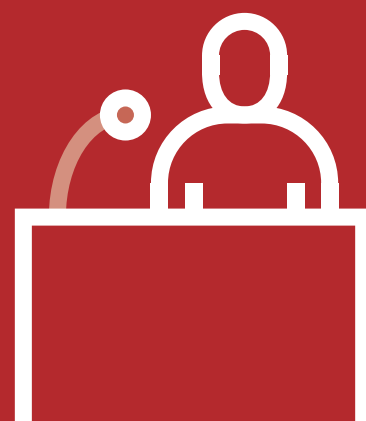


Review of the Local Government Act 1989

Discussion Paper



© The State of Victoria Department of Environment, Land, Water & Planning 2015



This work is licensed under a Creative Commons Attribution 4.0 International licence. You are free to re-use the work under that licence, on the condition that you credit the State of Victoria as author. The licence does not apply to any images, photographs or branding, including the Victorian Coat of Arms, the Victorian Government logo and the Department of Environment, Land, Water and Planning (DELWP) logo. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>.

ISBN 978-1-74146-714-7 (Print)

Accessibility

If you would like to receive this publication in an alternative format, please contact the Local Government Act Review Secretariat, email local.government@delwp.vic.gov.au, phone (03) 9948 8518. This document is also available on the internet at www.yourcouncilyourcommunity.vic.gov.au

Disclaimer

This publication may be of assistance to you but the State of Victoria and its employees do not guarantee that the publication is without flaw of any kind or is wholly appropriate for your particular purposes and therefore disclaims all liability for any error, loss or other consequence which may arise from you relying on any information in this publication.

Privacy

Any personal information provided in applications will be collected by the department for the purpose of grant administration. This information may be provided to other Victorian government bodies for the purposes of assessing your application. If personal information about third parties is included in an application, please ensure individuals are aware of the contents of this privacy statement.

Any personal information in correspondence will be collected, held, managed, used, disclosed or transferred in accordance with the provisions of the Information Privacy Act 2000 (Vic) and other applicable laws.

The Department of Environment, Land, Water and Planning (DELWP) is committed to protecting the privacy of personal information. You can find the DELWP Privacy Policy online at <http://delwp.vic.gov.au/privacy>.

Enquiries about access to personal information held by DELWP should be directed to the Manager Privacy, P.O. Box 500 East Melbourne 3002 or contact by phone on 9637 8697.

Review of the Local Government Act 1989

Discussion Paper



Contents

Minister's Foreword	6	Chapter 4: How councils operate	41
Glossary/abbreviations	7	In this chapter	42
How to use this paper	8	The mayor	42
How the discussion paper is organised	8	Councillor allowances and expenses	44
Chapter 1: Reviewing the Local Government Act 1989	11	The chief executive officer	46
In this chapter	12	Council staff	47
Local government in Victoria	12	Delegated decision making	48
Why the Local Government Act is being reviewed	12	Council proceedings	50
A new Local Government Act for Victoria	13	Consultation and engagement	51
Consultation	13	Complaint handling	53
Purpose of this discussion paper	13	Local laws	54
Chapter 2: The role of councils	17	Indemnities and insurance cover	56
In this chapter	18	Questions on how councils operate	57
Constitutional objectives of a Local Government Act	18	Chapter 5: Planning and reporting	59
Empowerment and regulation of councils	19	In this chapter	60
Special powers and responsibilities of councils	21	The council planning process	60
Administrative decision making	24	Questions on council planning and reporting	65
Questions on the role of councils	26	Chapter 6: Council rates and charges	67
Chapter 3: How councils are elected	27	In this chapter	68
In this chapter	28	Council revenue sources	68
Electoral representation	28	Declaring rates and charges and rateability of land	69
- Councillor numbers	28	Types of rates and charges	70
- Electoral structures and representation	29	Payment of rates and charges	73
- Voting and ballot counting systems	31	Review and appeals of rates and charges	75
Conduct of elections	31	Questions on council rates and charges	76
- Voter franchise	31	Chapter 7: Service delivery and financial decision making	77
- The voters' roll	33	In this chapter	78
Candidacy	34	Best value principles	78
- Requirements and qualifications of councillors	34	Investments and borrowing	79
- Information on candidates	35	Exchange and sale of land	79
- Donations	36	Procurement	80
Caretaker provisions	36	Entrepreneurial activities	81
Conducting elections	37	Collaborative arrangements - libraries and other services	82
- Polling method	37	Questions on council service delivery and financial decision making	83
- Complaints handling	38		
- Non-voting enforcement	39		
- Election validity	39		
Questions on how councils are elected	40		

