the Act). The general manager is, therefore, in charge of the council's management.

Councillors are required (as a group) to direct and control the council's affairs; allocate resources; and determine and review the council's policy and performance (s.232 of the Act). Councillors should not involve themselves in the day-to-day administration of council. This is the responsibility of the general manager.

Councillors and staff have a responsibility to behave professionally and maintain constructive working associations. This is based on the principle that all public officials have a duty to act with integrity, honesty, impartiality and in the public interest.

Councillors must not make personal attacks upon staff at meetings. If a councillor has a complaint about a member of staff that complaint should be addressed in writing to the general manager. If the complaint is about the general manager it should be addressed in writing to the Mayor.

Section 9 of the Model Code and part 4.4 of the Model Code Guidelines discuss the relationships between councillors and council staff, contractors or related persons. Councillors should familiarise themselves with these provisions and use them to guide their conduct.

8.1.3 Should the Mayor use the council's Code of Conduct against a councillor who criticises the Mayor?

Subject to the provisions of the Act, council's Code of Conduct and defamation law, Mayors and councillors who operate in a political environment must expect criticism of their performance and views. Mayors are able to correct the public record without having to use Code of Conduct powers, especially where there has not been a serious breach of the Code.

8.2 Maintaining order

8.2.1 Who is responsible for maintaining order?

A council must deal with any disorder of its members. As a councillor you should take responsibility for your own behaviour and that of your colleagues.

In some situations it may be appropriate to consider counselling or mediation to determine the issues motivating a councillor's behaviour. Early attention to issues is often required to prevent problems becoming entrenched.

When disorder at a meeting occurs, the chairperson has both the responsibility and authority to bring the meeting to order, including expelling councillors and others who cause disorder. Failure to effectively exercise this authority can result in a loss of order at meetings.

8.2.2 What is the procedure for maintaining order?

The Act has a number of provisions which deal with the behaviour of councillors, including:

- requirements to adopt and comply with a Code of Conduct (s.440);
- provisions for a Meeting Code (s.360);
- obligations to disclose pecuniary interests and provisions to deal with breaches of pecuniary interest requirements (ss.441–459);

- regulation of the conduct of council meetings; and
- the ability to exclude a person, including a councillor, from a meeting for disorder (s.10).

The Act imposes a duty on councillors to act honestly and exercise a reasonable degree of care and diligence in carrying out their functions (s.439 of the Act). Councils may use other techniques such as training, counselling and mediation to address councillor behaviour. Any powers for dealing with disorder should not be used unfairly, for example, against councillors who may have a differing view.

Clause 257(1) of the Regulation authorises the chairperson to adjourn a meeting and leave the chair for up to 15 minutes if disorder occurs. This clause does not preclude council from subsequently adjourning for further 15 minute periods should the circumstances so require. A short suspension of business can be effective in dealing with disorder at meetings though this should not be over-used.

8.2.3 In what situations may a councillor be expelled for disorder?

Clause 256(1) of the Regulation defines acts of disorder at council and committee meetings. These include a councillor:

- contravening the Act or any Regulation in force under the Act, or
- moving or attempting to move a motion or amendment that has an unlawful purpose, or
- assaulting or threatening to assault another councillor or person present at the meeting, or
- insulting or making personal reflections on or imputing improper motives to any other councillor, or
- saying or doing anything that is inconsistent with maintaining order at the meeting or is likely to bring the council into contempt.

Clause 256(2) of the Regulation authorises the chairperson to require a councillor to take back comments or to apologise without reservation for an act of disorder (see also Clause 12.25 Model Code). If you do not act as requested by the chairperson, you may be expelled from the meeting. This can be done by the council, committee, chairperson (if authorised to do so by a resolution of the meeting), or by a person presiding at the meeting (if the council has authorised exercise of the powers of expulsion under section 10(2) of the Act).

Options available to council for breach of the Model Code or council's Code of Conduct are detailed in sections 440A–440Q of the Act and in Clauses 12.25 and 12.27 of the Model Code.

You may be expelled from a meeting for refusing to apologise for an act of disorder that occurred at that meeting, or at an earlier meeting. This has effect only for the meeting at

which the expulsion occurs. You can be expelled from a later meeting only if you again refuse to apologise for your earlier (or new) act of disorder.

Section 10(2) of the Act states that a person is not entitled to be present at a council or committee meeting if expelled. If you refuse to leave a meeting immediately after being expelled, the chairperson may request a police officer or an authorised person to remove you from the meeting. The police officer or authorised person may use necessary force to remove you and prevent your re-entry (cl.258 of the Regulation).

8.3 Sanctions

8.3.1 What sanctions are available for councillor misbehaviour in a meeting?

The Model Code provides information on sanctions available to council to address councillor breaches of the Model Code and council's Code of Conduct (Clauses 12.25 and 12.27 Model Code). These include censure, apology, counselling, making a public finding of inappropriate conduct, and prosecution for the breach of any law.

8.3.2 How can a council formally censure a councillor for misbehaviour?

Through a resolution at a meeting, council can formally censure a councillor for misbehaviour (s.440G of the Act). Consideration of all the issues and points of view should take place before a councillor is censured or sanction is sought for a significant breach of the Code of Conduct. External factors such as political or other affiliations are irrelevant and must not influence any decision. A decision to seek sanction against a councillor should reflect the concern of the overwhelming majority of councillors about the conduct of the councillor and its impact on council's operations.

Note that any censure imposed by a council must not interfere with the councillor's common law right to conduct his or her civic duties, including participating in meetings, but should send a clear message that the breach is unacceptable.

8.3.3 When may council request the Director General to suspend a councillor?

Under section 440H of the Act, council may request the Director General to suspend a councillor from civic office. Suspension would only be considered where the councillor's behaviour has been disruptive over a period of time (that is, more than one incident) and forms a pattern of misbehaviour serious enough to justify suspension or the councillor has been involved in one incident of misbehaviour that is sufficiently serious as to justify the councillor's suspension (s 440I and Clauses 12.27-12.31 Model Code).

The Local Government Pecuniary Interest and Disciplinary Tribunal also has power to conduct disciplinary proceedings for councillor misbehaviour in accordance with chapter 14, parts 1 and 3.of the Act.

PART 9 - COMMITTEES, THEIR MEMBERS AND FUNCTIONS

9.1 Forming committees

9.1.1 How are council committees formed and what are their functions?

As a body politic (s.220 of the Act), a council can form committees and determine their functions, powers, membership and voting rights. Membership of a council committee is not restricted to councillors.

In regard to committees consisting entirely of councillors, a council can establish such a committee only by resolution (cl.260(1) of the Regulation). This has the effect of stopping a council from delegating the *function* of establishing such committees (s.377(1) of the Act).

A council committee could be advisory or it could have decision-making powers as delegated by the council. A committee may exercise a council function (s.355(b)) of the Act) and a council may delegate to the committee any of its functions other than those set out in section 377(1) of the Act, for example, the power to levy rates or borrow money. The council should set out the functions of each committee when the committee is established. The council can change those functions from time to time (cl.261 of the Regulation).

However a committee can exercise a council's regulatory functions under Chapter 7 of the Act only if all of its members are either councillors or council employees (s.379(1) of the Act). So a committee with members of the public on it cannot exercise a regulatory function under Chapter 7 of the Act.

Advisory committees or sub-committees are common and usually have the power to make recommendations but not to make decisions. Such committees often consist of experts, professional persons, government employees, community representatives, or council staff. The recommendations of advisory committees can assist a council in making informed decisions on complex matters. Alternatively, committees may be given power to spend council monies on certain matters, if a resolution to that effect has been previously passed by the council (s.377 and s.355 of the Act).

Councils should consider providing advisory committees with guidelines on how to conduct their meetings and related issues. This could form part of council's Meeting Code.

For information regarding the "committee of the whole" see paragraph 2.6 of this Practice Note.

9.1.2 When are council committees elected or appointed?

There is nothing in the Act or the Regulation indicating when a council is to elect or appoint its committees. The council decides when this is done. It can also postpone election or appointment. This power is subject to any meetings timetable set by the council in its Meeting Code.

9.1.3 Does a councillor have to be present at the meeting to elect committee members in order to be nominated or elected for that committee?

There is nothing in the Act or the Regulation to require a councillor to be present at the council meeting at which he or she is nominated or elected as a member, deputy chairperson or chairperson of a council committee. Therefore a councillor could be nominated or elected in his or her absence, unless council's Meeting Code requires them to be present. It would be wise for a council to require an absent councillor to have given their written consent to being nominated for a committee before that councillor is nominated at the meeting.

9.2 Status of committees with non-councillor members

9.2.1 Do references to 'committees of council' in the Act and Regulation refer to advisory committees that include members of the public?

In almost all cases, the answer is 'no'. Most references to council committees in the Act specifically state "…a committee of which all the members are councillors". These can be 'committees of the whole' (that is, all councillors, including the mayor, only) or a committee established under clause 260 of the Regulation (the mayor and some councillors only).

Sections 355(b) and 376(2) of the Act refer to committees whose members include people who are not councillors.

9.2.2 What is the status of a local traffic committee?

Section 355 of the Act enables the functions of a council to be exercised by the council, by a committee of the council, or partly or jointly by the council and another person or persons.

There is a difference between a committee of a council (of which all members are councillors) and other committees that have representatives from the council and/or other organisations. A local traffic committee falls into the latter category. The Roads and Traffic Authority of NSW have established these committees as a condition of the council being given certain traffic regulation functions.

While a local traffic committee is not restricted in the same way that council committees are under the Act, such committees can adopt the meetings procedures and policies of other council committees if they want to. For example, although a local traffic committee can close its meetings to the public, the committee may allow public access for reasons of openness and accountability. This is a matter for each local traffic committee to determine.

9.3 Meeting procedures

9.3.1 What procedure is followed during meetings of council committees?

If a council committee consists of councillors only, the relevant meeting provisions of the Act, the Regulation and council's Meeting Code govern its procedure. These include notifying councillors and making agendas and business papers available. The quorum for a committee made up entirely by councillors is to be a majority of the members of the committee, or such other number as the council decides (cl.260(3) of the Regulation).

If a committee includes people who are not councillors (that is, council staff and/or community representatives), the committee's meeting procedure (including any notifications and agendas) is determined by the council. It may, but does not have to, follow the procedure outlined in the Act and Regulation.

9.3.2 What is the position of the Mayor on council committees?

Clause 260(2) of the Regulation states that a committee comprising only of councillors is to consist of the Mayor and such other councillors as elected or appointed by the council. While the Mayor (however elected) is automatically a member of each council committee consisting of councillors only, the Mayor has discretion as to whether he or she will attend the meetings of each committee (cl.268(1) of the Regulation).

The Mayor is automatically the chairperson of each council committee consisting only of councillors unless he or she does not wish to be (cl.267(1) of the Regulation). In such a case, the council or committee will elect a chairperson. If the chairperson is unable or unwilling to chair a committee meeting, the deputy chairperson or acting chairperson is to run it (cl.267(4) of the Regulation).

9.3.3 What are the rights of councillors to attend committees?

Each councillor, whether a member of a committee or not, is entitled to attend and speak at a meeting of a council committee. However only councillors who are members of the committee are entitled to put business on the committee's agenda, move or second a motion at the committee meeting, or vote at the meeting (cl.263 of the Regulation). Voting at a committee meeting is to be by open means, such as by a show of hands (cl.265(3) of the Regulation).

9.3.4 What are the voting rights of committee members?

If a council committee is made up of councillors only, all the members have equal voting rights. The committee can decide that, when voting is equal, the chairperson has a casting vote as well as an original vote (cl.265 of the Regulation). Councillors who are not members of a particular committee are entitled to attend and speak at meetings of the committee, but cannot vote at those meetings (cl.263 of the Regulation).

If a committee includes people who are not councillors, it is up to the council to decide on the voting rights of committee members. Usually all committee members have equal voting rights (other than the chairperson, who may have a casting vote as well as an original vote). There could be special circumstances under which the members of a specific committee have different voting rights. These voting rights should be granted with regard to principles in the Model Code and Model Code Guidelines.

9.3.5 When and how can a committee chairperson exercise a casting vote?

Clause 265 of the Regulation allows a committee consisting of councillors only to decide that, whenever the voting on a motion is equal, the chairperson is to have the casting vote (as well as an original vote). Without such a decision of the committee, a casting vote cannot be exercised by the chairperson (or another committee member).

Once authorised, it is for the chairperson to decide as to how to exercise their casting vote, taking all relevant information into consideration.

In regard to a council committee including persons who are not councillors (for example, an advisory committee), the council can decide, when establishing the committee, whether the chairperson is to have a casting vote as well as an original vote. Alternatively, this issue could be covered in the council's Meeting Code.

9.3.6 Can committee members fill absences on their committee so as to achieve a quorum?

Clause 260 of the Regulation permits committee members to be chosen only by the council at a formal council meeting. A permanent vacancy on a council committee (caused by the resignation or death of a councillor) can be filled by the council electing or appointing a councillor to fill the vacancy.

For temporary absences, council's Meeting Code could provide for an alternate councillor to act in the office of a committee member absent through illness, etc. The Meeting Code would need to state that an alternate or acting member has the authority and role of the member. Alternate members would be elected or appointed under clause 260 of the Regulation from among the councillors. When acting as a committee member, an alternative member would form part of the committee's quorum.

A council has various options to make sure that its committees have quorums. These include: determining or altering the number of members on a committee to ensure that it is not too large; timetabling committee meetings to take account of the regular commitments of councillors; and reducing the quorum for a committee meeting, if necessary.

9.3.7 Can a council remove a councillor from membership of a committee?

Clause 260 of the Regulation authorises a council to establish (by resolution) such committees as it considers necessary. A committee is to consist of the mayor and such other councillors as are elected by the councillors or appointed by the council.

Under its general powers as a body politic (s.220 of the Act), a council may (by resolution) change the composition of its committees whenever it chooses. This can be done by removing a councillor from a committee and appointing another councillor as a member, or by changing the total number of councillors on the committee. Changes in committee composition can come directly from the council or be recommended by the committee to the council.

In *Yates v District Council of Penola* (1997) 68 SASR 64, the Court held that the power to remove a councillor from a committee must be exercised lawfully, rationally and fairly. It can't be used for an external or ulterior purpose, for example, if motivated by punishment (even if this was not the sole or main reason for the action taken).

9.3.8 Can a council consider and adopt the recommendations of a committee before the committee's minutes are confirmed?

There is nothing in the Regulation to stop a council from considering and adopting the recommendations of a committee before the committee's minutes are confirmed. An accurate record of the recommendations made at the committee meeting will ensure that the recommendations presented to the council for adoption will be the same as those later confirmed in the committee's minutes.

9.3.9 How can a person find out information on council committees and/or complain about the operation of a committee?

Council minutes should reveal the membership, functions and powers of all council committees. A council may also have a written policy on the running of its committees. These documents should be available for inspection by the public in accordance with section 12 of the Act. A person unhappy with the way a committee is run can approach the mayor or another councillor to have the matter dealt with at a council meeting.

9.4 General manager's role

9.4.1 Can the general manager be delegated the power to appoint non-councillor members to a council committee formed under s.355 of the Act?

Section 377 sets out the matters that a council cannot delegate to the general manager or another person or body. There appears to be nothing in section 377 to prevent a council delegating to the general manager the power to appoint new members to a committee (that is already established and given delegated functions by the council).

As a matter of good administrative practice, the council may require the general manager to report to the council whenever he or she has made an appointment. The delegation to the general manager may be with other conditions, such as requiring the general manager to report proposed appointments to the council, or to appoint new members only from certain groups.

9.4.2 If the general manager is on a council committee, what is the general manager's role?

If the general manager is a member of a council committee, he or she will not have a special function just because of their position. Like all committee members, the general manager must accept the majority decision of the committee. The council may, however, grant certain responsibilities to the general manager in relation to the committee.

PART 10 - AFTER THE MEETING

10.1 Acting on council decisions

10.1.1 Who makes and acts on council decisions?

The Act requires councillors as a group to direct and control the council's affairs; allocate council resources; determine council policies and objectives; and monitor the council's performance (s.223 and s.232 of the Act).

The general manager is responsible for the efficient and effective operation of council's organisation and for acting on council decisions. The general manager, not councillors, is responsible for the day-to-day management of the council and for the employment of council staff (s.335 of the Act).

10.1.2 When is a general manager required to act on council decisions?

Sections 335(1) of the Act states that the general manager is generally responsible for making sure council's decisions are acted on without unnecessary delay. Only a court can decide whether a specific delay was too long.

10.1.3 When is a general manager required to act on council decisions that are subject to a motion for rescission?

If notice of a rescission motion is given during the meeting at which the resolution is carried, the resolution cannot be put into effect until the rescission motion has been dealt with (s.372(2) of the Act). Council should identify what a general manager is to do when a rescission motion is received after the meeting, but where action on a resolution is expected before that rescission motion can be decided on by the council. This could be included in council's Meetings Code.

10.2 Public availability of decisions

10.2.1 How can the public find out about council decisions?

Councils usually make decisions at open council meetings following the issuing of agendas and business papers to councillors and members of the public. Usually each item of business to be dealt with at the meeting is on the agenda. However, in cases of great urgency, business can be dealt with at a meeting without it being recorded on the agenda.

The public has the opportunity to review all council decisions, even those made at closed meetings, through the inspection of council's meeting minutes. The right of the public to inspect council's meeting agendas, business papers, minutes of council and committee meetings, and the resolutions of any closed parts of those meetings, is expressly provided for under section 12 of the Act.

PART 11 - MINUTES

Councils are encouraged to hold open council meetings as far as practical, and must almost always vote by open means (such as by show of hands). In this way members of the public can witness the conduct of a council meeting. They can also investigate the background to council decisions by inspecting the business papers of the meeting. Through a combination of minutes, public attendance and open meetings, accountability is achieved.

11.1 Contents of Minutes

11.1.1 Why and how should minutes be kept?

Section 375 of the Act requires a council to keep full and accurate minutes of a council meeting. A verified copy of the minutes should be kept for public inspection purposes (s.12 of the Act); for use in any court proceedings; and as a historical record. Councils will also need to follow requirements under the *State Records Act* 1998 in regard to the keeping of minutes.

Ideally minutes and agenda will be published on the council's website.

11.1.2 What matters must be included in the minutes of council meetings?

The Regulation provides that the following matters must be included in the minutes of council meetings —

- Details of each motion moved at a council meeting and of any amendments (cl.254(a)).
- The names of the mover and seconder of each motion and amendment (cl.254(b)).
- Whether each motion and amendment is passed or lost (cl.254(c)).
- The circumstances and reasons relating to the absence of a quorum together with the names of the councillors present (cl.233(3)).
- The dissenting vote of a councillor, if requested (cl.251(2)).
- The names of the councillors who voted for a motion in a division and those who voted against it (cl.251(4)). Note that a division is always required when a motion for a planning decision is put at a meeting of the council (Section 375A of the Act).
- A report of the proceedings of the committee of the whole, including any recommendations of the committee (cl.259(3)).

The Act provides that the following matters must be included in the minutes of council meetings:

- The grounds for closing part of a meeting to the public (s.10D).
- The report of a council committee leading to a rescission or alteration motion (s.372(6)).
- The disclosure to a meeting by a councillor of a pecuniary interest (s.453).

11.1.3 What matters should be shown in the minutes of the closed part of a meeting?

Minutes must include the details of all motions and amendments; the names of their movers and seconders; and whether the motions and amendments are passed or lost (cl. 254 of the Regulation)

These details are required for both the open and closed parts of council meetings. Further information regarding the content of minutes of closed meetings and their publication are contained in paragraph 7.6 of this Practice Note.

11.1.4 What matters must be included in the minutes of committee meetings made up of councillors only?

Clause 266 of the Regulation requires full and accurate minutes to be kept of committee meetings made up of councillors only. The minutes must include at least:

- Details of each motion moved at a committee meeting and of any amendments (cl.266(1)(a) of the Regulation)
- The names of the mover and seconder of each motion and amendment (cl.266(1)(b) of the Regulation)
- Whether each motion and amendment is passed or lost (cl.266(1)(c) of the Regulation)
- The names of the councillors who voted for a motion for a planning decision and those who voted against it. Such voting must be conducted by way of a division (Section 375A of the Act)
- The grounds for closing part of a meeting to the public (s.10D of the Act)
- The disclosure to a meeting by a councillor of a pecuniary interest (s.453 of the Act).

11.1.5 How much detail should be shown in minutes?

Section 375(1) of the Act requires a council to keep full and accurate minutes of council meeting proceedings. Subject to legislative provisions and any directions from the council, it is up to the general manager to decide how much detail is to be shown in the minutes.

Although the minutes should contain enough detail to make the council's decisions understood, they are not meant to be a detailed transcript of council proceedings nor a record of the behaviour of individual councillors. However, when a council makes a decision against the recommendations of their officers or council engaged experts, it is considered best practice to minute the reasons for this. Minuting the reasons for council's decisions is particularly important when determining development applications against the recommendation of council officers. This can reduce the cost to councils of Land and Environment Court litigation, as well as achieving transparency and accountability in decision-making.

11.1.6 In what format should motions and amendments be shown in the council minutes?

The Act and the Regulation allows each council to decide how to record matters in its minutes (so long as the minutes are a full and accurate record). The manner of recording council business in the minutes could be specified in the council's Meeting Code.
Each council can decide whether to show the names of councillors voting for or against a particular motion. However if a division on a motion occurs under clause 251(4) of the Regulation (that is, when a division on a motion is demanded and takes place), the general manager is required to record the names of those voting for or against the motion in the minutes.

Motions could be recorded as: "Moved Clr X, seconded Clr Y that council….".