Chapter 8: Councillor conduct, offences and enforcement

In this chapter	85
Councillor conduct	86
Definitions of different levels of misconduct	87
Councillor responsibilities	88
Councillor conduct principles	88
Role of councillor	89
Council processes	89
Councillor code of conduct	89
Councillor conduct panels	90
Victorian Civil and Administrative Tribunal (VCAT)	91
Offences	92
- Conflict of interest	92
- Confidential information	94
- Improper direction	95
- Misuse of position	96
Enforcement	96
- Chief Municipal Inspector	96
- Municipal monitor	98
Ministerial action	98
<i>Questions on councillor conduct, offences and enforcement</i>	99

Chapter 9: Ministerial powers 101

In this chapter	102
Role of the Minister for Local Government	102
Power to provide exemptions from requirements under the Act	102
Power to make appointments	104
Power to issue guidance	105
Power to restructure	106
Power to make statutory rules	106
Power to direct councils	108
Power to suspend a council	108
- Dismissing a council	109
Power to revoke local laws	110
<i>Questions on ministerial powers</i>	110

Chapter 10: Harmonisation of the Local Government Act 111

In this chapter	112
<i>Questions on harmonisation of the Local Government Act</i>	115
How to get involved	117
Submissions	118
Bibliography	119
Appendix 1: Local Government Act Review Terms of Reference	124
Appendix 2: Governance and councillor conduct reforms	126

..



Minister's Foreword



The Andrews Government is getting on with its commitment to review the *Local Government Act 1989*. We're reviewing the Act to bring it into the 21st century and give communities the strong, accountable and efficient local councils that they deserve. Through the review, we want to improve transparency and create a more contemporary, accessible Act that meets the current and future needs of Victorian communities.

This is the first comprehensive review of local government in a quarter of a century. Long overdue, the Review responds to calls from the local government sector and the community for reform of the Act, which has seen over 90 amending acts resulting in hundreds of individual changes.

It will look at the objectives, roles and functions of councils; the powers required of councils to achieve these objectives and perform their roles and functions; and the extent these should be regulated under the Act. Other related legislation, the *City of Greater Geelong Act 1993*, the *City of Melbourne Act 2001* and the *Municipal Association Act 1907* are also included. This is an opportunity for both state and local government to build stronger communities for local residents.

I have appointed an advisory committee to provide independent advice on the review. The committee is chaired by Member for Yuroke Ros Spence, and made up of current councillors, people who have worked as chief executives in local government or the public sector, and public policy experts. I will also consult extensively with local government peak organisations, including the Municipal Association of Victoria, Victorian Local Governance Association and LGPro.

And I want local residents, business and councils to all have their say. The review will involve the release of various consultation papers and invitations for submissions over the coming months.

This discussion paper kick starts an important dialogue between councils, the community and the Andrews government as we begin to examine all aspects of the Act. I invite you to take this opportunity by making a formal submission and participating in online discussion at the review's website, www.yourcouncilyourcommunity.vic.gov.au. You can also read the review's terms of reference (Appendix 1) and the more immediate councillor conduct and governance reforms that are currently under way (Appendix 2).

Together, we can build an Act that creates strong, accountable and responsive local government. An Act that is shaped by the contemporary relationship between the Victorian Government, councils and the community. And an Act that reflects and responds to the needs of our state.

A handwritten signature in black ink, appearing to read 'Natalie Hutchins'.

The Hon Natalie Hutchins MP
Minister for Local Government

Glossary/Abbreviations

Administrator	Officer appointed by the Governor in Council on recommendation of the minister in situations where the council has been suspended or a new or reconstituted council has been established
Best value	Principles defined in the Act for achieving value for money
Board of inquiry	Board appointed by the Governor in Council on recommendation of the minister to inquire into and determine any dispute between a council and another public body
CEO	The Chief Executive Officer of a council
CIV	Capital Improved Value (defined in Section 3 of the Act)
CMI	Chief Municipal Inspector is the title conferred on the person leading the Local Government Investigations and Compliance Inspectorate (the Inspectorate)
Commissioner	Officer appointed by the minister to conduct an inquiry into the affairs of a council and report to the Minister on what is found
Community plan	A long-term plan setting out the aspirations of a community
Council plan	A four-year plan setting out the strategic objectives of a council
Differential rates	Rates levied at different values for different classes of land, such as farm land, urban farm land or residential use land.
Enabling provisions	Provisions in the Act that provide councils with powers to perform an act
ESC	The Essential Services Commission
Judicial review	Process whereby the validity of a decision is reviewed by a court
Local government panel	Panel appointed by the minister to carry out a review and advise the minister on matters relating to councillor allowances, local government restructuring and any other matters
MAV	Municipal Association of Victoria
Ministerial exemption	Process to provide for circumstances where the minister may determine that compliance with the requirements of the Act is not required
MoU	Memorandum of Understanding
Municipal monitor	Inspector of municipal administration appointed by the minister to observe governance practices at a council and report back to the minister
Normative provisions	Provisions in the Act that are not intended to create enforceable obligations or grant special powers to councils but instead describe the normal behaviour or way of doing things which should be observed and for which no sanctions are provided in the Act
Prescriptive provisions	Provisions in the Act that set out rules that councils, councillors and staff must follow
Regional Library Corporation	A group of councils which have entered into an agreement to provide library services to local libraries in the municipalities of the member councils
s./ss.	Section/sections of the <i>Local Government Act 1989</i>
SRP	Strategic resource plan – a plan setting out the resources required to meet the council plan
State	The State of Victoria
The Act	The Local Government Act 1989
The minister	The Minister for Local Government
VCAT	Victorian Civil and Administrative Tribunal
VEC	Victorian Electoral Commission

How to use this paper

The *Local Government Act 1989* (the Act) establishes the constitutional, electoral and operational arrangements for local government in Victoria. The terms of reference for the review of the Act address these dimensions and the structure of this discussion paper reflects the terms of reference (Appendix 1).

How the discussion paper is organised

The structure of the discussion paper and the major issues it raises are briefly summarised here. The discussion paper can be read as a whole, or for readers who have a particular interest each chapter largely stands alone. If reading individual chapters, it is worth looking at Chapter 1 as well to understand the purpose and context of the review.

Chapters reflect the terms of reference for the review. Each chapter is structured in the following way.

Current arrangements	The current provisions of the Act are described.
Key issues	An analysis of key issues raised by current arrangements follows. These issues are aimed at starting the dialogue and present a range of arguments prevalent in the sector and the community. They do not reflect the government's opinion, they are open for debate.
Questions	High level questions are embedded within chapters (under key issues) and also conclude each chapter. They ask readers to consider fundamental objectives and whether these are best served by current legislative settings. Framing the questions in this way signals the aim to fundamentally reconsider the intent and purpose of the legislation and create a new Act, rather than merely make further amendments to the existing Act.

Chapter 1: Reviewing the Local Government Act 1989

Chapter 1 explains the rationale for the review and its scope and purpose.

Chapter 2: The role of councils

Chapter 2 looks at how councils are established as legal entities. This includes the impact of recognition of the sector in the Victorian Constitution and the Local Government Charter contained in the Act. It looks at the ambit and extent of the powers provided to councils. It explains the different types of provisions in the Act (normative, enabling and prescriptive). A key question in the review will be the balance between these different types of provisions. Another issue is how noncompliance with prescriptive provisions should be dealt with. Finally, the chapter deals with how councillors can balance their political role alongside their administrative decision-making responsibilities – the so-called Winky Pop, or apprehended bias, issue.

Chapter 3: How councils are elected

Chapter 3 examines how councils are elected including requirements for persons standing for election as councillors. It explores the legal basis of local government electoral structures, the conditions for local democratic representation and the conduct of elections. The challenges arising from the structure of the



electoral system include how to optimise democratic participation by voters and attract candidates who understand and can fulfil the role of councillor. In addition, the integrity of the electoral process must be maintained as well as equity of electoral representation.

Chapter 4: How councils operate

Chapter 4 deals with the structure of councils and the legal framework within which they operate. This includes procedures for electing the mayor, employment of the chief executive officer and senior staff and how councils make decisions and create local laws. Most of these provisions are normative, in that they describe what is expected of a council but do not impose a penalty if a council does not comply. A key question is which of these processes is critical to ensuring councils operate effectively and whether penalties should apply if they are not followed. Other issues include the high level of detail in the Act regarding council proceedings that might no longer be necessary and important accountability measures to ensure significant activities are subject to appropriate public consultation and disclosure.

Chapter 5: Planning and reporting

Chapter 5 addresses the planning, accountability and budgeting arrangements of councils. It deals with the timing, consultation, comprehensiveness and integration of the existing planning and reporting framework. In particular it discusses the council plan, strategic resource plan, council budget and annual report. It raises questions on whether the current framework could be given a more long-term focus and on improving its scope and integration.

Chapter 6: Council rates and charges

Chapter 6 explores the capacity of councils to raise revenue through rates and charges. It includes the ways in which these can be structured and the conditions under which payments must be made and outstanding amounts recovered. Principles of effective and equitable taxation are considered and the extent to which Victorian rates and charges conform with these. It also looks at the conditions for payment of rates and charges, current exemptions and the appeals processes for challenging their imposition. Given the importance of this power to councils, the question raised is whether current processes are still appropriate. The issue for citizens is whether they are transparent and clearly understood.