11.1.7 How can a council increase the accuracy of its minutes?

Section 375 of the Act requires full and accurate minutes to be kept, but allows each council to decide how this is to be achieved. Requiring motions and amendments to be provided in writing to the chairperson and/or the minute taker before it is voted on can help make the recording of resolutions more accurate.

Councils could also consider typing the minutes on a computer during the meeting and/or taping the proceedings. Computerised minutes could be displayed on a screen during the meeting, together with notices of motion from the agenda and amendments moved at the meeting, for the information of the councillors and the public.

11.2 Signing Council Minutes

11.2 1 Should all the pages of the minutes be signed or only the last page?

The minutes of council and committee meetings must be signed by the person chairing the meeting at which they are confirmed (s.375 of the Act and cl.266 of the Regulation). There is no requirement in the Act or the Regulation that each page should be signed.

However it is important that there are safeguards against the pages of the minutes being substituted or tampered with. One way of achieving this is to have all the pages of the minutes signed by the chairperson. This could be done manually, by means of a rubber stamp signature, or by electronic signature.

An alternative to signing each page could be to have a long line at the top and bottom of the contents of each page (to prevent the addition of extra information), with each page having a number and identifying the meeting, for example, “Page 14 of Minutes of … Council Meeting held on ... (date)”. The final page would have a statement that the minutes, consisting of that page and the previous pages, were confirmed on a certain date. This would need to be signed by the chairperson. The electronic version of the minutes should be securely stored and could also be placed on council’s website for public information.

11.2.2 Are council minutes required to be signed by the general manager?

There is no requirement in the Act or the Regulation for the minutes of council or committee meetings to be signed by the general manager.

11.2.3 Can the Mayor use a stamp or electronic signature to sign the minutes?

A rubber stamp or electronic facsimile of a person’s signature, which is put on the document by that person, may be legally acceptable on the minutes, provided that the following safeguards are met:

- The rubber stamp or electronic signature should be kept under proper security to prevent its unauthorised use

- The chairperson should verify the use of the rubber stamp or electronic signature. This could be done by the chairperson signing (by pen) a certificate at the end of the minutes of a meeting stating that, following the confirmation of the minutes, he or she had authorised the use of his or her rubber stamp or electronic signature to the previous (number of) pages.

These and any other safeguards considered necessary by the council should be used to ensure that the minutes cannot be substituted or otherwise tampered with.

11.2.4 When should minutes be signed?

Once they have been confirmed at a subsequent meeting of the council, the minutes must be signed by the person chairing that later meeting (s.375(2) of the Act). It would be usual for the ‘subsequent’ or ‘later’ meeting to be the next ordinary meeting of the council or committee.

It is best to sign the minutes immediately after their confirmation or as soon as practical after that meeting (without delay). A council could include appropriate signing times in its Meeting Code.

PART 12 - CODE OF MEETING PRACTICE

12.1 Status of code

12.1.1 Can a council ignore its Meeting Code?

No. The Act and the Regulation set out the basic procedure that must be followed at council meetings. A council may choose to adopt a Meeting Code that covers the relevant provisions of the Act, the Regulation and additional provisions that are consistent with the Act or the Regulation (s.360(2) of the Act).

A council must publicly notify its draft Meeting Code and consider all submissions before adopting it (s.361 and s.362 of the Act). Once the Meeting Code is adopted, a council and a council committee consisting of councillors must run its meetings following the Meeting Code (s.360(3) of the Act).

Failure to run meetings in line with the Act and the Regulation is a breach of the Act (s.672 of the Act). Any person may bring proceedings in the Land and Environment Court to fix or stop a breach of the Act (s.674 of the Act).

Failure to follow the Meeting Code does not result in the proceedings of the council or committee meeting being invalid (s.374(e) of the Act). Although a breach, failure to follow the Act, the Regulation or the Meeting Code is not an offence under the Act and therefore no specific penalties apply.

12.2 Effect of Regulation change

12.2.1 Does a council have to change its Meeting Code each time the Regulation is changed?

Changes to the Act or Regulation will automatically impact council's Meeting Code. Each council should include any legislative changes in its Meeting Code and/or update the Code to ensure that its provisions are in line with those changes. If inconsistent, the provisions of the Meeting Code must be changed or removed to match the Act and the Regulation.

The Meeting Code is automatically amended as a result of changes to the Act or Regulation. These changes do not require public notification under sections 361 to 363 of the Act.

Any amendment to the additional provisions provided by the council in its Meeting Code will require public notification.

PART 13 - WORKSHOPS

13.1 Purpose

13.1.1 Can a council set up workshops? Are there any limitations on their use?

A council can hold a workshop (sometimes called a briefing session) under its general powers as a body politic. Workshops are informal gatherings and can provide useful background information to councillors on issues. A workshop may involve councillors, council staff and invited participants.

Workshops should not be used for detailed or advanced discussions where agreement is reached and/or a (de-facto) decision is made. Any detailed discussion or exchange of views on an issue, and any policy decision from the options, should be left to the open forum of a formal council or committee meeting. Workshops are merely a means which enable councillors to bring an informed mind to the appropriate decision-making forum.

The Division recognises the value of workshops or information sessions in developing councillor knowledge and expertise, and in assisting their role as public officials. However, where briefing sessions are held in relation to development applications or business enterprises, council needs to remember its obligations and responsibilities under the Model Code, and community perceptions in terms of unfair advantage and transparency of process. Council may wish to introduce protocols for workshops or information sessions in its Meeting Code.

13.2 Attendance

13.2.1 Who can attend council workshops?

Attendance entitlements in the Act and the Regulation apply only to meetings of the council and its committees (made up of councillors only). As workshops are not meetings of the council or such committees the attendance entitlements of councillors and the public do not apply. Despite this every councillor should be invited to workshops (Clauses 10.2 – 10.4 of the Model Code of Conduct).

Clause 10.4 of the Model Code provides that members of staff who provide any information to a particular councillor in the performance of their civic duties must also make it available to any other councillor who requests it. Equity in access to information (in the form of workshops) is a matter for each council to decide in the context of its policies and resources. While it is usual for all councillors to be entitled to attend workshops, attendance is a decision for the council or, failing that, the workshop convenor.

There is no obligation on councillors to attend workshops.

13.3 Procedure

13.3.1 What are the meeting procedures for council workshops?

The meeting procedures in the Act and the Regulation apply only to meetings of the council and its committees made up of councillors only. As workshops are not meetings of the council or its committees, the meeting procedures in the Act and the Regulation do not apply. Meeting procedures for council workshops is a decision for the council or, failing that, the workshop convenor. Council may wish to introduce protocols for the conduct of workshops in its Meeting Code.

The non-disclosure provisions of sections 664(1) and 664(2) of the Act apply to workshops but, because they cannot be closed under section 10A of the Act, the confidentiality provisions of sections 664(1A) and 664(1B) do not apply.

13.3.2 Can the public inspect workshop documents?

Any document produced in relation to a workshop would be a document of the council. This means that these documents could be inspected and copied in accordance with sections 12 to 12B of the Act or the provisions of the *Freedom of Information Act 1989* subject to any exemptions or copyright restrictions. A person refused access to a document under the *Freedom of Information Act 1989* can apply for a review of the determination by the NSW Administrative Decisions Tribunal.

13.3.3 What about public perception?

When conducting workshops, a council needs to think about its obligations and responsibilities under the Model Code, and of community perceptions in terms of unfair advantage and transparency of process. There may be a belief that workshops are a means of transacting council business and coming to council decisions in secret.

Negative public views of workshops could be changed by community education on the purpose of workshops, and by ensuring that council decisions are not made at workshops. Establishing clear guidelines for workshops and information sessions in council's Meeting Code would assist this. Guidelines could include requirements that, for example, workshop briefing papers contain information but no recommendations; or directions that no recommendations are to be put to, and no agreement sought from, the councillors or other workshop participants in the course of the workshop.

13.3.4 Can a council hold community access sessions separate from its meetings?

Community access sessions are not discussed in the Act or the Regulation. A council can hold these sessions under conditions set by the council. Again, guidelines for running community access sessions could be included in council's Meeting Code.

PART 14 - REFERENDUMS

14.1 Constitutional referendums

14.1.1 Is a council resolution required to give effect to the voters' decision at a constitutional referendum?

Certain matters require a constitutional referendum — they cannot be decided by a council (s.16 of the Act).

Section 17(1) of the Act provides that a decision made at a constitutional referendum binds the council until it is changed by a later constitutional referendum. As the council is bound by the decision, there is no requirement for a resolution to be carried to give effect to the decision. Any change has already occurred by the operation of law. The council has no choice as to whether it will put in place the change or not — by resolving to conduct the referendum, the council agreed to be bound by the result.

However to acknowledge the importance of the decision, the council could include in its minutes a resolution confirming or acknowledging the outcome of the referendum process.

PART 15 - SEAL

15.1 Purpose

15.1.1 What is the purpose of a council seal?

A council seal is like the signature of the council. It approves the content of the document and shows what the council has done or agreed to do.

15.2 Procedure

15.2.1 Why is a council resolution required before the seal is used?

Clause 400(4) of the Regulation requires a council resolution before each use of the seal. The resolution must specifically refer to the document to be sealed. This procedure reflects the important legal status of the seal. Requiring a resolution before the seal is used brings the document to the attention of the councillors and makes sure that they are aware of which documents are being sealed.

15.2.2 How can a council avoid delay when it needs to use the seal?

Council can resolve to approve a specific activity that requires the use of the seal on several occasions. For example, a resolution that authorises the transfer of certain council land could also authorise the use of the seal for any contracts that are part of that transfer. As there are only a limited number of documents in a land transaction that need to be executed under seal, each one of these could be identified in the resolution authorising the purchase or sale of the land. Clause 400 of the Regulation does not require a separate resolution as each document is prepared.

A council might also review the types of documents that are sealed to determine whether use of the seal is always necessary.

15.2.3 Which documents should or can be sealed?

In deciding whether the council seal should be used on a particular document, council needs to consider any legislative requirements. For example, the *Conveyancing Act 1919* (which requires that the seal be placed on certain documents) and cl.400(4) of the Regulation (which prohibits the seal being placed on a document unless the document relates to council business). It is a matter for the council to decide which documents relate to the business of the council.

A document in the nature of a reference or certificate of service for a council employee does not relate to the business of the council for the purpose of fixing the seal (cl.400(5) of the Regulation).

Council seals should not be used for certificates and statements of merit, or letters of congratulations. Service to the community or council can be recognised by special text printed on council letterhead or by distinctive certificates specially designed for employee references, certificates of service, Australia Day honours and the like.

15.2.4 How is the seal kept and used?

Clause 400(2) of the Regulation details how the seal is to be kept and used.

15.2.5 Can the general manager delegate to the public officer the power to use the council seal?

Section 378(1) of the Act authorises a general manager to delegate any of his or her functions, other than the power of delegation. This section allows the general manager to delegate the function of fixing the council seal to documents.

15.2.6 How can a government department ensure that a document is executed by the council itself and not delegated to the general manager?

A department could ensure that a document is made or approved by the council itself by requiring that the document be under seal, or by requesting evidence of the council resolution agreeing to make or accept the document.

PART 16 - SUSPENDED COUNCILLOR(S)

16.1 Circumstances

16.1.1 In what circumstances may a councillor be suspended?

Chapter 14 of the Act provides for the suspension of a councillor in any one of three circumstances:

- Section 440K authorises the Director General to suspend a councillor for up to 1 month for misbehaviour;
- Section 482A authorises, by way of alternative to section 440K, the Local Government Pecuniary Interest and Disciplinary Tribunal to suspend a councillor for up to 6 months for misbehaviour;
- Section 482 authorises the Local Government Pecuniary Interest and Disciplinary Tribunal to suspend a councillor for up to 6 months where it finds a complaint against that councillor proved.

16.2 Effect

16.2.1 What happens when a councillor is suspended from office?

While there is no definition of 'suspension' in the Act or the *Interpretation Act 1987*, the Macquarie Dictionary defines 'suspend' as "to debar, usually for a time, from the exercise of an office or function or the enjoyment of a privilege". 'Debar' is defined as "to bar out or exclude from a place or condition".

The suspension of a councillor results in that person being excluded from civic office during the period of suspension. It also means being excluded from the rights and privileges of that office during the period of suspension. If the councillor is also the mayor, that person is excluded from exercising the function, rights and privileges of both 'councillor' and 'mayor' during the period of suspension.

A suspended councillor/mayor has no greater access to council documents, council information or council facilities than any other resident or ratepayer. The suspended councillor/mayor can attend council meetings, but only as a member of the public. Therefore that person cannot take part in the election of the mayor or deputy mayor, either as a candidate or as a councillor, or vote on any matter before the council.

From: Bob Pigott [Bob.Pigott@canadabay.nsw.gov.au]
Sent: Thursday, 17 December 2009 11:24:03 AM
To: _All Councillors
Subject: FW: New prohibitions against political donations by property developers

Dear Councillors

Please find following information in relation to the Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill 2009 for your information.

Kind regards

Bob Pigott
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City of Canada Bay Council
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From: Tony McNamara
Sent: Thursday, 17 December 2009 10:57 AM
To: Bruce Cook; Bob Pigott
Subject: FW: New prohibitions against political donations by property developers
Bruce/Bob
can this information please be forwarded to Councillors for information?
Thanks

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From: Narelle Butler
Sent: Thursday, 17 December 2009 8:24 AM
To: _Planning & Environment Team
Subject: FW: New prohibitions against political donations by property developers

From: Maddocks Public Law, Planning & Environment [mailto:publications@maddocks.com.au]
Sent: Thursday, 17 December 2009 12:05 AM
To: Narelle Butler
Subject: New prohibitions against political donations by property developers

e-alert

17 December 2009

Public Law, Planning & Environment

Dear Narelle

New prohibitions against political donations by property developers

The much heralded Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill 2009 was assented to on 14 December 2009, and commenced on the same day. The Bill amends the *Election Funding and Disclosures Act* 1981 (**the EFDA**). The changes follow close media scrutiny over the political donations relating to the Medich Property Group which provided regular donations to Labor Party MPs and the Labor Party's NSW Branch, as well as the ICAC's investigation of Wollongong Council last year during which the donations of various property developers was also revealed. Under the amendments, property developers will no longer be able to provide political donations to NSW Councillors, and NSW Councillors will no longer be allowed to receive political donations from property developers.

Key elements of the new provisions

The Bill amends the EFDA so that:

- it is unlawful for a person to make a political donation if the person is a property developer or makes the donation on behalf of a property developer;
- it is unlawful for a person to accept a political donation that was made by or on behalf of a property developer; and
- it is unlawful for a property developer or a person on behalf of a property developer to solicit another person to make a political donation.

The definition of a 'property developer'

The obvious question raised by these provisions is what constitutes a 'property developer'. A property developer is defined to be:

> '(a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimately purpose of the sale or lease of the land for profit, or
> (b) a person who is a close associate of a corporation...'

Activities by a corporation for the dominant purpose of providing commercial premises at which the corporation (or related body corporate) will carry on its business are excluded for the purpose of determining whether the corporation is a property developer.

'Close associates' of a corporation include:

- directors and officers of the corporation and their spouses;
- a related body corporate of the corporation;
- persons whose voting power in the corporation or a related body corporate is greater than 20 percent and their spouses.

A 'relevant planning application' continues to have the same meaning given to it in section 147 of the *Environmental Planning Assessment Act* 1979 (**EP&A Act**). Such applications include:

- formal requests for the Minister or Director-General to initiate the making a Environmental Planning Instrument or Development Control Plan for a particular site;
- formal requests to the Minister or Director-General for a development to be made state significant development or a declared Part 3A project;
- an application for approval of a concept plan or project under Part 3A of the EP&A Act; or
- an application for development consent under Part 4 of the EP&A Act.

Offence provisions

The offence under the above provisions is triggered where the relevant person makes or accepts the donation knowing this to be unlawful. The maximum penalty is the same as for other offences relating to political donations, namely 200 penalty units for a party ($22,000 at present) and 100 penalty units in any other case ($11,000 at present).

Loans may comprise a political donation

It should also be borne in mind by Councillors and property developers alike that loans are also regarded as a political donation, except where the loan derives from a financial institution.

Party membership fees under $1000 not to be regarded as a political donation

Membership contributions to political parties are not considered political donations so long as the membership contribution is not a reportable political donation under section 86 of the EFDA, which are political donations of $1000 or more.

Determination that a person is not a property developer

A person may also apply to the Election Funding Authority of NSW for a determination that they are not a property developer for the purposes of the EFDA. However, such a determination will have no effect where such an application is made by a person who provides the authority with false or misleading material.

Observations

Overall these new provisions have important consequences for both property developers and elected Councillors who have historically been able to give and receive political donations. These changes co-exist with the various other requirements under the *Election Funding and Disclosures Act* 1981, the *Local Government Act* 1993, and the EP&A Act in relation to political donations. Both Councillors and persons who may fall under the definition of a property developer will need to prudently guard against donations which fall foul of the above provisions.

For further information please contact a member of our team below.

Kind regards,

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Maddocks

Maddocks will be closed over the Christmas and New Year period (from Friday 25 December 2009 until Friday 8 January 2010) and will reopen on Monday 11 January 2010.

The partners and staff at Maddocks wish you all the best for the festive season and safe holidays.

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office of the information commissioner
new south wales

Guideline 1:

Local councils

1 July 2010

Guidelines for local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the Government Information (Public Access) Act 2009 (NSW)

promoting open government

www.oic.nsw.gov.au • 1800 INFOCOM (1800 463 626)

Contents

The Information Commissioner is empowered under sections 12(3) and 14(3) of the *Government Information (Public Access) Act 2009 NSW* ("GIPA Act") to issue guidelines to assist agencies regarding the public interests in favour of, or against, disclosure.

These Guidelines, made pursuant to those sections of the GIPA Act, are made to assist local councils to determine the public interest considerations for and against disclosure of information contained in the returns disclosing the interests of councillors and designated persons as required by Schedule 1, clause [1](2)(a) of the *Government Information (Public Access) Regulation 2009* (NSW) ('the GIPA Regulation').

These Guidelines supplement the provisions of the GIPA Act. Agencies must have regard to them in accordance with section 15(b) of the GIPA Act.

The Guidelines have been developed in consultation with the Division of Local Government, the Local Government Shires Association, the Local Government Managers Australia (NSW), union representatives and Privacy NSW. The operation and effectiveness of the Guidelines will be reviewed after twelve months.

Deirdre O'Donnell

Information Commissioner

1 July 2010

Overview

Section 449 of the *Local Government Act 1993* (NSW) ('the LGA') requires a councillor or a designated person to complete and lodge with the general manager, a return disclosing his or her pecuniary interests. That return contains personal information about each councillor and designated person, including his or her name, address and signature, as well as information about property and share holdings, gifts received, debts owed, other sources of income, and positions held in a trade union or business or professional organisation.

Before the commencement of the *Government Information (Public Access) Act 2009* (NSW) ('the GIPA Act'), section 12 of the LGA required that the returns be made available for public inspection free of charge. Most councils complied with this provision by having the returns available for inspection at council offices.

The GIPA Act repeals section 12 of the LGA on 1 July 2010. In its place, the mandatory proactive release provisions in the GIPA Act and the *Government Information (Public Access) Regulation 2009* (NSW) ('the GIPA Regulation') now apply to disclosure of information contained in the returns disclosing the interests of councillors and designated persons. The combined effect of the GIPA Act and the GIPA Regulation is that the information in the returns would need to be disclosed on the website of each local council, unless to do so would impose unreasonable costs on the council, or if the council determined there was an overriding public interest against disclosing the information.

In order to decide whether there is an overriding public interest against disclosure, councils would need to apply the public interest test, and weigh the considerations in favour of release against those that favour non-disclosure.

Under sections 12(3) and 14(3) of the GIPA Act, the Information Commissioner may make guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure of information. These Guidelines are made under those sections to assist councils to determine how to disclose information in the returns in a way that promotes the public interest. Agencies are required to have regard to these Guidelines in accordance with section 15(b) of the GIPA Act.

The Guidelines recognise that disclosing the information in the returns furthers openness, transparency and accountability in local government. It also helps to flag potential conflicts of interests that might arise where councillors and other senior staff participate in decisions from which they may derive, or be perceived to derive, personal or financial benefit. However, the returns contain a significant amount of sensitive, personal information about the person concerned, and about third parties such as family members, business associates and creditors, that people are entitled to protect. Disclosing the information on a website could cut across this right, and could potentially expose a person to harassment, intimidation, or serious harm or identity theft.

Consequently, these Guidelines provide that the requirement in Sch 1, [2](2)(a) of the GIPA Regulation that returns of councillors and designated persons be released as part of local councils' open access information should be interpreted as follows:

- The returns should be made publicly available for inspection free of charge.
- Copies may be made in accordance with the GIPA Regulation Part 2 [4](b).
- Local councils should note clearly on their website that the returns are available for inspection at council offices during ordinary business hours.
- Information contained in the returns should not be placed on the website of a local council.

Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while protecting the individual's right to privacy and safety.

Part 1: Returns disclosing the interests of councillors and designated persons

What is a return?

1.1 Section 449 of the LGA states that a councillor or a designated person must complete and lodge with the general manager, within 3 months after becoming a councillor or designated person, a return disclosing his or her pecuniary interests (see Appendix A). A designated person is defined in section 441 as:

- the general manager
- other senior staff of the council
- any other staff member or delegate of the council who holds a position identified by the council as the position of a designated person because it involves the exercise of functions under the LGA or any other Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the person's duty as a member of staff or delegate and the person's private interest
- any other person who is a member of a committee of the council identified by the council as a committee whose members are designated persons because the functions of the committee involve the exercise of the council's functions under the LGA or any other Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the member's duty as a member of the committee and the member's private interest.