Chapter 7: Service delivery and financial decision making

Chapter 7 explores councils' ability to make decisions in relation to their finances, such as the exchange or sale of land, power to borrow funds, procure goods, services and works, and engage in business investments and other entrepreneurial activities. The chapter identifies issues relating to conditions for tendering, and guidance on commercial activities. Requirements for sale of land imposed on councils are explained, as are the best value principles contained in the Act. The key question is whether these provisions reflect the contemporary needs and practices of councils.

Chapter 8: Councillor conduct, offences and enforcement

Chapter 8 examines the framework for dealing with councillor conduct issues including reforms being considered by government that are summarised in Appendix 2. It details the role for councils, external tribunals and the minister in dealing with councillor behaviour in the proposed reforms. It also deals with offences under the Act in relation to councillor behaviour, including conflict of interest provisions and asks if the level of detail provided in the Act should be retained. The role of the chief municipal inspector in investigating and prosecuting breaches of the Act and the proposal for the Inspectorate to have a role in misconduct matters is also considered.

Chapter 9: Ministerial powers

Chapter 9 explores the powers currently available to the minister under the Act. A key issue is the extent to which these powers are sufficient. That is, do they allow the state government to ensure that councils are fulfilling their responsibilities and acting in the community interest? This directly raises the question of the appropriate balance between sector independence and state government intervention. It explains that the Act gives the minister extensive powers in a number of matters, but arguably very limited powers on issues that are of greater importance to the state and to the community.

Chapter 10: Harmonisation of the Local Government Act

Chapter 10 explores harmonising the Act with related legislation. Dozens of other pieces of Victorian legislation impose obligations or confer powers on councils. These include the *Planning and Environment Act 1987* and *Domestic Animals Act 1994*. This review is an opportunity to identify duplication and inconsistency. It discusses the possibility of removing redundant legislation, schedules or provisions; resolving and harmonising contested provisions in different Acts; and reducing confusion by councils and citizens about responsibilities and rights set out in different Acts. The chapter also looks at related Acts for the City of Melbourne, City of Greater Geelong and the Municipal Association of Victoria (for which the Minister for Local Government is responsible) with a view to simplifying, streamlining and making consistent that legislation with the new Act.

How to get involved

The final section of the paper outlines how stakeholders and members of the public can contribute to the review by responding to this discussion paper. It outlines the process for lodging submissions and how to stay informed about the policy issues that will be addressed in framing the new Act.

Appendix 1: Terms of reference

Appendix 1 contains the terms of reference for the review.

Appendix 2: Governance and councillor conduct reforms

Appendix 2 summarises reforms that are under consideration by the government in the short to medium term that are expected to be enacted before this review is completed. For more information refer to Chapter 3: How councils are elected and Chapter 8: Councillor conduct, offences and enforcement.

Queries about the review

Questions about any aspect of the review can be directed to local.government@delwp.vic.gov.au or (03) 9948 8518.

Next steps

There will be opportunities for contributing to the review following the release of this discussion paper and beyond. Keep informed via the Local Government Act Review website www.yourcouncilyourcommunity.vic.gov.au

Chapter 1:

Reviewing The Local Government Act 1989



Chapter 1:

Reviewing The Local Government Act 1989



In this chapter:

The context and objectives of the discussion paper

Local Government in Victoria

Local government plays an indispensable role within our federal system of government. It is recognised in the Victorian Constitution as a distinct and essential tier of government. As the level of government closest to the community, it gives people a say in matters affecting their local area. Councils are governments – they provide a vehicle for the expression of local democracy.

The local government sector's responsibilities are complex and dynamic. Councils' roles have expanded as community needs have changed and interdependence with other levels of government has grown.

Local government plans and delivers services in:

- health
- planning and building control
- business and economic development
- waste and environmental management
- human and community services.

Local government is a significant contributor to the Victorian economy and is a critical delivery partner for the state government in improving the lives of Victorians.

Local government in Victoria:

- employs over 50,000 people
- spends more than \$7 billion on service delivery and \$2 billion on infrastructure annually
- manages over \$70 billion in public assets.

As the tier of government closest to the community, as an economic force, and as a major service provider, the dynamic role of local government creates evolving challenges that need to be accommodated in the legislative framework in which councils operate.

Why the Local Government Act is being reviewed

The *Local Government Act 1989* ('the Act') defines the purposes, functions and duties of local government and provides the legislative framework for the establishment and administration of councils.

The Act has been extensively revised and altered over the past 25 years. Some parts of the Act have been comprehensively reviewed and undergone major reform such as conflict of interest, councillor conduct and performance reporting. Other amendments have addressed specific issues as they have arisen in the sector as a whole or in single councils, (e.g., the appointment of probity auditors to deal with complaints against the CEO). Others have responded to shifts in policy such as differential rates.