1.2 Section 442 of the LGA defines a pecuniary interest as one involving a reasonable likelihood or expectation of appreciable financial gain or loss to the person. A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter, or if the interest is of a kind not required to be disclosed under section 448 of the LGA.

1.3 For the purposes of the LGA, a pecuniary interest is one held by the councillor and designated person, or his or her spouse, de facto partner, relative, partner or employer, or a company or other body of which the person, or a nominee, partner or employer of the person, is a member. However, a person is not taken to have a pecuniary interest in a matter:

(a) if the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative, partner, employer or company or other body, or

(b) just because the person is a member of, or is employed by, a council or a statutory body or is employed by the Crown, or

(c) just because the person is a member of, or a delegate of a council to, a company or other body that has a pecuniary interest in the matter, so long as the person has no beneficial interest in any shares of the company or body (see section 443 *LGA*).

1.4 The returns are designed to promote openness and transparency in local government, and to avoid a conflict of interest on the part of councillors and senior council staff who exercise decision-making functions.

What information do the returns contain?

1.5 The *Local Government (General) Regulation 2005* (NSW) Part 8 Division 1 states that returns must contain details about the following information:

- the address of each parcel of real property in which the person has an interest, and the nature of the interest;
- particulars of each disposition of real property by, or in arrangement with, the person under which he or she wholly or partly retained the use and benefit of the property or the right to re-acquire the property;

- a description of gifts received exceeding $500 in value (including gifts of a lesser amount that total $500 or more, made by the same donor within a 12 month period) and the name and address of the donor, unless the donor was a relative or the gift is a political donation required to be disclosed under the *Election Funding and Disclosures Act 1981* (NSW);
- the name and address of each person making a financial or other contribution to the councillor's or designated person's travel expenses, listing the dates and places of travel;
- the name, address and principal objects of each corporation in which the person has an interest or holds a position, whether remunerated or not, including the nature of the interest or the position held, subject to certain exceptions;
- the name of each trade union and professional or business association in which the person holds a position, whether remunerated or not, and a description of the position held;
- details of each source of income exceeding, or expected to exceed $500, that the councillor or designated person reasonably expects to receive during the period covered by the return, including details of:
  - any occupation, and the name and address of the employer
  - any partnership arrangements the person has entered into
  - in relation to income generated from trusts, the name and address of the settlor and the trustee
  - in relation to any other income, a description sufficient to identify the person from whom, or the circumstances in which, the income was, or is reasonably expected to be, received;
- the name and address of each person to whom the councillor or designated person is liable to pay any debt in excess of $500 for the return period, unless the debt is owed to a relative, or to an authorised deposit-taking institution lent in the normal course of business; or
- any other benefit, interest, advantage or liability whether pecuniary or not, that the person chooses to disclose (see Appendix A).

Disclosure under the LGA

1.6 Section 12 of the LGA required the current version of the return of interests of councillors and designated persons to be made available for public inspection free of charge. Most councils complied with this provision by having the returns available for inspection at council offices, and allow copies to be made.

1.7 The GIPA Act repealed section 12 and replaces it with the mandatory proactive disclosure provisions in sections 6 and 18 of the GIPA Act, and the GIPA Regulation (see Part 2).

Privacy protection under the *LGA*

1.8 Under section 739 of the LGA, a person may make a request to the general manager that any material that is available (or is to be made available) for public inspection by or under the Act be prepared or amended so as to omit or remove any matter that would disclose or discloses the person's place of living if the person considers that the disclosure would place or places the personal safety of the person or of members of the person's family at risk.

1.9 Section 739 is unaffected by the GIPA Act.

Part 2: Disclosure requirements under the GIPA Act and the public interest test

Mandatory disclosure requirements

2.1 Section 6 of the GIPA Act requires agencies to make certain information publicly available. This information is known as open access information. Section 18 contains a list of the open access information that all agencies must make publicly available. Further, Schedule 1 to the GIPA Regulation lists additional open access information relevant only to local councils. This includes the returns of the interests of councillors and designated persons (see Sch 1, [2](2)(a)).

2.2 The GIPA Act states in section 6 that open access material must be made publicly available unless there is an overriding public interest against disclosure. Section 6(2) provides that the information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate. Part 2 [4](b) of the GIPA Regulation also provides that local councils must provide a copy of a record containing the information (or providing the facilities for making a copy of a record containing the information) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.

2.3 The combined effect of these provisions is that information in the returns of the interests of councillors and designated persons would need to be made available on a council's website, unless there is an overriding public interest against such disclosure, or if placing it on the web would impose unreasonable costs on a council.

The public interest test

2.4 In order to determine if there is an overriding public interest against disclosing information in the returns of the interests of councillors and designated persons, councils need to apply the public interest test (see Appendix B for the provisions of the GIPA Act that relate to the public interest test).

2.5 The public interest test involves weighing the considerations in favour of disclosure against those in favour of non-disclosure. While section 12 states that any number of factors may be considered in favour of disclosing information, only those considerations listed in the Table in section 14 may be taken into account in deciding that information should not be disclosed. The considerations against disclosure must be such that they outweigh those in favour, overturning the general presumption in the GIPA Act in favour of disclosure (see section 5).

2.6 Under section 15(b) of the GIPA Act, agencies must have regard to any relevant guidelines issued by the Information Commissioner in determining whether there is an overriding public interest against disclosure. The public interest considerations for and against disclosing information contained in the returns of the interests of councillors and designated persons, and the Information Commissioner's view on how they information should be disclosed, are outlined in Part 3.

Part 3: How the information on the returns should be disclosed

Public interest considerations in favour of disclosure

3.1 The 2008 Guidelines for the Model Code of Conduct for local councils provide as follows:

> The possibility of conflict between public duty and private interest is an ever-present risk for council officials. Sometimes, by virtue of their official status, position, functions or duties, council officials have the power to make decisions or act in ways that can further their own private interests. This may cause a real or perceived conflict between council officials' private interests and their public duty.
>
> As a general principle, no person should obtain a private benefit or advantage by virtue of their position as a council official. Additionally, no public official should misuse the power of authority of their position to unfairly influence or decide a matter where they have a real or perceived private interest (see para 4.2A).

3.2Section 12 of the GIPA Act contains a number of factors that favour disclosure of information, including the following:

- Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
- Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
- Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

3.3 Disclosure of the returns of the interests of councillors and designated persons promotes all of these public interest considerations. It furthers openness, transparency and accountability in local government. Disclosing the returns also protects the integrity of councils' decision-making processes by flagging potential conflicts of interests that would arise where councillors and other senior staff participate in decisions from which they may derive, or be perceived to derive, personal or financial benefit.

3.4 To assist members of the public to have confidence that potential conflicts of interest are avoided, they should have sufficient information about the areas of conflict. In this respect, disclosure of the information contained in the returns is an important element in promoting public accountability.

Public interest considerations against disclosure

3.5 Councillors and designated persons are required to disclose a significant amount of sensitive personal information in the returns. In addition to their names and addresses, the returns include details about each of their property and share holdings, debts and family business interests, as well as their signatures.

3.6 Section 14 of the GIPA Act lists as a consideration against disclosure the fact that information may reveal someone's personal information, or would contravene an information privacy principle under the *Privacy and Personal Information Protection Act 1998* (NSW). An individual has a right to protect the privacy of their personal information. Given the amount of information contained in the returns, its sensitive nature and the potential for misuse, special care should be taken to protecting this right.

3.7 A further consideration against disclosure listed in section 14 is where release of the information may expose a person to a risk of harm or of serious harassment or serious intimidation. It is foreseeable that disclosing the type and combination of information contained in the returns on a website could result in harassment and intimidation, and potentially serious harm or identity theft.

Conclusion

3.8 Disclosure of information contained in the returns of the interests of councillors and designated persons is an important public accountability measure. However, disclosure of the information on a website does not sufficiently protect individual privacy and opens the potential for serious harassment or harm to occur.

3.9 Therefore, the requirement in Sch 1, [2](2)(a) of the GIPA Regulation that returns of councillors and designated persons be released as part of local councils' open access information should be interpreted as follows:

- The returns should be made publicly available for inspection free of charge.
- Copies may be made in accordance with the GIPA Regulation Part 2 [4](b).
- Local councils should note clearly on their website that the returns are available for inspection at council offices during ordinary business hours.
- Information contained in the returns should not be placed on the website of a local council.

3.10 The right of councillors and designated persons under section 739 of the LGA to ask that certain personal information be removed from the returns before they are made publicly available would remain unaffected. This is consistent with section 6(4) of the GIPA Act which states that agencies may delete matter contained in a record to facilitate disclosure of open access information if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record, and it is practicable to delete the matter.

3.11 Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while protecting the individual's right to privacy and safety.

Appendix A

***Local Government Act 1993* (NSW)**

449 Returns disclosing interests of councillors and designated persons

(1) A councillor or designated person must complete and lodge with the general manager, within 3 months after becoming a councillor or designated person, a return in the form prescribed by the regulations.

(1A) A person must not lodge a return that the person knows or ought reasonably to know is false or misleading in a material particular.

(2) A person need not lodge a return within the 3-month period after becoming a councillor or designated person if the person lodged a return in that year or the previous year or if the person ceases to be a councillor or designated person within the 3-month period.

(3) A councillor or designated person holding that position at 30 June in any year must complete and lodge with the general manager within 3 months after that date a return in the form prescribed by the regulations.

(4) A person need not lodge a return within the 3-month period after 30 June in a year if the person lodged a return under subsection (1) within 3 months of 30 June in that year.

(5) Nothing in this section prevents a councillor or designated person from lodging more than one return in any year.

(6) Nothing in this section or the regulations requires a person to disclose in a return lodged under this section an interest of the person's spouse or de facto partner or a relative of the person.

739 Protection of privacy

(1) A person may request that any material that is available (or is to be made available) for public inspection by or under this Act be prepared or amended so as to omit or remove any matter that would disclose or discloses the person's place of living if the person considers that the disclosure would place or places the personal safety of the person or of members of the person's family at risk.

(2) A person who may make a request under this section includes a person who is entitled to be enrolled as an elector.

(3) The request is to be made to the general manager or, in the case of the residential roll for an area, the Electoral Commissioner.

(4) The request is to be in the form prescribed by the regulations, to give particulars of the relevant risk and to be verified by statutory declaration by the person making the request or by some other person.

(5) The person to whom the request is made may grant the request if satisfied that disclosing or continuing to disclose the matter would place or places the personal safety of the person or of members of the person's family at risk.

(6) The person to whom the request is made must notify the person concerned of the decision to grant or refuse the request.

(7) The Electoral Commissioner must not include in the residential roll for an area the address of an elector whose request under this section is granted by the Electoral Commissioner.

(8) The general manager, in relation to:

(a) the non-residential roll and the roll of occupiers and ratepaying lessees for the area, and

(b) any other material that is available (or is to be made available) for public inspection by or under this Act,

must not include in the roll or other material the address of a person whose request under this section is granted by the general manager. However, in the case of material other than a roll, the general manager may include the address of a person if the name of the person is excluded from the material.

Local Government (General) Regulation 2005 (NSW)

Part 8 Honesty and disclosure of interests

Division 1 Preliminary

180 Definitions

In this Part and Schedule 3:

address means:

(a) in relation to a person other than a corporation, the last residential or business address of the person known to the councillor or designated person disclosing the address, or

(b) in relation to a corporation, the address of the registered office of the corporation in New South Wales or, if there is no such office, the address of the principal office of the corporation in the place where it is registered, or

(c) in relation to any real property, the postal address of the property or particulars of title of the property.

disposition of property means a conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property, including the following:

(a) the allotment of shares in a company,

(b) the creation of a trust in respect of property,

(c) the grant or creation of a lease, mortgage, charge, easement, licence, power, partnership or interest in respect of property,

(d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of a debt, contract or chose in action, or of an interest in respect of property,

(e) the exercise by a person of a general power of appointment over property in favour of another person,

(f) a transaction entered into by a person who intends by the transaction to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of another person.

gift means a disposition of property made otherwise than by will (whether or not by instrument in writing) without consideration, or with inadequate consideration, in money or money's worth passing from the person to whom the disposition was made to the person who made the disposition, but does not include a financial or other contribution to travel.

interest means:

(a) in relation to property—an estate, interest, right or power, at law or in equity, in or over the property, or

(b) in relation to a corporation—a relevant interest (within the meaning of section 9 of the Corporations Act 2001 of the Commonwealth) in securities issued or made available by the corporation.

listed company means a company that is listed within the meaning of section 9 of the Corporations Act 2001 of the Commonwealth.

occupation includes trade, profession and vocation.

professional or business association means an incorporated or unincorporated body or organisation having as one of its objects or activities the promotion of the economic interests of its members in any occupation.

property includes money.

travel includes accommodation incidental to a journey.

181 Return dates and periods

(1) A reference in this Part or in Schedule 3 to the return date for a return made by a person under section 449 (1) of the Act is a reference to the date on which the person became the holder of a position required to make such a return.

(2) A reference in this Part or in Schedule 3 to the return period for a return by a person under section 449(3) of the Act in a particular year is a reference to:

(a) if the last return made by the person was a return under section 449 (1) of the Act, the period commencing on the first day after the return date and ending on 30 June in that particular year, or

(b) if the last return made by a person was a return under section 449 (3) of the Act, the period commencing on the expiration of the period to which that return relates and ending on 30 June in that particular year.

182 Matters relating to the interests that must be included in returns

(1) Interests etc outside New South Wales

A reference in this Part or in Schedule 3 to a disclosure concerning a corporation or other thing includes a reference to a disclosure concerning a corporation registered, or other thing arising or received, outside New South Wales.

(2) References to interests in real property

A reference in this Part or in Schedule 3 to real property in which a councillor or designated person has an interest includes a reference to any real property situated in Australia in which the councillor or designated person has an interest.

(3) Gifts, loans etc from related corporations

For the purposes of this Part and Schedule 3, gifts or contributions to travel given, loans made, or goods or services supplied, to a councillor or designated person by two or more corporations that are related to each other for the purposes of section 50 of the *Corporations Act 2001* of the Commonwealth are all given, made or supplied by a single corporation.

Division 2 Pecuniary interests to be disclosed in returns

183 Real property

(1) A person making a return under section 449 (1) of the Act must disclose:

(a) the address of each parcel of real property in which he or she had an interest on the return date, and

(b) the nature of the interest.

(2) A person making a return under section 449 (3) of the Act must disclose:

(a) the address of each parcel of real property in which he or she had an interest at any time since the last return under Part 2 of Chapter 14 of the Act was made, and

(b) the nature of the interest.

(3) An interest in a parcel of real property need not be disclosed in a return if the person making the return had the interest only:

(a) as executor of the will, or administrator of the estate, of a deceased person and not as a beneficiary under the will or intestacy, or

(b) as a trustee, if the interest was acquired in the ordinary course of an occupation not related to his or her duties as the holder of a position required to make a return.

(4) In this clause, interest includes an option to purchase.

184 Gifts

(1) A person making a return under section 449 (3) of the Act must disclose:

(a) a description of each gift received since the last return under Part 2 of Chapter 14 of the Act was made, and

(b) the name and address of the donor of each of the gifts.

(2) A gift need not be included in a return if:

(a) it did not exceed $500, unless it was among gifts totalling more than $500 made by the same person during a period of 12 months or less, or

(b) it was a political contribution disclosed, or required to be disclosed, under Part 6 of *the Election Funding and Disclosures Act 1981*, or

(c) the donor was a relative of the donee.

(3) For the purposes of this clause, the amount of a gift other than money is an amount equal to the value of the property given.

185 Contributions to travel

(1) A person making a return under section 449 (3) of the Act must disclose:

(a) the name and address of each person who made any financial or other contribution to the expenses of any travel undertaken by the person since the last return under Part 2 of Chapter 14 was made, and

(b) the dates on which the travel was undertaken, and

(c) the names of the States and Territories, and of the overseas countries, in which the travel was undertaken.

(2) A financial or other contribution to any travel need not be disclosed under this clause if it:

(a) was made from public funds (including a contribution arising from travel on free passes issued under an Act or from travel in government or council vehicles), or

(b) was made by a relative of the traveller, or

(c) was made in the ordinary course of an occupation of the traveller that is not related to his or her functions as the holder of a position requiring the making of a return, or

(d) did not exceed $250, unless it was among gifts totalling more than $250 made by the same person during a 12 month period or less, or

(e) was a political contribution disclosed, or required to be disclosed, under Part 6 of the *Election Funding Act 1981*, or

(f) was made by a political party of which the traveller was a member and the travel was undertaken for the purpose of political activity of the party in New South Wales or to enable the traveller to represent the party within Australia.

(3) For the purposes of this clause, the amount of a contribution (other than a financial contribution) is an amount equal to the value of the contribution.

186 Interests and positions in corporations

(1) A person making a return must disclose:

(a) the name and address of each corporation in which he or she had an interest or held a position (whether remunerated or not) on the return date (in the case of a return under section 449 (1) of the Act) or at any time since the last return under Part 2 of Chapter 14 of the Act was made (in the case of a return under section 449 (3) of the Act), and

(b) the nature of the interest, or the position held, in each of the corporations, and

(c) a description of the principal objects (if any) of each of the corporations, except in the case of a listed company.

(2) An interest in, or a position held in, a corporation need not be disclosed if the corporation is:

(a) formed for the purpose of providing recreation or amusement or for promoting commerce, industry, art, science, religion or charity, or for any other community purpose, and

(b) required to apply its profits or other income in promoting its objects, and

(c) prohibited from paying any dividend to its members.

(3) An interest in a corporation need not be disclosed if the interest is a beneficial interest in shares in a company that does not exceed 10 per cent of the voting rights in the company.

187 Positions in trade unions and professional or business associations

A person making a return must disclose:

(a) the name of each trade union, and of each professional or business association, in which he or she held any position (whether remunerated or not) on the return date (in the case of a return under section 449 (1) of the Act) or at any time since the last return under Part 2 of Chapter 14 was made (in the case of a return under section 449 (3) of the Act), and

(b) a description of the position held in each of the unions and associations.

188 Dispositions of real property

(1) A person making a return under section 449 (3) of the Act must disclose particulars of each disposition of real property by the person, at any time since the last return under Part 2 of Chapter 14 of the Act was made, under which he or she wholly or partly retained the use and benefit of the property or the right to re-acquire the property.

(2) A person making a return under section 449 (3) of the Act must disclose particulars of each disposition of real property to another person, since the last return under Part 2 of Chapter 14 of the Act was made, that is made under arrangements with, but is not made by, the person making the return, being a disposition under which the person making the return obtained wholly or partly the use of the property.

189 Sources of income

(1) A person making a return must disclose:

(a) in the case of a return under section 449 (1) of the Act—each source of income that the person reasonably expects to receive in the period commencing on the first day after the return date and ending on the following 30 June, and

(b) in the case of a return under section 449 (3) of the Act—each source of income received by the person since the last return under Part 2 of Chapter 14 of the Act was made.

(2) A reference in subclause (1) to each source of income received, or reasonably expected to be received, by a person is a reference to:

(a) in relation to income from an occupation of the person:

(i) a description of the occupation, and

(ii) if the person is employed or the holder of an office, the name and address of his or her employer or a description of the office, and

(iii) if the person has entered into a partnership with other persons, the name (if any) under which the partnership is conducted, or

(b) in relation to income from a trust, the name and address of the settler and the trustee, or

(c) in relation to any other income, a description sufficient to identify the person from whom, or the circumstances in which, the income was, or is reasonably expected to be, received.

(3) The source of any income need not be disclosed by a person in a return if the amount of the income received, or reasonably expected to be received, by the person from that source did not exceed $500, or is not reasonably expected to exceed $500, as the case may be.

190 Debts

(1) A person making a return must disclose the name and address of each person to whom the person was liable to pay any debt:

(a) in the case of a return under section 449 (1) of the Act—on the return date, or

(b) in the case of a return under section 449 (3) of the Act—at any time since the last return under Part 2 of Chapter 14 of the Act was made.

(2) A liability to pay a debt must be disclosed by a person in a return whether or not the amount, or any part of the amount, to be paid was due and payable on the return date or at any time since the last return under Part 2 of Chapter 14 of the Act was made, as the case may be.

(3) A liability to pay a debt need not be disclosed by a person in a return if:

(a) the amount to be paid did not exceed $500 on the return date or at any time since the last return under Part 2 of Chapter 14 of the Act was made, as the case may be, unless:

(i) the debt was one of two or more debts that the person was liable to pay to one person on the return date or at any time since the last return was made, as the case may be, and

(ii) the amounts to be paid exceeded, in the aggregate, $500, or

(b) the person was liable to pay the debt to a relative, or

(c) in the case of a debt arising from a loan of money the person was liable to pay the debt to an authorised deposit-taking institution or other person whose ordinary business includes the lending of money and the loan was made in the ordinary course of business of the lender, or

(d) in the case of a debt arising from the supply of goods or services:

(i) the goods or services were supplied in the period of 12 months immediately preceding the return date or were supplied since the last return under Part 2 of Chapter 14 of the Act was made, as the case may be, or

(ii) the goods or services were supplied in the ordinary course of any occupation of the person that is not related to his or her duties as the holder of a position required to make a return.

191 Discretionary disclosures

A person may voluntarily disclose in a return any interest, benefit, advantage or liability, whether pecuniary or not, that is not required to be disclosed under another provision of this Part.

Appendix B

Government Information (Public Access) Act 2009 (NSW)

12 Public interest considerations in favour of disclosure

(1) There is a general public interest in favour of the disclosure of government information.

(2) Nothing in this Act limits any other public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.

Note. The following are examples of public interest considerations in favour of disclosure of information:

(a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.

(b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.

(c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

(d) The information is personal information of the person to whom it is to be disclosed.

(e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

(3) The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies.

13 Public interest test

There is an overriding public interest against disclosure of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

14 Public interest considerations against disclosure

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

(2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

(3) The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.

Table

1 Responsible and effective government
There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

(a) prejudice collective Ministerial responsibility,

(b) prejudice Ministerial responsibility to Parliament,

(c) prejudice relations with, or the obtaining of confidential information from, another government,

(d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,

(e) reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency,

(f) prejudice the effective exercise by an agency of the agency's functions,

(g) found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence,

(h) prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

2 Law enforcement and security

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

(a) reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant,

(b) prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law,

(c) increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism),

(d) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person,

(e) endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,

(f) facilitate the commission of a criminal act (including a terrorist act within the meaning of the *Terrorism (Police Powers) Act 2002*),

(g) prejudice the supervision of, or facilitate the escape of, any person in lawful custody,

(h) prejudice the security, discipline or good order of any correctional facility.

3 Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

(a) reveal an individual's personal information,

(b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*,

(c) prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings,

(d) prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness,

(e) reveal false or unsubstantiated allegations about a person that are defamatory,

(f) expose a person to a risk of harm or of serious harassment or serious intimidation,

(g) in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.

4 Business interests of agencies and other persons

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

(b) reveal commercial-in-confidence provisions of a government contract,

(c) diminish the competitive commercial value of any information to any person,

(d) prejudice any person's legitimate business, commercial, professional or financial interests,

(e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

5 Environment, culture, economy and general matters

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

(a) endanger, or prejudice any system or procedure for protecting, the environment,

(b) prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge,

(c) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing, or threaten the existence of any species,

(d) damage, or prejudice the ability of the Government or an agency to manage, the economy,

(e) expose any person to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Government or an agency.

6 Secrecy provisions

(1) There is a public interest consideration against disclosure of information if disclosure of the information by any person could (disregarding the operation of this Act) reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.

(2) The public interest consideration under this clause extends to consideration of the policy that underlies the prohibition against disclosure.

7 Exempt documents under interstate Freedom of Information legislation

(1) There is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.

(2) The public interest consideration under this clause extends to consideration of the policy that underlies the exemption.

(3) In this clause, a reference to a corresponding law is a reference to:

(a) the *Freedom of Information Act 1982* of the Commonwealth, or

(b) a law of any other State that is prescribed by the regulations as a corresponding law for the

purposes of this clause.

15 Principles that apply to public interest determination

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

(a) Agencies must exercise their functions so as to promote the object of this Act.

(b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.

(c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.

(d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

(e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

Premier & Cabinet
Division of Local Government

The Model Code of Conduct for Local Councils in NSW

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PART 1 INTRODUCTION

This Model Code of Conduct for Local Councils in NSW ("the Model Code of Conduct") is made for the purposes of section 440 of the *Local Government Act 1993* ("the Act"). Section 440 of the Act requires every council to adopt a code of conduct that incorporates the provisions of the Model Code. For the purposes of section 440 of the Act, the Model Code of Conduct comprises all parts of this document.

Councillors, administrators, members of staff of council, independent conduct reviewers, members of council committees including the conduct review committee and delegates of the council must comply with the applicable provisions of council's code of conduct in carrying out their functions as council officials. It is the personal responsibility of council officials to comply with the standards in the code and regularly review their personal circumstances with this in mind.

Failure by a councillor to comply with the standards of conduct prescribed under this code constitutes misconduct for the purposes of the Act. The Act provides for a range of penalties that may be imposed on councillors for misconduct, including suspension or disqualification from civic office.

Failure by a member of staff to comply with council's code of conduct may give rise to disciplinary action.

A better conduct guide has also been developed to assist councils to review and enhance their codes of conduct. This guide supports this code and provides further information on the provisions in this code.

PART 2 PURPOSE OF THE CODE OF CONDUCT

The Model Code of Conduct sets the minimum requirements of conduct for council officials in carrying out their functions. The Model Code is prescribed by regulation.

The Model Code of Conduct has been developed to assist council officials to:

- understand the standards of conduct that are expected of them
- enable them to fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence (section 439)
- act in a way that enhances public confidence in the integrity of local government.

PART 3 GENERAL CONDUCT OBLIGATIONS

General conduct

3.1 You must not conduct yourself in carrying out your functions in a manner that is likely to bring the council or holders of civic office into disrepute. Specifically, you must not act in a way that:

a) contravenes the Act, associated regulations, council's relevant administrative requirements and policies
b) is detrimental to the pursuit of the charter of a council
c) is improper or unethical
d) is an abuse of power or otherwise amounts to misconduct
e) causes, comprises or involves intimidation, harassment or verbal abuse
f) causes, comprises or involves discrimination, disadvantage or adverse treatment in relation to employment
g) causes, comprises or involves prejudice in the provision of a service to the community. *(Schedule 6A)*

3.2 You must act lawfully, honestly and exercise a reasonable degree of care and diligence in carrying out your functions under the Act or any other Act. *(section 439)*

3.3 You must treat others with respect at all times.

Fairness and equity

3.4 You must consider issues consistently, promptly and fairly. You must deal with matters in accordance with established procedures, in a non-discriminatory manner.

3.5 You must take all relevant facts known to you, or that you should be reasonably aware of, into consideration and have regard to the particular merits of each case. You must not take irrelevant matters or circumstances into consideration when making decisions.

Harassment and discrimination

3.6 You must not harass, discriminate against, or support others who harass and discriminate against colleagues or members of the public. This includes, but is not limited to harassment and discrimination on the grounds of sex, pregnancy, age, race, responsibilities as a carer, marital status, disability, homosexuality, transgender grounds or if a person has an infectious disease.

Development decisions

3.7 You must ensure that development decisions are properly made and that parties involved in the development process are dealt with fairly. You must avoid any occasion for suspicion of improper conduct in the development assessment process.

3.8 In determining development applications, you must ensure that no action, statement or communication between yourself and applicants or objectors

conveys any suggestion of willingness to provide improper concessions or preferential treatment.

Binding caucus votes

3.9 You must not participate in binding caucus votes in relation to matters to be considered at a council or committee meeting.

3.10 For the purposes of clause 3.9, a binding caucus vote is a process whereby a group of councillors are compelled by a threat of disciplinary or other adverse action to comply with a predetermined position on a matter before the council or committee irrespective of the personal views of individual members of the group on the merits of the matter before the council or committee.

3.11 Clause 3.9 does not prohibit councillors from discussing a matter before the council or committee prior to considering the matter in question at a council or committee meeting or from voluntarily holding a shared view with other councillors on the merits of a matter.

3.12 Clause 3.9 does not apply to a decision to elect the Mayor or Deputy Mayor or to nominate a person to be a member of a council committee.

PART 4 CONFLICT OF INTERESTS

4.1 A conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty.

4.2 You must avoid or appropriately manage any conflict of interests. The onus is on you to identify a conflict of interests and take the appropriate action to manage the conflict in favour of your public duty.

4.3 Any conflict of interests must be managed to uphold the probity of council decision-making. When considering whether or not you have a conflict of interests, it is always important to think about how others would view your situation.

4.4 Private interests can be of two types: pecuniary or non-pecuniary.

What is a pecuniary interest?

4.5 A pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person. *(section 442)*

4.6 A person will also be taken to have a pecuniary interest in a matter if that person's spouse or de facto partner or a relative of the person or a partner or employer of the person, or a company or other body of which the person, or a nominee, partner or employer of the person is a member, has a pecuniary interest in the matter. *(section 443)*

4.7 Pecuniary interests are regulated by Chapter 14, Part 2 of the Act. The Act requires that:

a) councillors and designated persons lodge an initial and an annual written disclosure of interests that could potentially be in conflict with their public or professional duties *(section 449)*
b) councillors and members of council committees disclose an interest and the nature of that interest at a meeting, leave the meeting and be out of sight of the meeting and not participate in discussions or voting on the matter *(section 451)*
c) designated persons immediately declare, in writing, any pecuniary interest. *(section 459)*

4.8 Designated persons are defined at section 441 of the Act, and include, but are not limited to, the general manager and other senior staff of the council.

4.9 Where you are a member of staff of council, other than a designated person (as defined by section 441), you must disclose in writing to your supervisor or the general manager, the nature of any pecuniary interest you have in a matter you are dealing with as soon as practicable.

What are non-pecuniary interests?

4.10 Non-pecuniary interests are private or personal interests the council official has that do not amount to a pecuniary interest as defined in the Act. These commonly arise out of family, or personal relationships, or involvement in sporting, social or other cultural groups and associations and may include an interest of a financial nature.

4.11 The political views of a councillor do not constitute a private interest.

Managing non-pecuniary conflict of interests

4.12 Where you have a non-pecuniary interest that conflicts with your public duty, you must disclose the interest fully and in writing, even if the conflict is not significant. You must do this as soon as practicable.

4.13 If a disclosure is made at a council or committee meeting, both the disclosure and the nature of the interest must be recorded in the minutes. This disclosure constitutes disclosure in writing for the purposes of clause 4.12.

4.14 How you manage a non-pecuniary conflict of interests will depend on whether or not it is significant.

4.15 As a general rule, a non-pecuniary conflict of interests will be significant where a matter does not raise a pecuniary interest but it involves:

a) a relationship between a council official and another person that is particularly close, for example, parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the person or of the person's spouse, current or former spouse or partner, de facto or other person living in the same household
b) other relationships that are particularly close, such as friendships and business relationships. Closeness is defined by the nature of the friendship or business relationship, the frequency of contact and the duration of the friendship or relationship
c) an affiliation between the council official and an organisation, sporting body, club, corporation or association that is particularly strong.

4.16 If you are a council official, other than a member of staff of council, and you have disclosed that a significant non-pecuniary conflict of interests exists, you must manage it in one of two ways:

a) remove the source of the conflict, by relinquishing or divesting the interest that creates the conflict, or reallocating the conflicting duties to another council official
b) have no involvement in the matter, by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in section 451(2) of the Act apply

4.17 If you determine that a non-pecuniary conflict of interests is less than significant and does not require further action, you must provide an explanation of why you consider that the conflict does not require further action in the circumstances.

4.18 If you are a member of staff of council, the decision on which option should be taken to manage a non-pecuniary conflict of interests must be made in consultation with your manager.

4.19 Despite clause 4.16(b), a councillor who has disclosed that a significant non-pecuniary conflict of interests exists may participate in a decision to delegate council's decision-making role to council staff through the general manager, or appoint another person or body to make the decision in accordance with the law. This applies whether or not council would be deprived of a quorum if one or more councillors were to manage their conflict of interests by not voting on a matter in accordance with clause 4.16(b) above.

Reportable political donations

4.20 Councillors should note that matters before council involving political or campaign donors may give rise to a non-pecuniary conflict of interests.

4.21 Where a councillor has received or knowingly benefitted from a reportable political donation:

a) made by a major political donor in the previous four years, and
b) where the major political donor has a matter before council,

then the councillor must declare a non-pecuniary conflict of interests, disclose the nature of the interest, and manage the conflict of interests in accordance with clause 4.16(b).

4.22 For the purposes of this Part:

a) a "reportable political donation" is a "reportable political donation" for the purposes of section 86 of the *Election Funding, Expenditure and Disclosures Act 1981,*
b) a "major political donor" is a "major political donor" for the purposes of section 84 of the *Election Funding, Expenditure and Disclosures Act 1981.*

4.23 Councillors should note that political donations below $1,000, or political donations to a registered political party or group by which a councillor is endorsed, may still give rise to a non-pecuniary conflict of interests. Councillors should determine whether or not such conflicts are significant and take the appropriate action to manage them.

4.24 If a councillor has received or knowingly benefitted from a reportable political donation of the kind referred to in clause 4.21, that councillor is not prevented from participating in a decision to delegate council's decision-making role to council staff through the general manager or appointing another person or body to make the decision in accordance with the law (see clause 4.19 above).

Loss of quorum as a result of compliance with this Part

4.25 Where a majority of councillors are precluded under this Part from consideration of a matter the council or committee must resolve to delegate consideration of the matter in question to another person.

4.26 Where a majority of councillors are precluded under this Part from consideration of a matter and the matter in question concerns the exercise of a function that may not be delegated under section 377 of the Act, the councillors may apply in writing to the Chief Executive to be exempted from complying with a requirement under this Part relating to the management of a non-pecuniary conflict of interests.

4.27 The Chief Executive will only exempt a councillor from complying with a requirement under this Part where:

a) compliance by councillors with a requirement under the Part in relation to a matter will result in the loss of a quorum, and
b) the matter relates to the exercise of a function of the council that may not be delegated under section 377 of the Act.

4.28 Where the Chief Executive exempts a councillor from complying with a requirement under this Part, the councillor must still disclose any interests they have in the matter the exemption applies to in accordance with the requirements of this Part.

4.29 A councillor, who would otherwise be precluded from participating in the consideration of a matter under this Part because they have a non-pecuniary conflict of interests in the matter, is permitted to participate in consideration of the matter, if:

a) the matter is a proposal relating to
    i) the making of a principal environmental planning instrument applying to the whole or a significant part of the council's area, or
    ii) the amendment, alteration or repeal of an environmental planning instrument where the amendment, alteration or repeal applies to the whole or a significant part of the council's area, and
b) the councillor declares any interest they have in the matter that would otherwise have precluded their participation in consideration of the matter under this Part.

Other business or employment

4.30 If you are a member of staff of council considering outside employment or contract work that relates to the business of the council or that might conflict with your council duties, you must notify and seek the approval of the general manager in writing. *(section 353)*

4.31 As a member of staff, you must ensure that any outside employment or business you engage in will not:

a) conflict with your official duties
b) involve using confidential information or council resources obtained through your work with the council
c) require you to work while on council duty
d) discredit or disadvantage the council.

Personal dealings with council

4.32 You may have reason to deal with your council in your personal capacity (for example, as a ratepayer, recipient of a council service or applicant for a consent granted by council). You must not expect or request preferential treatment in relation to any matter in which you have a private interest because of your position. You must avoid any action that could lead members of the public to believe that you are seeking preferential treatment.

PART 5 PERSONAL BENEFIT

For the purposes of this section, a reference to a gift or benefit does not include a political donation or contribution to an election fund that is subject to the provisions of the relevant election funding legislation.

Gifts and benefits

5.1 You must avoid situations giving rise to the appearance that a person or body, through the provision of gifts, benefits or hospitality of any kind, is attempting to secure favourable treatment from you or from the council.

5.2 You must take all reasonable steps to ensure that your immediate family members do not receive gifts or benefits that give rise to the appearance of being an attempt to secure favourable treatment. Immediate family members ordinarily include parents, spouses, children and siblings.

Token gifts and benefits

5.3 Generally speaking, token gifts and benefits include:

a) free or subsidised meals, beverages or refreshments provided in conjunction with:
   i) the discussion of official business
   ii) council work related events such as training, education sessions, workshops
   iii) conferences
   iv) council functions or events
   v) social functions organised by groups, such as council committees and community organisations
b) invitations to and attendance at local social, cultural or sporting events
c) gifts of single bottles of reasonably priced alcohol to individual council officials at end of year functions, public occasions or in recognition of work done (such as providing a lecture/training session/address)
d) ties, scarves, coasters, tie pins, diaries, chocolates or flowers
e) prizes of token value.

Gifts and benefits of value

5.4 Notwithstanding clause 5.3, gifts and benefits that have more than a token value include, but are not limited to, tickets to major sporting events (such as state or international cricket matches or matches in other national sporting codes (including the NRL, AFL, FFA, NBL)), corporate hospitality at a corporate facility at major sporting events, discounted products for personal use, the frequent use of facilities such as gyms, use of holiday homes, free or discounted travel.

How are offers of gifts and benefits to be dealt with?

5.5 You must not:

a) seek or accept a bribe or other improper inducement
b) seek gifts or benefits of any kind
c) accept any gift or benefit that may create a sense of obligation on your part or may be perceived to be intended or likely to influence you in carrying out your public duty

d) accept any gift or benefit of more than token value
e) accept an offer of cash or a cash-like gift, regardless of the amount.

5.6 For the purposes of clause 5.5(e), a “cash-like gift” includes but is not limited to gift vouchers, credit cards, debit cards with credit on them, prepayments such as phone or internal credit, memberships or entitlements to discounts.

5.7 Where you receive a gift or benefit of more than token value that cannot reasonably be refused or returned, this must be disclosed promptly to your supervisor, the Mayor or the general manager. The recipient, supervisor, Mayor or general manager must ensure that any gifts or benefits of more than token value that are received are recorded in a Gifts Register. The gift or benefit must be surrendered to council, unless the nature of the gift or benefit makes this impractical.

Improper and undue influence

5.8 You must not use your position to influence other council officials in the performance of their public or professional duties to obtain a private benefit for yourself or for somebody else. A councillor will not be in breach of this clause where they seek to influence other council officials through the appropriate exercise of their representative functions.

5.9 You must not take advantage (or seek to take advantage) of your status or position with or of functions you perform for council in order to obtain a private benefit for yourself or for any other person or body.

PART 6 RELATIONSHIP BETWEEN COUNCIL OFFICIALS

Obligations of councillors and administrators

6.1 Each council is a body politic. The councillors or administrator/s are the governing body of the council. The governing body has the responsibility of directing and controlling the affairs of the council in accordance with the Act and is responsible for policy determinations, for example, those relating to workforce policy.

6.2 Councillors or administrators must not:

a) direct council staff other than by giving appropriate direction to the general manager in the performance of council's functions by way of council or committee resolution, or by the Mayor or administrator exercising their power under section 226 of the Act *(section 352)*
b) in any public or private forum, direct or influence or attempt to direct or influence, any other member of the staff of the council or a delegate of the council in the exercise of the functions of the member or delegate *(Schedule 6A of the Act)*
c) contact a member of the staff of the council on council related business unless in accordance with the policy and procedures governing the interaction of councillors and council staff that have been authorised by the council and the general manager
d) contact or issue instructions to any of council's contractors or tenderers, including council's legal advisers, unless by the Mayor or administrator exercising their power under section 226 of the Act. This does not apply to council's external auditors or the Chair of council's audit committee who may be provided with any information by individual councillors reasonably necessary for the external auditor or audit committee to effectively perform their functions.

Obligations of staff

6.3 The general manager is responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation of the decisions of the council without delay.

6.4 Members of staff of council must:

a) give their attention to the business of council while on duty
b) ensure that their work is carried out efficiently, economically and effectively
c) carry out lawful directions given by any person having authority to give such directions
d) give effect to the lawful decisions, policies, and procedures of the council, whether or not the staff member agrees with or approves of them
e) ensure that any participation in political activities outside the service of the council does not conflict with the performance of their official duties.

Obligations during meetings

6.5 You must act in accordance with council's Code of Meeting Practice, if council has adopted one, and the *Local Government (General) Regulation 2005* during council and committee meetings.

6.6 You must show respect to the chair, other council officials and any members of the public present during council and committee meetings or other formal proceedings of the council.

Inappropriate interactions

6.7 You must not engage in any of the following inappropriate interactions:

a) Councillors and administrators approaching staff and staff organisations to discuss individual or operational staff matters other than broader workforce policy issues.
b) Council staff approaching councillors and administrators to discuss individual or operational staff matters other than broader workforce policy issues.
c) Council staff refusing to give information that is available to other councillors to a particular councillor.
d) Councillors and administrators who have lodged a development application with council, discussing the matter with council staff in staff-only areas of the council.
e) Councillors and administrators being overbearing or threatening to council staff.
f) Councillors and administrators making personal attacks on council staff in a public forum.
g) Councillors and administrators directing or pressuring council staff in the performance of their work, or recommendations they should make.
h) Council staff providing ad hoc advice to councillors and administrators without recording or documenting the interaction as they would if the advice was provided to a member of the community.
i) Council staff meeting with applicants or objectors alone AND outside office hours to discuss applications or proposals.
j) Councillors attending on-site inspection meetings with lawyers and/or consultants engaged by council associated with current or proposed legal proceedings unless permitted to do so by council's general manager or, in the case of the Mayor or administrator, exercising their power under section 226 of the Act.

PART 7 ACCESS TO INFORMATION AND COUNCIL RESOURCES

Councillor and administrator access to information

7.1 The general manager and public officer are responsible for ensuring that members of the public, councillors and administrators can gain access to the documents available under the *Government Information (Public Access) Act 2009*.

7.2 The general manager must provide councillors and administrators with information sufficient to enable them to carry out their civic office functions.

7.3 Members of staff of council must provide full and timely information to councillors and administrators sufficient to enable them to carry out their civic office functions and in accordance with council procedures.

7.4 Members of staff of council who provide any information to a particular councillor in the performance of their civic duties must also make it available to any other councillor who requests it and in accordance with council procedures.

7.5 Councillors and administrators who have a private (as distinct from civic) interest in a document of council have the same rights of access as any member of the public.

Councillors and administrators to properly examine and consider information

7.6 Councillors and administrators must properly examine and consider all the information provided to them relating to matters that they are dealing with to enable them to make a decision on the matter in accordance with council's charter.

Refusal of access to documents

7.7 Where the general manager and public officer determine to refuse access to a document sought by a councillor or administrator they must act reasonably. In reaching this decision they must take into account whether or not the document sought is required for the councillor or administrator to perform their civic duty (see clause 7.2). The general manager or public officer must state the reasons for the decision if access is refused.

Use of certain council information

7.8 In regard to information obtained in your capacity as a council official, you must:

a) only access council information needed for council business
b) not use that council information for private purposes
c) not seek or obtain, either directly or indirectly, any financial benefit or other improper advantage for yourself, or any other person or body, from any information to which you have by virtue of your office or position with council
d) only release council information in accordance with established council policies and procedures and in compliance with relevant legislation.

Use and security of confidential information

7.9 You must maintain the integrity and security of confidential documents or information in your possession, or for which you are responsible.