This has led to parts of the Act becoming ambiguous and inconsistent. Overall the structure of the Act is cumbersome. Some sections are unnecessarily prescriptive while in others the meaning is obscure. In some areas critical legislative detail is lacking. The Act also contains historic and redundant provisions, which should be removed.

The Act may not be entirely clear to either the sector or to the community about the role, functions and powers councils exercise. In particular, the processes that councils must follow are not transparent to the community. This leads to community frustration and, calls for state intervention.

Since its inception in 1989, the Local Government Act has been the subject of more than 90 amending Acts – an average of over three and a half amending Acts each year.

A new Local Government Act for Victoria

The intention of this review is not to further renovate the existing Act but rather to create an entirely new legislative structure. This will accommodate the needs of modern governance and reflect a mature relationship between councils and the state.

The review will create a comprehensive, contemporary and accessible Local Government Act. It is an opportunity to modernise and strengthen the logic and coherence of the legislative framework. It is also an opportunity to strengthen transparency and accountability of councils to their communities.

The review will encompass all relevant legislation pertaining to how councils operate. The Terms of Reference state:

The review will include consideration of all legislation for which the Minister for Local Government has administrative responsibility with a view to simplifying and integrating these Acts in the new Act where possible; but will not include consideration of legislation which imposes responsibilities on councils which is not the responsibility of the Minister for Local Government (e.g. the *Planning and Environment Act 1987*), except insofar as this latter legislation interacts with the Local Government Act 1989 with a view to clarifying that interaction.

Consultation

This review is the most significant policy project undertaken in Victorian local government for decades. The resulting reforms must be guided by the people most affected by the legislation and those who best understand its workings and impacts. Accordingly, this review will be informed by extensive and detailed consultation with councillors, council staff, peak bodies and the wider community.

This discussion paper is the first stage of an extensive consultation process. It will be followed by further consideration of possible reform directions with stakeholders and the community.

Purpose of this discussion paper

This discussion paper will begin a conversation, with the sector and the community more broadly, about the legislative framework that governs local government in Victoria.

The Minister for Local Government, the Hon Natalie Hutchins MP, has announced that the review will be conducted by Local Government Victoria with advice from an advisory committee, appointed by the minister and chaired by Ms Ros Spence MP, Member for Yuroke and former councillor and mayor at Hume City Council.

The other members of the advisory committee are:

Dr Kathy Alexander, former CEO of Melbourne City Council

Kay Rundle, former CEO of Port Phillip, Greater Geelong and Maribyrnong city councils

Nicholas Reece, Principal Fellow Melbourne School of Government and senior executive in Chancellery, University of Melbourne, former Director of Strategy, Office of the Prime Minister

Mary Delahunty, councillor and deputy mayor at Glen Eira City Council

David Clark, councillor and former mayor at Pyrenees Shire Council.



Sector Feedback

In particular feedback is sought from the sector – councillors, chief executive officers and council staff on all aspects of the Act. A primary underlying question for discussion is **the appropriate balance between state government oversight and sector autonomy**. As outlined in the following chapters the state has an interest, and a responsibility, in ensuring probity and good governance in the sector. This is important for the sector as well in terms of its reputation and standing in the community. In the legislative framework, the state's interests are expressed in the powers given to the minister to intervene in various matters relating to council procedures, and powers regarding the overall structure of the sector. The extent of these powers is a matter to be considered as part of this review.

Sector feedback is sought on **whether the role and functions of councils are appropriately described** in the Act. For each section of the Act, there is a series of questions about the sort of powers required by councils, and what rules and procedures should be prescribed in relation to those powers, if any. This includes views about the powers that are required to enable councils to perform their role and functions.

Having established this information, views are then sought on **the level of prescription required in legislation** – in either the Act itself or in regulations – to ensure councils exercise these powers consistently and appropriately to meet the standards of probity and good governance expected by communities. This raises the further question of **enforcement**. If the Act is to impose legislative requirements on councils, councillors and council staff, what penalties should be imposed for a failure to comply with these requirements?

Another key purpose of the review is to **reduce any unnecessary prescription** contained in the current Act. Feedback is sought from the sector about any parts of the Act in their entirety or sections that could be removed without affecting the effective performance of councils.

A key question in the review – and throughout this discussion paper – is the balance between **different types of provisions** in the Act. Different ways of thinking about power sit behind each of them. They provide the foundation of how councils operate and the relationship between state and local government, and between local government and communities.

The different types of provisions in the Act are:

normative – which describe the normal behaviour or ways of doing things that should be followed through broad principles

enabling – which provide a general power to perform an act, such as giving councils powers to make local laws and levy rates

prescriptive – which set out detailed requirements that must be followed and raise the further issue of how non-compliance with these provisions should be dealt with.