7.10 In addition to your general obligations relating to the use of council information, you must:

a) protect confidential information
b) only release confidential information if you have authority to do so
c) only use confidential information for the purpose it is intended to be used
d) not use confidential information gained through your official position for the purpose of securing a private benefit for yourself or for any other person
e) not use confidential information with the intention to cause harm or detriment to your council or any other person or body
f) not disclose any information discussed during a confidential session of a council meeting.

Personal information

7.11 When dealing with personal information you must comply with:

a) the Privacy and Personal Information Protection Act 1998
b) the Health Records and Information Privacy Act 2002
c) the Information Protection Principles and Health Privacy Principles
d) council's privacy management plan
e) the Privacy Code of Practice for Local Government

Use of council resources

7.12 You must use council resources ethically, effectively, efficiently and carefully in the course of your official duties, and must not use them for private purposes (except when supplied as part of a contract of employment) unless this use is lawfully authorised and proper payment is made where appropriate.

7.13 Union delegates and consultative committee members may have reasonable access to council resources for the purposes of carrying out their industrial responsibilities, including but not limited to:

a) the representation of members with respect to disciplinary matters
b) the representation of employees with respect to grievances and disputes
c) functions associated with the role of the local consultative committee.

7.14 You must be scrupulous in your use of council property, including intellectual property, official services and facilities, and must not permit their misuse by any other person or body.

7.15 You must avoid any action or situation that could create the appearance that council property, official services or public facilities are being improperly used for your benefit or the benefit of any other person or body.

7.16 You must not use council resources, property or facilities for the purpose of assisting your election campaign or the election campaign of others unless the resources, property or facilities are otherwise available for use or hire by the public and any publicly advertised fee is paid for use of the resources, property or facility.

7.17 You must not use council letterhead, council crests and other information that could give the appearance it is official council material for:

a) the purpose of assisting your election campaign or the election campaign of others, or
b) for other non-official purposes.

7.18 You must not convert any property of the council to your own use unless properly authorised.

7.19 You must not use council's computer resources to search for, access, download or communicate any material of an offensive, obscene, pornographic, threatening, abusive or defamatory nature.

Councillor access to council buildings

7.20 Councillors and administrators are entitled to have access to the council chamber, committee room, mayor's office (subject to availability), councillors' rooms, and public areas of council's buildings during normal business hours and for meetings. Councillors and administrators needing access to these facilities at other times must obtain authority from the general manager.

7.21 Councillors and administrators must not enter staff-only areas of council buildings without the approval of the general manager (or delegate) or as provided in the procedures governing the interaction of councillors and council staff.

7.22 Councillors and administrators must ensure that when they are within a staff area they avoid giving rise to the appearance that they may improperly influence council staff decisions.

PART 8 MAINTAINING THE INTEGRITY OF THIS CODE

8.1 You must not conduct yourself in a manner that is likely to undermine confidence in the integrity of this code or its administration.

Complaints made for an improper purpose

8.2 You must not make a complaint or cause a complaint to be made under this code for an improper purpose.

8.3 For the purposes of clause 8.2, a complaint is made for an improper purpose where it is trivial, frivolous, vexatious or not made in good faith, or where it otherwise lacks merit and has been made substantially for one or more of the following purposes:

a) to intimidate or harass another council official
b) to damage another council official's reputation
c) to obtain a political advantage
d) to influence a council official in the exercise of their official functions or to prevent or disrupt the exercise of those functions
e) to influence the council in the exercise of its functions or to prevent or disrupt the exercise of those functions
f) to avoid disciplinary action under this code
g) to take reprisal action against a person for making a complaint under this code except as may be otherwise specifically permitted under this code
h) to take reprisal action against a person for exercising a function prescribed under the procedures for the administration of this code except as may be otherwise specifically permitted under this code
i) to prevent or disrupt the effective administration of this code.

Detrimental action

8.4 You must not take detrimental action or cause detrimental action to be taken against a person substantially in reprisal for a complaint they have made under this code except as may be otherwise specifically permitted under this code.

8.5 You must not take detrimental action or cause detrimental action to be taken against a person substantially in reprisal for any function they have exercised under this code except as may be otherwise specifically permitted under this code.

8.6 For the purposes of clauses 8.4 and 8.5 detrimental action is an action causing, comprising or involving any of the following:

a) injury, damage or loss
b) intimidation or harassment
c) discrimination, disadvantage or adverse treatment in relation to employment
d) dismissal from, or prejudice in, employment
e) disciplinary proceedings.

Compliance with requirements under this code

8.7 You must not engage in conduct that is calculated to impede or disrupt the consideration of a matter under this code.

8.8 You must comply with a reasonable and lawful request made by a person exercising a function under this code.

8.9 You must comply with a practice ruling made by the Division of Local Government.

8.10 Where you are a councillor or the general manager, you must comply with any council resolution requiring you to take action as a result of a breach of this code.

Disclosure of information about the consideration of a matter under this code

8.11 You must report breaches of this code in accordance with the reporting requirements under this code.

8.12 You must not make allegations of suspected breaches of this code at council meetings or in other public forums.

8.13 You must not disclose information about the consideration of a matter under this code except for the purposes of seeking legal advice unless the disclosure is otherwise permitted under this code.

Complaints alleging a breach of this part

8.14 Complaints alleging a breach of this Part (Part 8) by a councillor, the general manager or an administrator are to be made to the Division of Local Government.

8.15 Complaints alleging a breach of this Part by other council officials are to be made to the general manager.

PART 9 DEFINITIONS

In the Model Code of Conduct the following definitions apply:

the Act	the *Local Government Act 1993*
act of disorder	see the definition in clause 256 of the Local Government (General) Regulation 2005
administrator	an administrator of a council appointed under the Act other than an administrator appointed under section 66
Chief Executive	Chief Executive of the Division of Local Government, Department of Premier and Cabinet
committee	a council committee
conflict of interests	a conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty
council committee	a committee established by resolution of council
"council committee member"	a person other than a councillor or member of staff of a council who is a member of a council committee
council official	includes councillors, members of staff of council, administrators, council committee members, conduct reviewers and delegates of council
councillor	a person elected or appointed to civic office and includes a Mayor
delegate of council	a person (other than a councillor or member of staff of a council) or body, and the individual members of that body, to whom a function of the council is delegated
designated person	see the definition in section 441 of the Act
election campaign	includes council, State and Federal election campaigns
personal information	information or an opinion about a person whose identity is apparent, or can be ascertained from the information or opinion

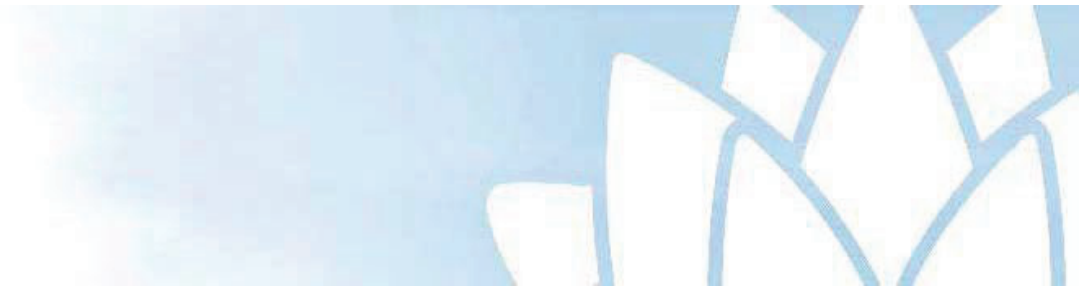
the Regulation	the Local Government (General) Regulation 2005

The term “you” used in the Model Code of Conduct refers to council officials.

The phrase “this code” used in the Model Code of Conduct refers also to the procedures for the administration of the Model Code of Conduct prescribed under the Local Government (General) Regulation 2005.

Premier & Cabinet
Division of Local Government

The Closure of Council Meetings to the Public



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INTRODUCTION

Meetings are the key forum in which councils make strategic and policy decisions on behalf of their communities. As elected institutions, councils are ultimately accountable to their communities for their decisions. It is therefore important that council meetings are open and can be attended by members of the community.

However, there will be occasions where councils are required to consider information which, by its nature, is confidential and ought not to be publicly disclosed. The *Local Government Act 1993* (the Act) recognises that on such occasions, the public interest in protecting confidential information will outweigh the public interest in ensuring accountability through open meetings.

This publication offers practical guidance on how councils can appropriately weigh these competing public interests and ensure that they comply with their obligations under the Act when closing meetings to the public. They do this by addressing commonly asked questions that have been raised with the Division about the closure of council meetings and provide best practice examples.

This publication is issued under section 10B(5) of the Act. It therefore constitutes a guideline that councils are required to consider when closing meetings to the public.

GUIDELINES

1. Who can attend Council or Committee meetings?

Any person can attend a council meeting or the meeting of a committee of which all the members are councillors (a committee of councillors) (see section 10 of the Act).

However, members of the public are not entitled to attend other types of meetings (eg committees comprising of councillors and non-councillors or informal briefing meetings). Councils can make these meetings open to the public if they choose to do so.

2. What are the grounds on which a council can close its meeting to the public?

Despite the right of members of the public to attend meetings of a council or a committee of councillors, the council or the committee may still close to the public, parts of the meeting that involve the discussion or receipt of any of the following matters or information:

- personnel matters concerning particular individuals (other than councillors)
- the personal hardship of any resident or ratepayer
- information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business
- commercial information of a confidential nature that would, if disclosed:
  - prejudice the commercial position of the person who supplied it, or
  - confer a commercial advantage on a competitor of the council, or
  - reveal a trade secret
- information that would, if disclosed, prejudice the maintenance of law
- matters affecting the security of the council, councillors, council staff or council property
- advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege
- information concerning the nature and location of a place or an item of Aboriginal significance on community land
- alleged contraventions of the council's code of conduct.

(see section 10A(2))

In order to close a meeting to the public, a council or committee must be satisfied that the matter or information being discussed or received falls within at least one of the above grounds.

It should be noted that the existence of any of these grounds does not place any obligation on a council to close its meeting to consider a matter or information, (though in many cases, it would be appropriate for it to do so). It simply permits a council to do so. As will be discussed below, in the case of most of these grounds, the council will also need to demonstrate why it is in the public interest to close the meeting to discuss the matter or information.

3. When can a council meeting be closed?

A council or committee of councillors can close its meeting to the public without further discussion to consider three types of matters; personnel matters concerning particular individuals, matters involving the personal hardship of a resident or ratepayer or matters that would disclose a trade secret.

However, in the case of the other grounds listed in Part 2 above, the existence of these grounds on their own is not enough to allow the closure of a meeting. In such cases, the council or committee must also be satisfied that discussion of the matter in an open meeting would, **on balance, be contrary to the public interest** (see section 10B(1)(b).

This in effect creates a two step process:

- first, the council must be satisfied that the matter falls within at least one of the grounds listed in Part 2
- second, the council must be satisfied that if the matter does not fall within one of the 3 grounds set out in this Part, that discussion of the matter in an open meeting would, on balance, be contrary to the public interest.

Example

To illustrate, consider the example of a proposal to sell off council-owned land by auction. The council would not be able to close the meeting to consider a proposal to sell the land or the reasons for the sale. These are not matters that fall within the grounds listed above.

However, where the discussion concerns the valuation of the land and the reserve price, this would potentially fall within one of the grounds for closure because the disclosure of a reserve price could confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business.

The existence of these grounds is not on its own enough to permit the closure of the meeting to the public. The council also needs to demonstrate why it would, on balance, be in the public interest for it to do so.

In such circumstances, it could be argued that the disclosure of the reserve price would, on balance be contrary to the public interest because it would put the council at a competitive disadvantage in its negotiations preventing it from achieving a 'best value for money' outcome for the community.

4. What matters should not be considered when determining the public interest?

The Act says that when determining whether the discussion of a matter in an open meeting would be contrary to the public interest, it is irrelevant that:

- a person may misinterpret or misunderstand the discussion, or
- the discussion of the matter may:
  - cause embarrassment to the council or committee concerned, or to councillors or to employees of the council
  - cause a loss of confidence in the council or committee.

(see section 10B(4))

5. When can a meeting be closed to consider legal advice?

The Act says that a meeting is not to be closed for the receipt and consideration of information or advice concerning litigation or the subject of legal professional privilege unless the advice concerns legal matters that:

- are substantial issues relating to a matter in which the council or committee is involved, **and**
- are clearly identified in the advice, **and**
- are fully discussed in that advice.

(See section 10B(2))

6. Can a meeting be closed to consider a conduct reviewer's report?

Yes. The Act specifically allows a meeting to be closed to the public to consider alleged contraventions of a council's code of conduct (see section 10A(2)(i)). Clause 8.45 of the prescribed *Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW* state that a council is to close its meeting to the public to consider a final investigation report where

it is permitted to do so under section 10A. However, in closing a meeting to consider a conduct reviewer's report, the council is still required to apply the public interest test under section 10B(1)(b).

7. Do members of the public have any say on the closure of council meetings?

Yes. A council, or a committee of a council, may allow members of the public to make representations to or at a meeting, before any part of the meeting is closed to the public, as to whether that part of the meeting should be closed (see section 10A(4)).

8. How long can a council meeting remain closed?

The Act requires councils to close their meeting for only so much of the discussion as is necessary to preserve the relevant confidentiality, privilege or security being protected.

(See section 10B(1)(a))

Example

In the proposal to auction council-owned land, the relevant confidentiality in relation to the proposed sale is limited to the valuation and the reserve price information.

As such, discussion of the reasons justifying the sale could occur while the meeting was open. However, when the discussion turned to the valuation and reserve price, the meeting may then be closed to the public.

9. What notice must be given of matters that are proposed to be considered in a closed meeting?

Where the general manager is of the opinion that the agenda includes the receipt of information or discussion of matters that are likely to take place when the meeting is closed to the public, the agenda for the meeting must indicate that the relevant item of business is of such a nature (but must not give details of that item) (see section 9(2A)).

It should be noted that the ultimate decision to close the meeting rests with the council. This means that the council is not under any obligation to close the meeting where the general manager identifies a matter in the agenda as being one that the council may close its meeting to discuss.

Conversely, where a matter has not been identified in the agenda for the meeting as one that is likely to be considered when the meeting is closed, the

council can still close the meeting to consider the item. However, it can only do so if:

- it becomes apparent during the discussion of a particular matter that the matter is one for which any of the grounds for closure exist (see above), **and**
- the council or committee, after considering any representations made by members of the public, resolves that further discussion of the matter:
  - should not be deferred (because of the urgency of the matter), **and**
  - should take place in a part of the meeting that is closed to the public.

(See section 10C)

Example

In the proposed auction of council-owned land case, the agenda for the meeting would identify the matter as one that is likely to be considered when the meeting is closed.

A best practice approach would be for the valuation and reserve price information to be included in a confidential attachment to the report that is not made available to the public. This would enable the report, including the reasons justifying the sale to be made public prior to the meeting and at the same time preserve the confidentiality of the valuation and reserve price information.

10. What must be recorded in the minutes about the decision to close part of a council meeting?

The Act requires that the grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting. The grounds must specify the following:

- the relevant grounds on which the meeting is being closed
- the matter that is to be discussed during the closed part of the meeting
- the reasons why the part of the meeting is being closed, including an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest (unless the matter relates to a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret).

(See section 10D)

Example

The decision to close the meeting to consider the auction of a parcel of council-owned land may be recorded as follows:

RESOLVED: Councillor Borg/Lee

1. *That the meeting is closed during the discussion of the matter "Item 1 - Sale of 393 Smith Street, Jonestown by public auction" in accordance with section 10A(2)(c) on the basis that:*

Item 1 involves the receipt and discussion of information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business.

On balance, the public interest in preserving the confidentiality of information about the reserve price outweighs the public interest in maintaining openness and transparency in council decision-making because the disclosure of this information would put the Council at a competitive disadvantage in its negotiations with a prospective purchaser, preventing it from achieving a 'best value for money' outcome for the community.

11. Must a decision made during a closed part of a meeting be made public?

It is important to remember that the purpose of section 10A is to protect the confidentiality or privilege of the information upon which council relies. It does not allow councils to make secret decisions.

This intention is reflected in clause 253 of the *Local Government (General) Regulation 2005* (the Regulation). This requires that where a council passes a resolution during a meeting or a part of a meeting that is closed to the public, the chairperson must make the resolution public as soon as practicable after the meeting or the relevant part of the meeting has ended.

12. Do resolutions made during a closed part of a meeting have to be recorded in the minutes?

Yes. Under clause 254 of the Regulation, details of each motion moved at a council meeting (including those moved when the meeting is closed to the public) must be recorded in the minutes as well as whether the motion is passed or lost. Once passed, a motion becomes a resolution.

This means that when framing a motion relating to a matter being considered in a closed part of a meeting, councils need to be careful to ensure that the wording of the motion does not disclose any confidential information.

However, the resolution should be sufficiently clearly framed to enable the public to identify the decision that has been made by the council. A resolution to "adopt the recommendation contained in the staff report" for instance does not meet the requisite standards of accountability expected of council decision making.

In addition, under clause 243(3), a recommendation made in a report of a council employee is, so far as adopted by the council, a resolution of the council. As a result, where a council resolves to accept a recommendation contained in a report of a council employee, that recommendation is deemed to be the resolution and must be made public as soon a practicable under clause 253 and recorded in the minutes of the meeting under clause 254.

This means that when framing a recommendation relating to a matter being considered in a closed part of a meeting, council staff need to be careful to ensure that the wording of the recommendation does not disclose any confidential information.

Example

The motion or staff recommendation on the proposed auction of council-owned land could be worded as follows:

1. *That Council proceed with the sale of 393 Smith Street, Jonestown* ***(NB clearly indentify the parcel of land)*** *by way of public auction.*
2. *That the reserve price be set at the amount specified in the confidential attachment to the report.*

13. When can members of the public access confidential business papers?

The business papers and minutes of council meetings are deemed to be open access information under the *Government Information (Public Access) Act 2009* (the GIPA Act) and the *Government Information (Public Access) Regulation 2009*. This means they must be publicly available for inspection by anyone free of charge, including on the council's website.

However, where a matter is considered in a part of a meeting that is closed to the public, only the resolutions and recommendations of the meeting are open access information.

This does not necessarily mean that reports and business papers cannot be otherwise accessed under the GIPA Act. Where a council receives a request for access to a confidential business paper under the GIPA Act it must comply with the provisions of that Act. This means that it must be decided whether there is an overriding public interest against disclosure which outweighs the public interest in favour of disclosure. Further information about council obligations under the GIPA Act is available on the Office of the Information Commissioner's website www.oic.nsw.gov.au.

Example

If the council received a request for access to the confidential valuation and reserve price information after the sale of the land has been completed, the reason for confidentiality (i.e. putting council at a competitive disadvantage in its negotiations with a prospective purchaser) no longer exists. Similarly, the relevant public interest consideration against disclosure for the purposes of the GIPA Act (see part 4 of the table to section 14 of the Act) no longer exists. In such circumstances, the council may be obliged to provide access to the report.

14. What obligations do council officials have in relation to information about matters that were considered in a part of a meeting that was closed to the public?

Under the Model Code of Conduct for Local Councils in NSW, all council officials have an obligation to maintain the integrity and security of confidential documents or information in their possession, including confidential business papers. In particular, all council officials must:

- protect confidential information
- only release confidential information if they have authority to do so
- only use confidential information for the purpose it is intended to be used
- not use confidential information for the purpose of securing a private benefit for themselves or for any other person
- not use confidential information with the intention to cause harm or detriment to the council or any other person or body
- not disclose any information discussed during a confidential session of a council meeting.

It is also an offence under section 664(1A) of the Act to disclose information about a matter that was considered in a meeting that was closed to the public under section 10A.

15. What happens if a council official inappropriately discloses information about a matter that was considered in a part of a meeting that was closed to the public?

Where a council official fails to comply with their obligations in relation to the protection of confidential information they may face disciplinary action. This might include termination of employment for council staff or suspension or disqualification from civic office for a councillor.

A council official may also face prosecution under section 664 of the Act if they disclose information about a matter that was considered in a meeting that was closed to the public under section 10A.

The inappropriate disclosure of such information can also have broader ramifications for the trust and constructive working relationships between staff and councillors so necessary to the effective functioning of a council.

MEETING OF COUNCIL

Held in the Council Chambers
Canada Bay Civic Centre
1a Marlborough Street, Drummoyne
on Tuesday, 4 February, 2014 commencing at 6.05pm.

MINUTES

Present:	Cr Tsirekas (Mayor) Cr Tyrrell (Deputy Mayor) Cr Ahmed Cr Cestar Cr Fasanella Cr Kenzler Cr McCaffrey Cr Megna Cr O'Connell
In attendance:	Mr Gary Sawyer (General Manager) Mr B Cook Ms L Miscamble Mr T McNamara Mr J Osland Ms N Butler Mr B Pigott Mrs J Kalouche

TABLE OF CONTENTS

Council Meeting
04 February 2014

General Manager's Reports

WELCOME TO COUNTRY

The City of Canada Bay acknowledges the Wangal clan, one of the 29 tribes of the Eora nation and the traditional custodians of this land.

The City's Council pays respect to Elders past and present and extends this respect to all Aboriginal people living in or visiting the City of Canada Bay.

APOLOGIES

Nil

DECLARATIONS OF PECUNIARY INTEREST

Nil

DECLARATIONS OF NON-PECUNIARY INTEREST

MM-1 – Cr O'Connell – employed by Transport NSW.
Item 1 – Mayor Tsirekas – applicant former member of Council's Executive team.

CONFIRMATION OF MINUTES

Council Meeting – 10 December 2013

M- 4008 RESOLVED
(Crs Tyrrell/Kenzler)

THAT the minutes of the Council Meeting of 10 December 2013 be confirmed with the following amendment:

Item 16 – Moved Cr Megna, seconded Cr O'Connell.