Community feedback

The views of the Victorian community – residents and ratepayers, including local businesses – are important to the review. As the tier of government closest to people, the decisions taken by councils have an immediate impact on people's lives. Ratepayers have strong views about aspects of their communities that are governed by councils, for example, the location of parks and playgrounds and how they are maintained. Decisions about when and how rubbish is removed are important to people. A key issue for most ratepayers is the level at which rates are set and how the revenue collected is used.

Feedback is sought from the people most affected by the actions of councils, while noting this review is of the framework that supports how councils work, not of an individual council's day-to-day operations. Two primary areas of feedback sought are:

- **what people expect of their councils** - the effectiveness of the current Act as the framework for councils to meet the expectations of their communities
- **what people believe the appropriate role of councils to be** now and into the future - whether the current Act accurately describes the role and functions of councils.

An issue often raised in correspondence to the minister is frustration about **levels of consultation and engagement** with communities by councils about key decisions. Feedback is sought from the public as to whether the Act currently contains strong enough provisions about community consultation. A further question is what decisions require the most extensive consultation with residents and ratepayers.

Another concern raised by community members is how **complaints** by residents on a council's performance are dealt with. This has been the subject of a recent Ombudsman's report and is discussed at chapters 2 and 4 of this paper.

What is clear is that members of the community have strong views about how their councils should perform their role and functions. This review gives everyone an opportunity to raise issues that need to be addressed in the legislative framework governing the sector.

Accountable local government

Councils must take responsibility for the decisions they make and be open to public scrutiny over their actions. This discussion paper talks about a range of legal mechanisms that currently (and potentially) enhance both governance and financial accountability in local government. Topics include for example:

- Consultation and engagement & complaint handling (Chapter 4)
- Strategic planning and reporting (Chapter 5)
- Best Value (Chapter 7)
- Councillor conduct principles & conflicts of interest disclosure (Chapter 8)

Submitters may wish to consider addressing what other measures could be included in the new Act that would further improve the way councils are accountable to their communities.

Submissions close on Friday 18 December 2015 at 5pm

Visit www.yourcouncilyourcommunity.vic.gov.au

- To complete and return your submission online
or
- To download, print and complete a submission form that can be:

Emailed to local.government@delwp.vic.gov.au

or

Posted to Local Government Act Review Secretariat, C/o Local Government Victoria,
PO Box 500, Melbourne Vic 3002

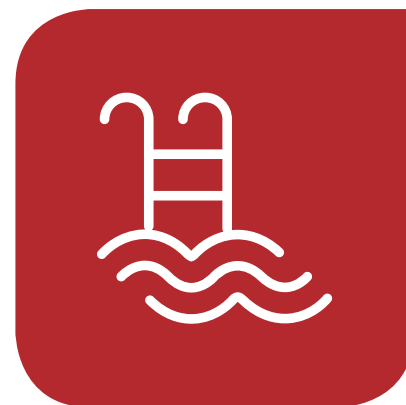
Chapter 2:

The role of councils



Chapter 2:

The role of councils



In this chapter:

How councils are established as legal entities, including the impact of recognition in the Victorian Constitution and the Local Government Charter

The range and extent of powers currently provided to councils

The balance between normative, enabling and prescriptive provisions in the Act

How councillors balance their political role and administrative decision-making responsibilities – the so-called Winky Pop, or apprehended bias, issue

Constitutional objectives of a Local Government Act

Constitution Act
Part IIA, ss.74A,
74B

Current arrangements

A Local Government Act is constitutionally necessary to create local government. It must, at a minimum, provide for the creation of democratically elected councils that are empowered to act in relation to defined municipalities. When making a Local Government Act, Parliament has broad, but not unlimited, powers to legislate for the constitution, powers, administration and election of councils but is limited in the degree to which it can provide for the suspension or dismissal of councils.

Part IIA of the *Constitution Act 1975 (Victoria)* defines the relationship between state and local government by providing the degree to which the state can legislate in relation to local government. The Constitution Act provides that Parliament can make any laws that are necessary related to the creation, empowerment and election of councils (ss.74B(2)(a-h)). It also contains a catch-all provision allowing Parliament to make laws with respect to any act, matter or thing related to the administration of councils (s.74B(2)(i)).

The Constitution Act also places limits on Parliament's powers in relation to councils. Section 74A mandates that local government must continue to exist and that it must consist of democratically elected councils that are empowered to provide government to their municipal districts. Limits also exist on the ways the state can suspend or dismiss councils (ss.74B(2) and (3)).