M- 4009 RESOLVED
(Crs Megna/McCaffrey)

THAT Standing Orders be varied to allow the speakers to be heard and the items to be dealt with.

Item 9 was considered out of agenda sequence but is recorded in correct agenda sequence for the sake of clarity.

COUNCIL IN CLOSED SESSION

ITEM-12 PROPOSED DEVELOPMENT AT 3-9 MARQUET STREET AND 4 MARY STREET, RHODES BY HOSSA GROUP

M- 4027 RESOLVED
(Crs Kenzler/Tyrrell)

1. THAT Council decline the offer by Hossa dated 24 January 2014 to enter into a Voluntary Planning Agreement for the land referred to as 3-9 Marquet Street and 4 Mary Street, Rhodes.

2. THAT Council notes that in accordance with current practice the landowners of 3-9 Marquet Street and 4 Mary Street, Rhodes (preferably on a consolidated basis) or 1 Marquet Street, 3-9 Marquet Street and 4 Mary Street, Rhodes (preferably on a consolidated basis) have the opportunity to discuss and submit a Planning Proposal in the future and that any such Planning Proposal for those sites must not overshadow the Town Square during the critical 12 noon to 2.00pm Winter Solstice period and hence must be within height and Floor Space Ratio acceptable to Council.

M- 4028 RESOLVED
(Crs Tyrrell/Fasanella)

THAT the Council revert back to Open Session.

At 8.45pm the Council in Closed Session returned to Open Session.

M- 4029 RESOLVED
(Crs Kenzler/Tyrrell)

THAT the item discussed in Closed Session be endorsed.

THE MEETING CLOSED AT 8.49PM.

CHAIRMAN

FW: Workshop

From: Neil Kenzler <neil.kenzler@canadabay.nsw.gov.au>
To: Angelo Tsirekas <angelo.tsirekas@canadabay.nsw.gov.au>
Date: Thu, 01 May 2014 06:31:45 +1000

You were supposed to be cc in the first email.

From: Neil Kenzler
Sent: Thursday, 1 May 2014 6:31 AM
To: Gary Sawyer; Tony McNamara; Bruce Cook; John Osland; Lisa Miscamble
Subject: Workshop

Rhodes – Billberga
The preferred proposal looked good but the fundamental issue is the heliostat. We have overshadowing of the town square. Something we have said is not acceptable. They have a building which overshadows so hence the proposal is unacceptable. They have proposed the heliostat to overcome the overshadowing. So the fundamental issue for us is how do we ensure the heliostat for the life of the building.

We do not own the heliostat and do not wish to do so. That is the fundamental issue and unless that is resolved then the 'preferred' proposal is not acceptable.

I suggest we communicate that aspect before we all race off and do other things with the preferred proposal.

Rhodes – Hossa/B1
There was nothing in that letter that gave me any comfort.

My issue is this – VPAs are great but have tremendous risk. We have been fortunate (and/or we have managed the VPA process well to date). However, when I recall the VPAs we have done they have almost all been done with the owner and builder (happy to be corrected – but if not all certainly the majority). Hossa have, I am told, made it clear that they are not owner/builders but 'speculators' (ie get DA approved and sell). Hence the risk for us is much greater.

Hossa are, as expected, seeking to maximise their commercial position. However, it is us taking the risk.

With Billberga's heliostat, would the party to whom Hossa sell the DA wish to do the same? I would think yes, as the cost of the heliostat would be well and truly covered by fattening the building for 30 storeys.

My view, is that we need to tell Hossa (as I recommended we do lend of last year), thanks but no thanks.

We should not be seduced by the VPA money.

Strathfield Triangle
At this stage, I have not read the judgement or received any advice re options for appeal. I only have Bruce's presentation and a subsequent conversation with Bruce.

That said, what are the implications of the judgement (if it was to stand)?

My thoughts – the DCP that we sent to Planning is now flawed and should be withdrawn. Additionally, the financial risk in the DCP has changed as the value from the sale of the former Chapman St is not there. The proposed park is compromised.

If I am correct (in part or full), then should we re-open the road (that is as a road)?

Five Dock

I was perhaps a little disappointed we had not progressed the purchase of the properties in Five Dock a little further. I am supportive of the concept for the access ways – but I am not supportive of an access way of 14 metres (or whatever) when only 3 metres (or whatever) is required and having large sums of funds trapped in unproductive assets. I cannot justify such largesse (or waste of scarce public funds).

Neil Kenzler
Councillor, City of Canada Bay
www.canadabay.nsw.gov.au

ITEM **STATION PRECINCT, RHODES - PLANNING PROPOSAL, MASTER PLAN AND VOLUNTARY PLANNING AGREEMENTS**

Department **Planning and Environment**

Author Initials: TMc

REASON FOR CONFIDENTIALITY

In accordance with Section 10A(2)(d) of the Local Government Act 1993, the Council is permitted to close the meeting to the public for business relating to the following: -

(d) commercial information of a confidential nature

EXECUTIVE SUMMARY

Since the Gateway Determination for Station Precinct in December 2013 a number of major changes have occurred that required amendments to the Planning Proposal and Master Plan for Station Precinct. These include plan amendments by Billbergia, due to their inability to purchase 16 Walker Street as reported to Council on 2 September 2014, and the inclusion of the 'Hossa' site and No 1 Marquet site in the proposal. This report seeks Council's endorsement for these changes and the withdrawal of the previous Planning Proposal (December 2013) from the Department of Planning and Environment.

The changes have also necessitated the preparation of three VPAs for Station Precinct which will deliver public benefit to the community and includes a Recreation Centre, Public Car Park, Child Care Centre and Public Domain improvements around the Station. The actual rates have been negotiated with each of the parties with the assistance of Council's valuer and are documented in the report. The total estimated VPA contributions for the three VPAs are in excess of $60m. In relation to the Billbergia's estimated contribution of approximately $54m, the valuer concluded that 'we would view this offer as a reasonable outcome and is the result of an extended period of negotiation'.

In addition, the Renewing Rhodes Contributions Framework (RRCF) will generate approximately $10m, which can be used to fund the public domain works and other public infrastructure projects on the Rhodes Peninsula.

The report also details the safeguards which are included in the Billbergia VPA to ensure the Recreation Centre, Child Care Centre and Car Park are built to Council's specifications and standards as well as to a fixed cost to minimise any risk to Council.

It is recommended that Council supports the amendments to the Master Plan and Planning Proposal for the submission to the Department of Planning and

Environment for Gateway Determination and the withdrawal of the previous Planning Proposal. It is also recommended that Council accepts the proposed VPA rates and authorises the General Manager to execute the VPAs prior to the amended Planning Proposal being forwarded to the Department. If a favourable Gateway Determination is given for the Planning Proposal and associated documentation it will be placed on exhibition and reported to Council for further consideration.

STRATEGIC CONNECTION

This report supports FuturesPlan20 Outcome area:

My City has attractive streets, village centres and public spaces,
My City has a range of housing options.

This report also relates to the Canada Bay Local Planning Strategy and the Canada Bay Local Environmental Plan 2013, (CBLEP).

REPORT

Background

In December of 2013, a Gateway Determination was issued by the then Department of Planning and Infrastructure to amend the CBLEP for the Station Precinct, Rhodes. Early in 2014 Billbergia approached Council in relation to amending their plans. At the same time agreement was reached between the Hossa Group and Council on their plans for properties in Marquet and Mary Streets. Council subsequently agreed to review the Planning Proposal which had been submitted to the Department.

The last eight months have seen amended plans being developed including a Master Plan which has underpinned the preparation of the Planning Proposal for the Station Precinct. The Master Plan and Planning Proposal have been prepared by Council's Urban Design Consultant, Conybeare Morrison. Council has also engaged valuation, legal, probity, transport and specialist Recreation Centre design consultants to provide expert advice and peer review plans.

A report on the amended Planning Proposal for the Station Precinct was considered by Council on 2 September 2014. Council resolved:

1. *THAT the content of the report is noted.*

2. *THAT the 'Principles for Voluntary Planning Agreements in Station Precinct, Rhodes' dated August 2014 be endorsed.*

3. *THAT the Voluntary Planning Agreements are executed before the revised Planning Proposal is forwarded to the Department for Gateway Determination.*

4. *THAT the revised Planning Proposal be submitted to the Minister for Planning and Environment with a request for a Gateway Determination.*

5. *THAT authority be delegated to the General Manager to make minor variations to the Planning Proposal following receipt of a Gateway Determination.*

6. *THAT the revised Planning Proposal be approved for public authority consultation and public exhibition in accordance with a Gateway Determination.*

Further work has been undertaken over the last couple of months, particularly in relation to the development of the voluntary planning agreements (VPAs) which will accompany the Planning Proposal. The VPAs will deliver public benefit to the community including a Recreation Centre, Car Park and Childcare Centre.

The B1 Group which has entered into an arrangement with the Hossa Group to develop 3-9 Marquet St and 4 Mary Street, has managed to purchase 1 Mary Street which is a good planning outcome as all sites on the south western corner of the Station Precinct can now be consolidated. It is therefore recommended that 1 Mary Street be included in the Planning Proposal.

Discussion

The purpose of this report is to:

1. Seek Council's endorsement for the inclusion of No 1 Marquet St, Rhodes as the B1 Group has been able to purchase the site since the Council meeting of 2 September, 2014. This results in amendments to the Planning Proposal and Master Plan.

2. Authorise the withdrawal of the previous Planning Proposal from the Department of Planning and Environment, which was given Gateway Approval on 23 December 2013 but has never been publicly exhibited;

3. Provide Council with the proposed VPA rates and the basis on which they have been derived, the estimated cost of the Recreation Centre, Car park and Child Care Centre and the safeguards that have been put in place to ensure it is fully funded by VPA contributions;

4. Provide Council with the estimated costs of the Public Domain works and the funding sources (VPA and Renewing Rhodes Contributions Framework (RRCF) contributions); and

5. For Council to give authority to the General Manager to execute the VPAs prior to the amended Planning Proposal being forwarded to the

Department for Gateway Determination, in accordance with Council's resolution of 2 September 2014.

Inclusion of No 1 Marquet St, Rhodes in the Planning Proposal and Master Plan

The B1 Group has purchased No 1 Marquet Street, Rhodes, which enables the site to be amalgamated with 3-9 Marquet Street and 4 Mary Street, as foreshadowed in the Station Precinct Master Plan. B1 Group has requested that the site be included in the Planning Proposal.

Council's Urban Design Consultant, Conybeare Morrison has advised that this would be a preferable urban design outcome for the Station Precinct and has made modifications to the Planning Proposal and Master Plan that accommodates the inclusion of No 1 Marquet Street. These include the following:

- amending the proposed height and FSR maps to include 1 Marquet Street;
- adopting the same height and floor space ratio (FSR) as 3-9 Marquet Street and 4 Mary Street i.e. height of 99 metres (30 storeys) and FSR of 6.5:1;
- providing a new tower podium setback of 3m to Mary Street; and
- making minor editorial changes to include 1 Marquet Street.

The revised Planning Proposal and Master Plan are provided as Attachments 1 and 2 of this report.

The B1 Group intends to 'move' the 'Tony Owen' designed building to the south with appropriate setbacks to Mary Street and accommodate the additional FSR 6.5:1 across the combined B1/Hossa site within the permissible height of 99m (30 storeys). This will achieve a better design outcome and generate approximately $1.5 million dollars in VPA and Renewing Rhodes Contribution Framework (RRCF) contributions. However, the proposed uplift on No 1 Marquet Street will only be possible if the site is developed in conjunction with the Hossa site. This will be achieved by clauses included in the VPA as advised by Lindsay Taylor Lawyers.

As a consequence of the inclusion of No 1 Marquet St and the scope of the amendments endorsed by Council on 2 September 2014, the Planning Proposal, which was given Gateway Approval on 23 December 2013, needs to be formally withdrawn. A resolution to this effect has been included in this report.

Proposed VPA Rates and Contributions under the Renewing Rhodes Contributions Framework

Voluntary Planning Agreements

The VPA rates have been the subject of negotiations since June 2013 with the assistance of Council's valuer, Richard Montague of BEM Property Consultants and Valuers Pty Ltd. These negotiations have been complicated by numerous

changes to the plans, heights and floor space ratios and sites being included and then excluded (16 Walker St) and vice versa (1 Marquet Street).

There was also a technical change to the definition of Gross Floor Area (GFA) from SREP 29 to the CBLEP 13, which has resulted in a 'discount' being given on previously agreed rates to accommodate this change in definition. For Billbergia the rate was discounted by 18% and Hossa 16%, reflecting the average amount of floorspace used for wintergardens, corridors and communal space in their respective proposals.

In summary, the VPA rates (using CBLEP 2013 definition for GFA) that are proposed are as follows:

Hossa and B1 Central (1-9 Marquet Street and 4 Mary Street)

- $554.32 per m^2 of additional residential GFA

This rate has been adjusted for CPI from the date of the original agreement in February 2013.

Billbergia (6-14 Walker St, 21 Marquet Street, 23 Marquet Street and 34 Walker Street)

- Residential below level 25 - $586.66 per m^2 of additional residential GFA.
- Residential above level 25 - $1,050 per m^2 of additional residential GFA.
- Ground level retail - $715.44 per m^2 of additional ground floor retail GFA.
- Levels 1 & 2 retail/commercial - $383.27 per m^2 of additional retail/commercial GFA.
- Basement retail - $350 per m^2 of additional basement retail GFA
- Hotel - $700 per m^2 of additional hotel GFA.

These VPA rates, with the exception of Billbergia residential above 25 levels and basement retail are to be adjusted for CPI from December 2013 when the rates were negotiated.

The Billbergia residential above 25 levels and basement retail rates are current (November 2014) as they have been negotiated recently as a result of the increased building heights and additional basement retail GFA in the revised Planning Proposal.

As shown in Attachment 3 to this report the total estimated VPA contributions from the Hossa, B1 Group and Billbergia sites are in excess of $60 million.

A summary of the provisions of the three VPAs for the Station Precinct prepared by Lindsay Taylor Lawyers is included as Attachment 8 to this report. The

provisions include the security and delivery of the Recreation Centre, Car Park and Child Care Centre.

Renewing Rhodes Contributions Framework (RRCF)

These are developer contributions which have to be paid over and above the VPA contributions. The estimated monetary contribution required under the RRCF is almost $10 million (Attachment 4 to this report) which can be used to fund the proposed public domain works and may be used to for other public infrastructure projects in the Rhodes Peninsula.

Recreation Centre, Public Car Park and Child Care Centre

The proposed Recreation Centre, Public Car Park and Child Centre to be built for Council will form two of the basement levels and three of the proposed development levels at No 34 Walker Street Rhodes. Billbergia has indicated that the Recreation Centre will be built as the second stage of development at 34 Walker Street in association with the 22 storey residential building on the NW corner of Walker Street and Marquet Street.

The proposed Recreation Centre includes a Health Club, Group Fitness Centre, Indoor Stadium, Multi-Purpose Hall, Program Pool (20m x 10m), commercial space, café, 47 place Child Care Centre and a 333 space Public Car Park. The facility has been designed for Council by ML Design with input from InSynch. Both these companies specialise in recreation, sporting and leisure facilities design and management.

The facilities offered respond to the anticipated growth and age demographic in key catchment areas in and around Rhodes, shortage of learn to swim venues, the multicultural demographic, importance of community facilities in high density living and the long term financial sustainability of the facility. The concept design is included as Attachment 5 to this report.

The estimated cost of the centre is to be fully funded through VPA contributions. Various safeguards are included in the VPA which will ensure the Centre is built to Council's specifications and standards as well as to a fixed cost. These include:

- Funding the Recreation Centre using the VPA Contributions. Council's payments will be capped at the estimated cost of the Recreation Centre, Car Park and Child Care Centre (which are currently being determined), and Council does not need to pay any progress payments which exceed the value of VPA contributions paid by Billbergia;
- Any development application for 34 Walker Street must include the Recreation Centre Car Park and Child Care Centre;
- The VPA will include the terms of a construction contract between Council and Billbergia for the delivery of the Recreation Centre Car Park and Child Care Centre;
- Billbergia must dedicate the land on which the Recreation Centre is located to Council, and Council can acquire that land for $1 if the land is not dedicated; and
- A timeframe within which the development application for the Recreation Centre Car Park and Child Care Centre must be made and the Recreation Centre etc. must be commenced and Council can apply the VPA contributions towards a facility elsewhere if commencement does not occur by the required dates.

In relation to security for delivery of the facilities, contributions are required to be made before the issue of subdivision certificates for buildings and the VPA will be registered on the title to the Land so that its provisions will bind any owner of the land. The Renewing Rhodes Contributions Framework contributions will be paid at issue of construction Certificates for buildings.

Public Domain Works

Colin Henson, Traffic and Transport Consultant was engaged by Council in June 2014 to undertake an assessment of the transport and public domain needs arising from the proposed re-development of Station Precinct and the impacts arising from the new bridge from Wentworth Point to Rhodes.

The proposed public domain works are illustrated in Attachment 6 to this report. These works include new signalised intersections at Gauthorpe/Walker Streets and Mary Street, bicycle lanes, bicycle storage facilities, shared pedestrian/cycle paths, bus bays and the associated design, engineering, environmental and legal works. In the VPA the public domain works are listed as a 'public purpose' for which contributions can be expended.

The estimated cost of these works (excluding the road works which the developers are required to undertake as part of their development) is approximately $5.3 million (Attachment 7 to this report). These costs are able to be fully funded by the Renewing Rhodes Contributions Framework (RRCF) contributions for Hossa/ B1 Group and Billbergia with provisions included in the VPAs to accommodate this expenditure if required.

Next Steps

Should Council resolve to support the amended Planning Proposal, Master Plan and associated Voluntary Planning Agreements as discussed in this report the following will occur:

1. Finalisation of the VPAs with B1 and Hossa Group including VPAs to be executed and signed by the developers and land owners in question.
2. Finalisation of the VPA with Billbergia including measures ensuring the delivery of the Recreation Centre, Car Park and Child Care Centre within budget constraints including VPAs to be executed and signed by the developers and land owners in question.
3. Planning Proposal and associated documentation submitted to the Department of Planning and Environment for Gateway Determination.
4. Draft Development Control Plan finalised and reported to Council for endorsement to publicly exhibit – February 2015.
5. Gateway determination to publicly exhibit the Planning Proposal.
6. Public exhibition of the Planning Proposal, Master Plan, VPAs and Development Control Plan.
7. Report to Council on the outcome of the public exhibition and further action to be taken.
8. General Manager to sign three VPAs at Gazettal of amending LEP.

It is anticipated that the Planning Proposal and associated documents will be on public exhibition by March/April of next year. The exhibition date will be dependent on the finalisation of the VPAs and the time taken to receive a Gateway Determination. Council will be kept informed of the progress of the project and the dates of any public exhibition.

FINANCIAL IMPACT

Council has allocated $150,000 in the 14/15 financial year to pay for the following:

- Master Plan and Planning Proposal
- Valuation advice
- Traffic and Transport (Public Domain) Report
- Recreation Centre Concept Plan design advice

Legal costs associated with the preparation of the VPAs will be recouped from the developers as required by provisions within the individual VPAs and in accordance with Council's Planning Agreements Policy.

Conclusion

The development of the Station Precinct is a bold and exciting project. The last eight months has seen a great deal of work undertaken to ensure that the amended plans deliver a good and robust planning outcome for the Station Precinct and Rhodes as a whole. The Master Plan provides the framework for development and delivers the 'vision' for the Precinct and underpins the development of the Planning Proposal and associated planning controls. The Public Domain Plan will

ensure that the area around the Station Precinct is designed to accommodate the increased pedestrian, bike, bus and car movements that will arise from the development in Rhodes and Wentworth Point.

As a result of the increased development proposed Council will enter into Voluntary Planning Agreements to deliver public benefits to the community. The main public infrastructure to be delivered will be a three level Recreation Centre, including a Child Centre and 2 basement levels of Car Parking. Council has engaged specialist designers to ensure the Recreation Centre will respond to the emerging population at Rhodes and beyond and be financial sustainable into the future.

It is recommended that Council support the amendments to the Master Plan and Planning Proposal for submission to the Department of Planning and Environment for a Gateway Determination once the Voluntary Planning Agreements are executed. Following a favourable Determination the Planning Proposal will be placed on public exhibition, the outcome of which will be reported to Council.

RECOMMENDATION

1. THAT Council support the inclusion of No 1 Marquet St, Rhodes into the amended Planning Proposal and Master Plan provided that the proposed uplift, through the Voluntary Planning Agreement, can only be actioned if the site is developed in conjunction with the Hossa site.

2. THAT Council support the submission of the amended Planning Proposal to the Department of Planning and Environment for a Gateway Determination following execution of the agreed draft Voluntary Planning Agreements by B1, Hossa Group, Billbergia and respective owners.

3. THAT Council formally requests that the Planning Proposal dated December 2013 and issued with Gateway Approval (PP-2013-CANAD-004-00) on 23 December 2013 be withdrawn

4. THAT Council accepts the proposed Voluntary Planning Agreement rates.

5. THAT following a favourable Gateway Determination the Planning Proposal and associated documentation be publicly exhibited in accordance with the provisions of the Determination.

6. THAT a report be considered by Council following the public exhibition recommending any other action to be taken.

Attachments:

Hard copies of all attachments have been circulated to Council under separate cover.

Attachment 1	Planning Proposal
Attachment 2	Master Plan
Attachments 3 & 4	Monetary Contributions
Attachment 5	Concept Plans Rec Centre
Attachment 6	Public Domain Plans
Attachment 7	Public Domain Costings
Attachment 8	VPA Summary Advice
Attachment 9	Valuation Advice

@NSWLabor retweeted a Tweet you were mentioned in!