The legal recognition of local government in Victoria was achieved in two stages, in 1988 and 2003. The *Constitution (Local Government) Act 1988* inserted Part IIA into the *Constitution Act 1975* ('the Constitution') for the first time. Previously, the Victorian Constitution had only referred to the four separate branches of the state, that is: the Crown, the Parliament, the Executive and the Supreme Court. It was not until 2003 that the *Constitution (Parliamentary Reform) Act 2003* expanded on the 1988 reform to establish local government as a "distinct and essential" tier of government.

The Preamble

The Local Government Act's Preamble (2003) provides a broad overview of the Act's objectives consistent with the Constitution. It serves two essential functions. It ties the Act directly to the Victorian Constitution (Part IIA). Secondly, it provides that the Local Government Charter and Preamble, both located at the front of the Local Government Act, are to be used to interpret the remainder of the Act.

The Preamble is integral to denoting the constitutional significance of the Act. It is the result of extensive community and sector consultation and was subjected to the high levels of scrutiny as required for any constitutional amendment in 2003. It is therefore not considered desirable to amend either the Preamble or the Constitution.

Empowerment and regulation of councils

Current arrangements

The Local Government Act's Charter (2003) creates the policy framework of the Act. It states what councils are intended to be and for what they are responsible. The Charter's six sub-sections outline the purpose, constitution, objectives, role, functions and powers of councils. This terminology is drawn directly from sections 74B(1) and (2) of the Constitution Act which gives the Victorian Parliament the power to make laws about local government.

The Charter serves four important functions:

- tying the operative provisions of the Local Government Act to its Preamble and to Part IIA of the Constitution Act
- describing the essential characteristics of councils
- providing a theoretical framework for the interpretation of the remainder of the Act
- determining the legitimate extent of councils' exercise of their statutory powers.

Section 1 of the Act provides that the purpose of the Act is to create the legislative framework for the democratic system of local government envisaged by the Constitution.


Sections 3A, 3B and 3F of the Act legislatively describe and broadly empower councils. Collectively, these provisions provide that councils are democratic bodies comprised of councillors and vested with all the powers necessary to achieve their objectives, role and function.

The remaining part of the Charter (ss.3C, 3D and 3E of the Act) broadly outline the key objectives, roles and functions of councils. These provisions provide a framework for determining what activities are within the ambit of councils' powers and what are not.

The Charter replaced similar provisions that were already in the Act. It was not intended to 'change the actual functions and power of councils' but to 'provide greater clarity' in respect to them.¹

The introduction of the Charter in 2003 represented a significant clarification of the intent of the Act. A stated intention of the Act when introduced in 1989, was to give councils a wider scope to undertake functions than had been possible under previous local government legislation. The previous Act included a list of specific functions (e.g., litter control, public health) that was interpreted by some courts as restrictive. The Charter removed the list of functions and expressly stated that councils could undertake any function relating to the peace, order and good government of the municipality. In doing this it completed a philosophical shift from a system where councils had narrowly defined functions to a system where councils have broad powers to engage in activities that serve community needs.

¹ Local Government (Democratic Reform) Act 2003, 2003 second reading speech, Hansard 6 November 2003 p1259



Q: What should the key roles and functions of council be and what powers are required to perform these roles and functions? Should there be any limitations?

Key issues

General power of competence

The key question to be addressed is whether the Charter defines the role of councils properly and in a way that allows both councillors and the community to understand what this role is. The second issue is whether the powers provided to councils are sufficiently clear.

The Charter currently sits somewhere between the traditional approach of listing the powers available to councils and a more recent approach of providing general powers of competence to councils.

Recent UK reform

In 2011, the UK passed the *Localism Act 2011* (UK) which provided councils with the general power to do anything that an individual may lawfully do. This was an expansion of an existing 'well-being' power, which was similar to the Victorian Charter's 'peace, order and good governance' provision. The UK general power of competence was intended to enable councils to innovate to respond to community needs and financial pressures. It was also intended to alter the restrictive legalistic approach taken by courts in determining whether a particular council activity (e.g. setting up a mutual insurance company) was permissible.

Some protections were built into the new UK provision to ensure that councils did not engage in activities that were clearly outside the scope of the intended devolution of state power. Specifically, councils were prevented from doing anything that is specifically prohibited in legislation, such as raise taxes or alter their political management. Under the UK Act, the Secretary of State has broad powers to remove or alter provisions that restrict use of the power and also to restrict the use of the general power of competence by councils.

These UK protections highlight the need for any areas where councils cannot or should not act to be clearly articulated in an enforceable way in legislation if such a general power of competence was to be introduced in Victoria.

It is worth noting that the UK experience of devolution is quite different from Australia's and should be approached cautiously. In particular, the UK is a unitary state rather than a federalist state and therefore has different drivers for devolving centralised state power than exist in Australia.

Nonetheless, in its 2013 discussion paper on a new local government Act, the NSW Government included a general power of competence as one of the most commonly articulated principles when considering a new local government framework.