From: NSW Labor (via Twitter) <notify@twitter.com>
To: Angelo Tsirekas <angelo.tsirekas@canadabay.nsw.gov.au>
Date: Sat, 30 Apr 2016 15:37:59 +1000

Angelo Tsirekas,
A Tweet you were mentioned in got retweeted!

Kaila Murnain
@[redacted]

Congratulations local @[redacted] Tsirekas on today becoming our @NSWLabor Candidate for Reid! #Auspol @AustralianLabor

07:36 PM - 29 Apr 16

Retweeted by

NSW Labor @NSWLabor
To 12146 followers.

Learn more about @NSWLabor.

View their profile

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Twitter, Inc. 1355 Market St., Suite 900 San Francisco, CA 94103

RE: URGENT Reid bank account

From: Maggie Wang <maggie@nswlabor.org.au>
To: Andrew Ferguson <andrew_ferguson@coverforce.com.au>
Cc: "Angelo Tsirekas M (atsirekas[redacted])" <atsirekas[redacted]>
Date: Mon, 2 May 2016 23:48:57 +0000

Hi Andrew,

You, Joe and Ian are the signatories.

Maggie Wang
Financial Controller
Australian Labor Party (NSW Branch)
(M) [redacted]9 711 | (P) 9207 2029
Level 9, 377-383 Sussex St, Sydney NSW 2000
PO Box K408, Haymarket NSW 1240
www.nswlabor.org.au

From: Andrew Ferguson [mailto:andrew_ferguson@coverforce.com.au]
Sent: Tuesday, 3 May 2016 9:15 AM
To: Maggie Wang <Maggie@nswlabor.org.au>
Cc: 'Angelo Tsirekas M (atsirekas[redacted])' <atsirekas[redacted]>
Subject: RE: URGENT Reid bank account

My understanding is that Branch President Ian west and myself Branch secretary are the signatories and maybe Joe Chidiac
Can you please confirm?

Andrew Ferguson
Chief Business Development Officer
Coverforce Pty Ltd
D +61 2 9376 7814
M +[redacted]1 994
F +61 2 9223 1422
1-3000-COVER | www.coverforce.com.au
AFSL 238874

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From: Maggie Wang [mailto:Maggie@nswlabor.org.au]
Sent: Tuesday, 3 May 2016 9:09 AM
To: Andrew Ferguson; Angelo Tsirekas
Subject: RE: URGENT Reid bank account

Hi Andrew,

The balance in the branch account is $58422.63, I can transfer the funds for you if you email me and copy everyone on this account on the email to avoid future dispute.

Cheers

Maggie Wang
Financial Controller
Australian Labor Party (NSW Branch)
(M) [redacted]9 711 | (P) 9207 2029
Level 9, 377-383 Sussex St, Sydney NSW 2000
PO Box K408, Haymarket NSW 1240
www.nswlabor.org.au

From: Andrew Ferguson [mailto:andrew_ferguson@coverforce.com.au]
Sent: Tuesday, 3 May 2016 9:05 AM
To: Angelo Tsirekas <atsirekas[redacted]>; Maggie Wang <Maggie@nswlabor.org.au>
Subject: URGENT Reid bank account

Maggie
How much in our account?
How do I transfer over internet?
AF
Secretary Concord Branch ALP

Andrew Ferguson
Chief Business Development Officer
Coverforce Pty Ltd
D +61 2 9376 7814
M +[redacted]1 994
F +61 2 9223 1422
1-3000-COVER | www.coverforce.com.au
AFSL 238874

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From: Angelo Tsirekas [mailto:atsirekas[redacted]]
Sent: Tuesday, 3 May 2016 8:57 AM
To: Andrew Ferguson; Joseph Chidiac; Andrew Lillicrap
Subject: Fw: Fwd: RE: Reid bank account

Bank Acount details for campaign.

Sent from [redacted] for iPhone

Begin forwarded message:

On Tuesday, May 3, 2016, 8:37 am, Ariane Psomotragos <Ariane.Psomotragos@nswlabor.org.au> wrote:

Sent from Outlook Mobile

---------- Forwarded message ----------
From: "**Maggie Wang**" <Maggie@nswlabor.org.au>
Date: Mon, May 2, 2016 at 3:36 PM -0700
Subject: RE: Reid bank account
To: "Ariane Psomotragos" <Ariane.Psomotragos@nswlabor.org.au>, "Jessica Malnersic" <jessica.malnersic@cbr.alp.org.au>

ALP REID FEDERAL CAMPAIGN |
BSB: 06 2006
Account: [redacted]9231

Maggie Wang
Financial Controller
Australian Labor Party (NSW Branch)
(M) [redacted]9 711 | (P) 9207 2029
Level 9, 377-383 Sussex St, Sydney NSW 2000
PO Box K408, Haymarket NSW 1240

www.nswlabor.org.au

From: Ariane Psomotragos
Sent: Tuesday, 3 May 2016 8:33 AM
To: Jessica Malnersic <jessica.malnersic@cbr.alp.org.au>; Maggie Wang <Maggie@nswlabor.org.au>
Subject: Reid bank account

Hey Maggie is it possible to get the bank account details for the Reid campaign?
One of the branches has money ready to put in but need the account number and BSB

Let me know if you need anything from me.

Cheers,
Ariane

Sent from Outlook Mobile

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Re: URGENT Reid bank account

From: Andrew Ferguson <andrew_ferguson@coverforce.com.au>
To: Angelo Tsirekas <atsirekas[redacted]>
Date: Tue, 3 May 2016 05:39:28 +0000

Already sent

Andrew Ferguson
Chief Business Development Officer
Coverforce Pty Ltd
D +61 2 9376 7814
M +[redacted]1 994
F +61 2 9223 1422
1-3000-COVER | www.coverforce.com.au
AFSL 238874

Note: Your insurance documentation is distributed electronically. Should you like to receive your documentation in hard copy format, please advise our offices by return email and we will update our records accordingly.

COVERFORCE
Smart Insurance Solutions

Let's Connect

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On 3 May 2016, at 3:38 PM, Angelo Tsirekas <atsirekas[redacted]wrote:

> Yes
>
> Sent from [redacted] for iPhone
>
> On Tuesday, May 3, 2016, 9:14 am, Andrew Ferguson <andrew_ferguson@coverforce.com.au> wrote:
>
> > Angelo
> > Are you ok if we transfer $55,000.00 leaving a little in out kitty?
> > AF
> >
> > **Andrew Ferguson**
> > **Chief Business Development Officer**
> > Coverforce Pty Ltd
> > **D** +61 2 9376 7814
> > **M** +[redacted]1 994
> > **F** +61 2 9223 1422
> > **1-3000-COVER** | www.coverforce.com.au
> > AFSL 238874

Note: Your insurance documentation is distributed electronically. Should you like to receive your documentation in hard copy format, please advise our offices by return email and we will update our records accordingly.

<CoverforceLogo.png> **Let's Connect**
<cf_linkedin.png><social-spacer.png><cf_twitter.png> <social-spacer1.png> <cf_youtube.png>

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From: Maggie Wang [mailto:Maggie@nswlabor.org.au]
Sent: Tuesday, 3 May 2016 9:09 AM
To: Andrew Ferguson; Angelo Tsirekas
Subject: RE: URGENT Reid bank account

Hi Andrew,

The balance in the branch account is $58422.63, I can transfer the funds for you if you email me and copy everyone on this account on the email to avoid future dispute.

Cheers

<image001.jpg> **Maggie Wang**
Financial Controller
Australian Labor Party (NSW Branch)
(M) [redacted]9 711 | (P) 9207 2029
Level 9, 377-383 Sussex St, Sydney NSW 2000
PO Box K408, Haymarket NSW 1240

<image002.jpg> <image003.jpg> <image004.jpg> <image005.jpg>
www.nswlabor.org.au

From: Andrew Ferguson [mailto:andrew_ferguson@coverforce.com.au]
Sent: Tuesday, 3 May 2016 9:05 AM
To: Angelo Tsirekas <atsirekas[redacted]>; Maggie Wang <Maggie@nswlabor.org.au>
Subject: URGENT Reid bank account

Maggie
How much in our account?
How do I transfer over internet?
AF
Secretary Concord Branch ALP

--

--
Andrew Ferguson
Chief Business Development Officer
Coverforce Pty Ltd
D +61 2 9376 7814
M +[redacted]1 994
F +61 2 9223 1422
1-3000-COVER | www.coverforce.com.au

AFSL 238874

Note: Your insurance documentation is distributed electronically. Should you like to receive your documentation in hard copy format, please advise our offices by return email and we will update our records accordingly.

<image007.png> **Let's Connect**
<image008.png> <image009.png> <image010.png>
<image009.png> <image011.png>

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From: Angelo Tsirekas [mailto:atsirekas[redacted]]
Sent: Tuesday, 3 May 2016 8:57 AM
To: Andrew Ferguson; Joseph Chidiac; Andrew Lillicrap
Subject: Fw: Fwd: RE: Reid bank account

Bank Acount details for campaign.

Sent from [redacted] for iPhone

Begin forwarded message:

On Tuesday, May 3, 2016, 8:37 am, Ariane Psomotragos <Ariane.Psomotragos@nswlabor.org.au> wrote:

> Sent from Outlook Mobile
>
> ---------- Forwarded message ----------
> From: "**Maggie Wang**" <Maggie@nswlabor.org.au>
> Date: Mon, May 2, 2016 at 3:36 PM -0700
> Subject: RE: Reid bank account
> To: "Ariane Psomotragos" <Ariane.Psomotragos@nswlabor.org.au>, "Jessica Malnersic" <jessica.malnersic@cbr.alp.org.au>
>
> ALP REID FEDERAL CAMPAIGN |
> BSB: 06 2006
> Account: [redacted]9231
>
> <image001.jpg> **Maggie Wang**
> Financial Controller
> Australian Labor Party (NSW Branch)
> (M)[redacted]9 711 | (P) 9207 2029
> Level 9, 377-383 Sussex St, Sydney NSW 2000
> PO Box K408, Haymarket NSW 1240
>
> <image002.jpg> <image003.jpg> <image004.jpg> <image005.jpg>
> **www.nswlabor.org.au**

From: Ariane Psomotragos
Sent: Tuesday, 3 May 2016 8:33 AM
To: Jessica Malnersic <jessica.malnersic@cbr.alp.org.au>; Maggie Wang <Maggie@nswlabor.org.au>
Subject: Reid bank account

Hey Maggie is it possible to get the bank account details for the Reid campaign?
One of the branches has money ready to put in but need the account number and BSB

Let me know if you need anything from me.

Cheers,
Ariane

Sent from Outlook Mobile

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<cf_youtube.png>

<image004.jpg>

<social-spacer.png>

<cf_twitter.png>

<CoverforceLogo.png>

<image001.jpg>

<cf_linkedin.png>

<image008.png>

<image007.png>

<image009.png>





NSW
Labor


in


COVERFORCE
Smart Insurance Solutions

Information for Electoral Commission Returns

From: Andrew Lillicrap <andrew.lillicrap@hsu.asn.au>

To: Ariane Psom <ariane.psom[redacted]>, joe@nswlabor.org.au, Joseph Chidiac <joseph@jchidiac.com.au>, Angelo Tsirekas <atsirekas[redacted]>

Date: Mon, 25 Jul 2016 06:20:31 +0000

Attachments: 4792_001.pdf (382.53 kB)

The Returns to the Electoral Commission need to be prepared. This includes accounts, receipts, expenditures, donations etc.

There are a number of gaps in our information that need to be filled before we can submit the information.

Please see the attached copy of the bank statement. The Party and the Electoral Commission requires the following information:

1. Each transaction in the bank account needs to be accounted for. Therefore each deposit needs to be broken down into its components. I understand that on occasions, a number of cheques were banked at the same time. This means that say, four cheques of $5000 each, are simply entered in the bank statement as $20,000. These will need to be broken down as to which cheques/companies they were. Can you go through the attached statement and look at the green highlighted transactions and identify which cheques/companies each of these were for.

2. Ariane, can you also look at the transactions that have been deposited from the Nationbuilder "Online Donations" and are you able to give me a list of each of these. I presume it is online somewhere, but will need to incorporate it into the Returns. These transactions are: 29/6/16; 22/6/16; 15/6/16;

3. There are some transactions which I don't have company details or reservation forms for. I will need contact details of people in these companies, addresses, ABN etc. These are:

   Burlington Holdings - $6,200 deposited on 1/7/16
   Knot Project (Eoin Daniels) - $5000 deposited on 21/6/16
   DTraffic Lack Group - $5000 deposited on 2/6/16
   Foxville Project Foxville NSW - $5000 deposited on 2/6/16
   Group Aust EVS - $5000 deposited on 2/6/16

4. Joe, there is a transaction on 15/6/16 for $12,400. Do you have any details of this transaction.

The returns are due back to the Party head Office by 31st July. I will need the above information ASAP. There is other information required which I am working on, but will come back to you for more details.

Regards,

Andrew Lillicrap
Assistant Secretary/Treasurer
Health Services Union NSW
Level 2, 109 Pitt St, Sydney 2000
Ph: 1300 478 679
Fax: 1300 329 478
Mob: [redacted]1 223

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AEC returns

From: Andrew Lillicrap <andrew.lillicrap@hsu.asn.au>
To: Angelo Tsirekas <atsirekas[redacted]>, Joseph Chidiac <joseph@jchidiac.com.au>
Cc: Heather Crichton <heather.crichton1[redacted]>
Date: Fri, 29 Jul 2016 07:56:14 +0000

Angelo/Joe/Heather, can you review the database of donors and try and fill in the gaps. The problem items are the ones highlighted in yellow. Check the notes next to that item.

There are also a couple of items in red – Deacon and Trinity Concrete x 2 cheques. You don't need to worry about Trinity, as they redeposited the money and it reached us. However, Deacon is still outstanding.

To get into the database, log into google drive:
Username: angelo.tsirekas
Password: [redacted]

Up will pop the email account. At the top right corner is a box of nine dots that look something like this
. . .
. . .
. . .

Click on this and look for Google "Sheets" in green. It looks like a spreadsheet icon.

Click on that and you should then see the donations list.

We need to finalise this information – officially by Sunday.

Some more accounting needs to be done and then something needs to be signed before submitting it to the ALP. I've spent a lot of time pulling this together already and I'm going to need you to chase these last details for me.

Thanks,

Andrew Lillicrap
Assistant Secretary/Treasurer
Health Services Union NSW
Level 2, 109 Pitt St, Sydney 2000
Ph: 1300 478 679
Fax: 1300 329 478
Mob: [redacted]1 223

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ITEM **ASSESSMENT OF COMMUNITY BENEFITS FOR VOLUNATARY PLANNING AGREEMENTS**

Department **Technical Services and Operations**

Author Initials: KJW

REASON FOR CONFIDENTIALITY

In accordance with Section 10A(2)(c) of the Local Government Act 1993, the Council is permitted to close the meeting to the public for business relating to the following: -

(c) information that would, if disclosed, confer a commercial advantage on a person with whom the Council is conducting (or proposes to conduct) business.

EXECUTIVE SUMMARY

The purpose of this report is to:

- Outline the existing approach to assessing community benefit for proposed Voluntary Planning Agreements
- Recommend a new method of assessing community benefit for proposed Voluntary Planning Agreements
- Seek Councils resolution to implement the new method to all future proposed Voluntary Planning Agreements

REPORT

The current method for assessing community benefit for proposed Voluntary Planning Agreements (VPAs) has a high resource requirement, is not always fully accurate (for various reasons as detailed below) and does not provide Council, and thus the community, with a reasonable share of the net profit from the development uplift when compared with that of the developer or applicant for the proposal.

Current Method of Assessment

The current method of assessing community benefit from VPAs is a complex process where the applicant provides their proposed development financials for both a complying development and proposed VPA development. The financials are provided in a format similar to a Discounted Cash Flow (DCF) or Development Feasibility Model which provides financial information for Revenue (Gross Realisations less selling costs) and Expenditure (Project Costs including

construction costs, consultants fees and interest on loans etc) for the proposed development.

In order to assess the financials of a project a considerable amount of time and effort is required (from both internal and external resources) to review items like local sales for property within the area of the proposed development but more so from the cost side. Costs included within the assessment are construction cost per m² (including excavation for basement parking), professional fees, contributions and charges, land holding costs, loan establishment fees, gst (various methods can be used), interest costs on development loans and costs relating to acquisition.

Proposed Method of Assessment

The proposed method of assessing of community benefit from VPAs is a much simpler exercise which requires calculation of the additional Gross Floor Area (GFA) that would be provided within the proposed VPA development (when compared to a complying development at the site) and then a value is attributed to that per square metre GFA. This is calculated by deducting the proposed GFA for the VPA development from the GFA that would normally be achieved from a complying development under the CB LEP 2013 or other planning control that applies to the property. The next step is to multiply the additional GFA by a per square metre rate or value for that GFA.

The value of additional GFA will vary depending on the property location and building use (Residential/Commercial/Retail) as would be expected.

The value per square metre of the additional GFA would be calculated by valuation provided by a licensed and suitably experienced valuer who would provide that advice following review of relevant comparable sales evidence similar to the proposed development.

Note: It is important that the measurement of GFA be the same as the definition found within the Canada Bay LEP 2013.

Split of Resulting Net Profit from Uplift in Development

The existing model is structured so that the developer gains the greatest amount of benefit from the uplift in development as the current ratio of benefit from the resulting net profit is 75% developer **:** 25% Council.

The current ratio overly favours the developer and should be reconsidered to provide Council, and the community, with a more favourable position which will result in greater community benefit as a result.

A more preferable ratio of the split in net profit and more equitable outcome for the community would be 50% Council **:** 50% developer. This provides the developer with sufficient incentive to undertake the development and still provide

the community benefit. Further it provides Council and the community with a greater ability to provide public infrastructure and assets and ongoing maintenance funding from the Voluntary Planning Agreement.

This proposed method has been used previously by Council for VPAs in Rhodes and was accepted by the developer/s during those negotiations.

Implementing the new method will also provide greater consistency across Council in approaching the assessment of proposed VPAs with developers.

FINANCIAL IMPACT

Nil for the report.

RECOMMENDATION

THAT Council endorse the Gross Floor Area method of calculating community benefit for proposed Voluntary Planning Agreements with equal share in the net profit from development uplift.

MEETING OF COUNCIL

Held in the Council Chambers
Canada Bay Civic Centre
1a Marlborough Street, Drummoyne
on Tuesday, 16 August 2016, commencing at 6.00pm

MINUTES

Present:	Cr McCaffrey (Acting Mayor) Cr Ahmed Cr Cestar Cr Fasanella Cr Kenzler Cr Megna Cr Parnaby Cr Tyrrell
In attendance:	Mr Gary Sawyer (General Manager) Mr B Cook Mr J Earls Mr P Edney Ms N Butler Mr B Pigott Ms B Gibson

TABLE OF CONTENTS

Council Meeting
16 August 2016

General Manager's Reports

A prayer was given by Reverend Matt Stedman - St Bedes Drummoyne.

WELCOME TO COUNTRY

The City of Canada Bay acknowledges the Wangal clan, one of the 29 tribes of the Eora nation and the traditional custodians of this land.

The City‟s Council pays respect to Elders past and present and extends this respect to all Aboriginal people living in or visiting the City of Canada Bay.

APOLOGIES

Nil

DECLARATIONS OF PECUNIARY INTEREST

Nil

DECLARATIONS OF NON-PECUNIARY INTEREST

Item 10 – Cr Ahmed – brother-in-law formerly worked for one of the tenderers.

Item 10 - Cr Kenzler – employer has commercial contracts with one of the tenderers.

CONFIRMATION OF MINUTES

Council Meeting – 2 August 2016

M- 5122 RESOLVED
(Crs Megna/Tyrrell)

THAT the minutes of the Council Meeting of 2 August 2016 be confirmed.

PUBLIC FORUM

M- 5123 RESOLVED
(Crs Kenzler/Cestar)

THAT Standing Orders be varied to allow the speakers to be heard and the items to be dealt with.

MM-1 and Item 10 were considered out of agenda sequence but are recorded here in correct agenda sequence for the sake of clarity.

ITEM-11 ASSESSMENT OF COMMUNITY BENEFITS FOR VOLUNTARY PLANNING AGREEMENTS

M- 5136 RESOLVED
(Crs Parnaby/Cestar)

THAT Council endorse the Gross Floor Area method of calculating community benefit for proposed Voluntary Planning Agreements with equal share in the net profit from development uplift.

M- 5137 RESOLVED
(Crs Megna/Cestar)

THAT the Council revert back to Open Session.

At 7.37pm the Council in Closed Session returned to Open Session.

M- 5138 RESOLVED
(Crs Megna/Parnaby)

THAT the items discussed in Closed Session be endorsed.

THE MEETING CLOSED AT 7.38PM.

CHAIRMAN

Donations

From: Angelo Tsirekas <atsirekas[redacted]>
To: Andrew Lillicrap <andrew.lillicrap@hsu.asn.au>
Date: Wed, 21 Sep 2016 11:24:11 +1000

Andrew still finalising the electoral donations forms with a Joe now. Can you send me the latest campaign bank statement pls.
Angelo

Sent from my iPhone

Re: Bossy Blue Pty Ltd

From: Angelo Tsirekas <atsirekas@[redacted]>
To: Andrew Lillicrap <andrew_lillicrap@[redacted]>
Date: Sat, 15 Oct 2016 09:31:59 +1100

Hi Andrew, back Monday will follow up.
Hope your well.
Angelo

Sent from my iPhone

On 12 Oct. 2016, at 1:07 am, Andrew Lillicrap <andrew_lillicrap@[redacted]> wrote:

See the inquiry below from ALP head office. Can you shed any light on this.

Andrew

From: Brendan Byron <Brendan.Byron@nswlabor.org.au>
Sent: Wednesday, 12 October 2016 4:47:20 PM
To: andrew_lillicrap@[redacted]
Cc: Maggie Wang
Subject: Bossy Blue Pty Ltd

Hi Andrew,

We're chasing up the $15,000 given to you by Bossy Blue Pty Ltd.

We've got the ABN, but as the address is the same as two other companies who have donated to you, we're unsure as to whether that's the registered business address -- 3/66 Ocean Rd, The Entrance looks like a residential property, not a business address.

Is there a way of determining the registered address of this business?

Please let us know as a matter of priority - the return is due very soon.

Best,
Brendan Byron

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Donor to Political Party Disclosure Return – Organisations

FINANCIAL YEAR 2015-16

Section 305B(1) requires donors to furnish a return within 20 weeks after the end of the financial year.
The due date for lodging this return is 17 November 2016

Completing the Return:

- This return is to be completed by organisations who made a donation to a registered political party (or a State branch), or to another person or organisation with the intention of benefiting a registered political party.
- This return is to be completed with reference to the *Financial Disclosure Guide for Donors to Political Parties.*
- Further information is available at www.aec.gov.au.
- This return will be available for public inspection from Wednesday 01 February 2017 at www.aec.gov.au.
- Any supporting documentation included with this return may be treated as part of a public disclosure and displayed on the AEC website.
- The information on this return is collected under s305B of the *Commonwealth Electoral Act 1918*.

NOTE: This form is for the use of organisations only. Please use the form Donor to Political Party Disclosure Return – Individuals if you are completing a return for an individual.

Details of organisation that made the donation

Name	Ballyfore Engineering & Excavation PL			
Address	PO Box 3486			
	Suburb/Town PUTNEY	State NSW	Postcode 2112	
ABN	77073768064	ACN 073768064		

Details of person completing this return

Name	Katrina Cronin			
Capacity or position (e.g. company secretary)	Office Finance Manager			
Postal address	PO Box 3486			
	Suburb/Town PUTNEY	State NSW	Postcode 2112	
Telephone number	0288196315	Fax number		
Email address	ballyfore@optusnet.com.au			

Certification

I certify that the information contained in this return and its attachments is true and complete to the best of my knowledge, information and belief. I have made due and reasonable inquiries of the organisation on whose behalf I am authorised to complete this form.

I understand that submitting an incomplete, false or misleading return is an offence under section 315 of the Commonwealth Electoral Act 1918.

Signature katcronin Date 08/11/2016

Enquiries and returns should be addressed to:
Funding and Disclosure
Australian Electoral Commission
Locked Bag 4007
Canberra ACT 2601

Phone: 02 6271 4552
Fax: 02 6293 7655
Email: fad@aec.gov.au

Office use only
Date received

Part 1a: Other business names

Do you operate or conduct business under any other names?

No ☑

Yes ☐ List other trading names

Part 1b: Related bodies corporate

Subsection 287(6) of the *Commonwealth Electoral Act 1918* deems bodies corporate related under the provisions of the *Corporations Act 2001* to be a single entity for disclosure purposes. The parent company of the group, therefore, should lodge under its name a return consolidated across the entire group.

Does this return cover any other related bodies corporate?

No ☑

Yes ☐ List any related bodies corporate **you are lodging on behalf of**

Name		
Postal address		
Suburb/town	State	Postcode
ABN	ACN	

Part 2: Donations made

Details of **donations** made to a political party **totalling** more than $13,000, between 1 July 2015 and 30 Jun 2016. If the total of donations made to one political party exceeds the disclosure threshold, all donations made to that political party, regardless of their value, must be disclosed.

For each donation made, the following details must be disclosed:

- Party code* and the address of the political party to which the donation was made
- date each donation was made
- value of each donation made.

Party details						Date of donation	Value of donation** (GST inclusive)
Name/Party Code	Australian Labor Party (N.S.W. Branch) *1					10 Jun 2016	$1,200
Postal address	PO Box K408						
Suburb/town	HAYMARKET	State	NSW	Postcode	1240		
Name/Party Code	Australian Labor Party (ALP) *2					14 Jun 2016	$20,000
Postal address	PO Box 6222						
Suburb/town	KINGSTON	State	ACT	Postcode	2604		

Total $21,200

****Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX the *Commonwealth Electoral Act 1918*.

Part 3: Donations received

Details of **donations** of more than $13,000 and used (wholly or partly) to make donations shown in Part 2 of this return. The 'donations received' section of this return applies to a donor:

- who received a donation of more than $13,000 (whether within the 2015-16 financial year or not); **and**
- used that donation, or part of it, to make donations totalling more than $13,000 to a political party in the 2015-16 financial year.

For donations that meet the disclosure criteria above, the following details must be reported:

- full name and address details*** of the person or organisation from whom the donation was received
- date each donation was received
- value or amount of each donation.

Donation received from			Date of donation	Value of donation** (GST inclusive)
Name				
Postal address				
Suburb/town	State	Postcode		

Total $0

*** **Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX of the *Commonwealth Electoral Act 1918*.

*** **Name and address details**

- If the gift was from an unincorporated association (other than a registered industrial organisation), the name of the association and the name and addresses of the executive committee members are required.
- If the gift was from a trust, the name of the trust, and the name and addresses of the trustee are required.

---

*1 Julie Owens 2016 Parramatta

*2 Campaign for Reid

Donor to Political Party Disclosure Return – Organisations

FINANCIAL YEAR 2015-16

Section 305B(1) requires donors to furnish a return within 20 weeks after the end of the financial year.
The due date for lodging this return is 17 November 2016

Completing the Return:

- This return is to be completed by organisations who made a donation to a registered political party (or a State branch), or to another person or organisation with the intention of benefiting a registered political party.
- This return is to be completed with reference to the *Financial Disclosure Guide for Donors to Political Parties.*
- Further information is available at www.aec.gov.au.
- This return will be available for public inspection from Wednesday 01 February 2017 at www.aec.gov.au.
- Any supporting documentation included with this return may be treated as part of a public disclosure and displayed on the AEC website.
- The information on this return is collected under s305B of the *Commonwealth Electoral Act 1918*.

NOTE: This form is for the use of organisations only. Please use the form Donor to Political Party Disclosure Return – Individuals if you are completing a return for an individual.

Details of organisation that made the donation

Name	BOSSY BLUE PTY LTD			
Address	6 BARTIL CL			
	Suburb/Town EPPING	State NSW	Postcode 2121	
ABN	51151547312	ACN		

Details of person completing this return

Name	Craig Stubbs			
Capacity or position (e.g. company secretary)	Financial Controller			
Postal address	6 BARTIL CL			
	Suburb/Town EPPING	State NSW	Postcode 2121	
Telephone number	[redacted]8388	Fax number		
Email address	yellowco@[redacted]			

Certification

I certify that the information contained in this return and its attachments is true and complete to the best of my knowledge, information and belief. I have made due and reasonable inquiries of the organisation on whose behalf I am authorised to complete this form.

I understand that submitting an incomplete, false or misleading return is an offence under section 315 of the Commonwealth Electoral Act 1918.

Signature	 craig stubbs	Date	20/03/2017

Enquiries and returns should be addressed to:
Funding and Disclosure
Australian Electoral Commission
Locked Bag 4007
Canberra ACT 2601

Phone: 02 6271 4552
Fax: 02 6293 7655
Email: fad@aec.gov.au

Office use only
Date received

Part 1a: Other business names

Do you operate or conduct business under any other names?

No ☑

Yes ☐ List other trading names

Part 1b: Related bodies corporate

Subsection 287(6) of the *Commonwealth Electoral Act 1918* deems bodies corporate related under the provisions of the *Corporations Act 2001* to be a single entity for disclosure purposes. The parent company of the group, therefore, should lodge under its name a return consolidated across the entire group.

Does this return cover any other related bodies corporate?

No ☑

Yes ☐ List any related bodies corporate **you are lodging on behalf of**

Name		
Postal address		
Suburb/town	State	Postcode
ABN	ACN	

Part 2: Donations made

Details of **donations** made to a political party **totalling** more than $13,000, between 1 July 2015 and 30 Jun 2016. If the total of donations made to one political party exceeds the disclosure threshold, all donations made to that political party, regardless of their value, must be disclosed.

For each donation made, the following details must be disclosed:

- Party code* and the address of the political party to which the donation was made
- date each donation was made
- value of each donation made.

Party details						Date of donation	Value of donation** (GST inclusive)
Name/Party Code	Australian Labor Party (N.S.W. Branch)					07 Jun 2016	$15,000
Postal address	PO Box K408						
Suburb/town	HAYMARKET	State	NSW	Postcode	1240		
Name/Party Code	Liberal Party of Australia					30 Jun 2016	$15,000
Postal address	PO Box 6004						
Suburb/town	KINGSTON	State	ACT	Postcode	2604		
Name/Party Code	Australian Labor Party (ALP)					09 Jun 2016	$1,200
Postal address	PO Box 6222						
Suburb/town	KINGSTON	State	ACT	Postcode	2604		

Total $31,200

****Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX the *Commonwealth Electoral Act 1918*.

Part 3: Donations received

Details of **donations** of more than $13,000 and used (wholly or partly) to make donations shown in Part 2 of this return. The 'donations received' section of this return applies to a donor:

- who received a donation of more than $13,000 (whether within the 2015-16 financial year or not); **and**
- used that donation, or part of it, to make donations totalling more than $13,000 to a political party in the 2015-16 financial year.

For donations that meet the disclosure criteria above, the following details must be reported:

- full name and address details*** of the person or organisation from whom the donation was received
- date each donation was received
- value or amount of each donation.

Donation received from			Date of donation	Value of donation** (GST inclusive)
Name				
Postal address				
Suburb/town	State	Postcode		

Total $0

*** **Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX of the *Commonwealth Electoral Act 1918*.

*** **Name and address details**

- If the gift was from an unincorporated association (other than a registered industrial organisation), the name of the association and the name and addresses of the executive committee members are required.
- If the gift was from a trust, the name of the trust, and the name and addresses of the trustee are required.

Request for Amendment Donor to Political Party Disclosure Return – Organisations

Financial Year 2015-16

Completing the Return:

- This request for amendment should be used to amend a *2015-16 Donor to Political Party Disclosure Return – Organisations* lodged with the AEC.
- This request for amendment is to be completed with reference to the *Financial Disclosure Guide for Donors to Political Parties.*
- Further information is available at www.aec.gov.au.
- This request for amendment will be available for public inspection from Wednesday 01 February 2017 at www.aec.gov.au.
- Any supporting documentation included with this request for amendment may be treated as part of a public disclosure and displayed on the AEC website.
- The information on this request for amendment is collected under S319A(2) of the *Commonwealth Electoral Act 1918*.

NOTE: This form is for the use of organisations only. Please use the form Request for Amendment – Donor to Political Party Disclosure Return - Individuals if you are completing a return for an individual.

Details of organisation who made the donation

Name	Ballyfore Engineering & Excavation PL		
Address	PO Box 3486		
	Suburb/Town PUTNEY	State NSW	Postcode 2112
ABN	77073768064	ACN 073768064	

2015-16 Return details.

Is this the first amendment to the return? Yes ☑ No ☐

How many other Request for Amendments have been made?

Details of person completing this return

Name	Katrina Cronin		
Capacity or position (e.g. company secretary, self)	Office Finance Manager		
Postal address	PO Box 3486		
	Suburb/Town PUTNEY	State NSW	Postcode 2112
Telephone number	[redacted]6315	Fax number	
Email address	ballyfore@[redacted]		

Request and Certification

I request the Electoral Commission amend the Donor to Political Party Return – Organisations as detailed in this request for amendment.

I certify that the information contained in this request and its attachments is true and complete to the best of my knowledge, information and belief. I have made due and reasonable inquiries of the organisation on whose behalf I am authorised to complete this form. I understand that submitting an incomplete, false or misleading return is an offence under section 315 of the Commonwealth Electoral Act 1918.

Signature katcronin

Enquiries and returns should be addressed to:

Funding and Disclosure
Australian Electoral Commission
Locked Bag 4007
Canberra ACT 2601

Phone: 02 6271 4552
Fax: 02 6293 7655
Email: fad@aec.gov.au

Office use only
Date received

	Date	22/05/2017

How to complete this form:

- If you are amending an existing entry, complete the 'Original Entry' item as it appeared on the original return and then write the amendment in full at the 'Amended Entry' item.
- If adding a completely new entry, write N/A in the 'Original Entry' item and complete the 'Amended Entry' item in full.
- Amounts should be reported on a GST inclusive basis.

Part 1a: Other business names

No change to previous information ☑ **OR**

Provide details of changes or amendments to the information previously provided.

Original Entry	
Amended Entry	

Part 1b: Related bodies corporate

No change to previous information ☑ OR

Provide details of changes or amendments to the information previously provided.

Original Entry	Name		
	Postal address		
	Suburb/town	State	Postcode
Amended Entry	Name		
	Postal address		
	Suburb/town	State	Postcode

Part 2: Donations made

No change to previous information ☐ OR

Provide details of changes or amendments to the information previously provided.

	Party details						Date of donation	Value of donation** (GST inclusive)
Original Entry	Name	N/A						
	Postal address							
	Suburb/town		State		Postcode			
Amended Entry	Name	Australian Labor Party (N.S.W. Branch)					14/06/2016	$20,000
	Postal address	PO Box K408						
	Suburb/town	HAYMARKET	State	NSW	Postcode	1240		

Original Entry	Name	Australian Labor Party (ALP)					14/06/2016	$20,000
	Postal address	PO Box 6222						
	Suburb/town	KINGSTON	State	ACT	Postcode	2604		
Amended Entry	Name	Remove						
	Postal address							
	Suburb/town		State		Postcode			

** **Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX the *Commonwealth Electoral Act 1918*.

Part 3: Donations received

No change to previous information ☑ OR

	Received from			Date of donation	Value of donation** (GST inclusive)
Original Entry	Name				
	Postal address				
	Suburb/town	State	Postcode		
Amended Entry	Name				
	Postal address				
	Suburb/town	State	Postcode		

** **Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX the *Commonwealth Electoral Act 1918*.

Donor to Political Party Disclosure Return – Organisations

FINANCIAL YEAR 2015-16

Section 305B(1) requires donors to furnish a return within 20 weeks after the end of the financial year.
The due date for lodging this return is 17 November 2016

Completing the Return:

- This return is to be completed by organisations who made a donation to a registered political party (or a State branch), or to another person or organisation with the intention of benefiting a registered political party.
- This return is to be completed with reference to the *Financial Disclosure Guide for Donors to Political Parties.*
- Further information is available at www.aec.gov.au.
- This return will be available for public inspection from Wednesday 01 February 2017 at www.aec.gov.au.
- Any supporting documentation included with this return may be treated as part of a public disclosure and displayed on the AEC website.
- The information on this return is collected under s305B of the *Commonwealth Electoral Act 1918*.

NOTE: This form is for the use of organisations only. Please use the form Donor to Political Party Disclosure Return – Individuals if you are completing a return for an individual.

Details of organisation that made the donation

Name	HYRISE PTY LTD			
Address	72 ARCADIA RD			
	Suburb/Town GALSTON	State NSW	Postcode 2159	
ABN	26132178986	ACN		

Details of person completing this return

Name	Craig Stubbs		
Capacity or position (e.g. company secretary)	Financial Controller		
Postal address	72 ARCADIA RD		
	Suburb/Town GALSTON	State NSW	Postcode 2159
Telephone number	[redacted]8388	Fax number	
Email address	elizabethwildes[redacted]		

Certification

I certify that the information contained in this return and its attachments is true and complete to the best of my knowledge, information and belief. I have made due and reasonable inquiries of the organisation on whose behalf I am authorised to complete this form.

I understand that submitting an incomplete, false or misleading return is an offence under section 315 of the Commonwealth Electoral Act 1918.

Signature  craig stubbs

Date 08/09/2017

Enquiries and returns should be addressed to:
Funding and Disclosure
Australian Electoral Commission
Locked Bag 4007
Canberra ACT 2601

Phone: 02 6271 4552
Fax: 02 6293 7655
Email: fad@aec.gov.au

Office use only
Date received

Part 1a: Other business names

Do you operate or conduct business under any other names?

No ☑

Yes ☐ List other trading names

Part 1b: Related bodies corporate

Subsection 287(6) of the *Commonwealth Electoral Act 1918* deems bodies corporate related under the provisions of the *Corporations Act 2001* to be a single entity for disclosure purposes. The parent company of the group, therefore, should lodge under its name a return consolidated across the entire group.

Does this return cover any other related bodies corporate?

No ☑

Yes ☐ List any related bodies corporate **you are lodging on behalf of**

Name		
Postal address		
Suburb/town	State	Postcode
ABN	ACN	

Part 2: Donations made

Details of **donations** made to a political party **totalling** more than $13,000, between 1 July 2015 and 30 Jun 2016. If the total of donations made to one political party exceeds the disclosure threshold, all donations made to that political party, regardless of their value, must be disclosed.

For each donation made, the following details must be disclosed:

- Party code* and the address of the political party to which the donation was made
- date each donation was made
- value of each donation made.

Party details						Date of donation	Value of donation** (GST inclusive)
Name/Party Code	Australian Labor Party (N.S.W. Branch)					06 Jun 2016	$15,000
Postal address	PO Box K408						
Suburb/town	HAYMARKET	State	NSW	Postcode	1240		

Total $15,000

****Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX the *Commonwealth Electoral Act 1918*.

Part 3: Donations received

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- used that donation, or part of it, to make donations totalling more than $13,000 to a political party in the 2015-16 financial year.

For donations that meet the disclosure criteria above, the following details must be reported:

- full name and address details*** of the person or organisation from whom the donation was received
- date each donation was received
- value or amount of each donation.

Donation received from			Date of donation	Value of donation** (GST inclusive)
Name				
Postal address				
Suburb/town	State	Postcode		

Total $0

*** **Donation** is a gift within the meaning of Division 4 – Disclosure of donations, in Part XX of the *Commonwealth Electoral Act 1918*.

*** **Name and address details**

- If the gift was from an unincorporated association (other than a registered industrial organisation), the name of the association and the name and addresses of the executive committee members are required.
- If the gift was from a trust, the name of the trust, and the name and addresses of the trustee are required.

RE: Exec Meeting

From: Tony McNamara <tony.mcnamara@canadabay.nsw.gov.au>
To: Tony Pavlovic <tony.pavlovic@canadabay.nsw.gov.au>, PA General Manager <pageneralmanager@canadabay.nsw.gov.au>
Cc: bob pigott <bob.pigott@canadabay.nsw.gov.au>
Date: Wed, 22 Nov 2017 13:44:41 +1100

Minutes are OK by me.
Tony

Tony McNamara
Director Planning & Environment
City of Canada Bay
1a Marlborough Street, Drummoyne NSW 2047
tony.mcnamara@canadabay.nsw.gov.au
T 02 99116400
M [redacted]0926
www.canadabay.nsw.gov.au

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Please consider the environment before printing this e-mail

From: Tony Pavlovic
Sent: Wednesday, 22 November 2017 12:01 PM
To: Tony McNamara; PA General Manager
Subject: Fwd: Exec Meeting

Draft minutes for your approval

Tony Pavlovic
Manager Health, Building & Environment
9911-6414

Begin forwarded message:

> **From:** "tony.pavlovic@canadabay.nsw.gov.au" <no-reply@evernote.com>
> **Date:** 22 November 2017 at 12:00:16 pm AEDT
> **To:** tony.pavlovic@canadabay.nsw.gov.au
> **Subject: Exec Meeting**
> **Reply-To:** "tony.pavlovic@canadabay.nsw.gov.au" <tony.pavlovic@canadabay.nsw.gov.au>
>
> Inner West Central - Clrs on board - Mayor supports PCYC, James has been recruited to support the proposal,
> RMS Lyons Rd - to be noted. RMS to publicly consult - proposal to provide clearways
> 36 Leicester - matter to be raised again at a Council meeting supporting open space, traffic safety, cycle network - Dec 5 report
> Rhodes East - Mayor unhappy with the plan, infrastructure a concern
> IProsperity - consideration is whether we would support overshadowing of the Square. Applicant raised concern with economic viability and a proposal that incorporates a

heliostat
Billbergia - presentation centred around an increase of public transport options to justify an uplift to the development substantially above that proposed within the master plan. Paul working towards what is required to support the uplift which may include zero parking - to be raised at Exec next week
Rhodes Recreation Centre - supported by Council

Item 1 - GM's farewell - Menu option - Wilson - PA GM to organise RSVP's to staff - email to be sent to 'save the date'.
Item2 - Integrated Planning & Reporting - Exec supported the direction as outlined within the memo by Sally. Detailed timeframe to be provided next week, Dec 6 briefing session to Managers, 31 January proposed presentation of CMP to Exec and Managers, presentation to Clrs to follo, public exhibition of CMP in April
Item 3 - website - Intranet - launched Feb 2018, phase 2 - moving files to Cloud, Council branding to be reviewed (approx 6 month timeframe), new website to be delivered timeline to be delivered end of February, report to Council on December 5 , Russell and Pauline key staff involved with CPR,

Projects
CSP - 697 surveys completed on-line, focus groups commenced - schools, sustainability and Five Dock residents, pop-up stalls still be undertaken,
Parramatta Rd Renewal - discussions being held re priority precinct at Burwood Council

Councillor Workshop - November 28 - Greater Sydney Commission, key information sheets to be developed for Clrs to be sent prior to the workshop regarding process.

Organisation will contribute $250 to each department for Christmas Party - Bob to speak with Mark

To be raised at the Clr Workshop on the 28th - Nominees for the NSW Government Woman of the Year Awards -
Young woman of the year award - Rose Cox to be nominated
Community hero award - Justine Perkins

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