Special powers and responsibilities of councils

Current arrangements

The Act contains many provisions that have a normative function in that they do not create a clearly enforceable obligation or power, but instead provide guidance for council behaviour and processes. The clearest examples are found in the Charter. These concepts are described in more detail below.

Otherwise, the Act is broadly broken up into provisions that provide councils with specific powers (enabling provisions) and others that provide councils with particular responsibilities and obligations (prescriptive provisions).

Key issues

ss.3A-3E,
208A-208J

Normative provisions

Many of the provisions in the Charter are essentially normative statements; they are not intended to create enforceable obligations or grant special powers to councils but are a statement of particular values that should be observed. Some nominally prescriptive provisions in the remainder of the Act, might also fit into this category.

However, the intent of the normative provisions, where they exist, is generally not clear. For example, the normative function of the Charter, while important, is not clearly articulated and is not separated from its other legally critical functions, such as delineating the absolute extent of a council's power to act.

Example: Part 9 Division 3 of the Act, which requires councils to 'comply' with best value principles

Example: Sections 3E(1)(a-g) are redundant in relation to defining the extent of councils' powers to act, given that section 3E(1)(h) has been interpreted as broadly empowering councils to essentially act in any way related to providing local government. As such, only section 3E(1)(h) is especially critical in the legal evaluation of council action. By contrast sections 3E(1)(a-g) exist as normative statements about the core activities in which councils are expected, but not compelled, to engage.

Separating and clearly articulating the normative nature of some of these provisions should be considered. This might lead to greater clarity and emphasis on the underlying values which councils are intended to observe.

As with any normative statements, the sections of the Charter where they are found represent the subjective values that informed the 2003 amendments and are open for reconsideration as part of this review of the Act.

ss.3F, 82,
86, and 158,
Parts 3 and 8

Enabling provisions

Enabling provisions give councils the powers that are essential for them to exist as a distinct tier of government. For example, the provisions that create the powers to make local laws and levy rates are essential in enabling councils to operate.

These provisions are different from the broader empowerment of councils and have a slightly different policy basis. Empowerment under a general power of competence would allow councils to act as freely as any other body corporate, whereas enabling provisions grant specific powers, such as the power to levy rates which other bodies corporate would not ordinarily be able to exercise.

There is a compelling state interest in ensuring that these enabling provisions are sufficiently narrow and clear to ensure that the powers granted are not greater than anticipated or unbounded. This is a state-granted power that is being exercised, therefore the state should be explicit about its extent.

Prescriptive provisions

Prescriptive provisions are the obverse of enabling provisions. They place requirements on councils or restrict council behaviour, particularly in the exercise of a power granted by enabling provisions.

Other prescriptive provisions have broader application either creating an obligation or general restriction.

Example: Section 158 of the Act provides the date by which councils must make declarations of rates each year.

Example: Section 82 of the Act provides that councils must maintain an office, and section 86(4) provides that a council cannot delegate some of its powers to committees.

Probably the most important prescriptive provisions, in a constitutional sense, are those that set out the requirements for democratic operation of councils, such as the provisions in Part 3 on the requirements for elections. These types of prescriptive provisions are essential for ensuring the constitutional validity of councils as opposed to other prescriptive provisions that provide a general regulatory framework for council behaviour.

Some of the prescriptive provisions relate to the constituent parts of the council (i.e. the councillors, the chief executive officer and council committees) and regulate the actions of individuals or other sub-components of the council.

Example: Section 80B requires council staff to disclose conflicts of interest.

ss.76D, 218,
219, 128, 223A

Compliance with prescriptive provisions

The prescriptive provisions in the Act, placing requirements on councils rather than individuals, do not usually have any compliance mechanism. By contrast, those placing obligations on individuals do.

Example: Section 128 requires that a council must prepare a revised budget if circumstances arise that cause a material change in the budget. This is clearly mandated yet there is no specific mechanism for ensuring that the council comply with the obligation. There are no sanctions for failing to comply and no direct means for a body or person, the minister for example, to request or require a council comply or to take other remedial action.

In contrast, section 76D provides that a councillor must not misuse their position and provides a clear sanction for a breach of the provision. Implicitly, the Act assigns investigating and prosecuting offences under this provision to inspectors of municipal administration appointed under section 223A of the Act.

This difference in approach appears to stem from divergent policy drivers for sanctioning individual wrongdoing or for ensuring regulatory compliance by an organisation. For example, it makes less sense to fine a council than a councillor for wrongful behaviour, since fining the council is effectively penalising the local community, which is already the victim of the breach.

Currently, there appear to be three different 'enforcement' mechanisms (*see next page*). None of them seem to be particularly effective in ensuring broad compliance with the various regulatory provisions of the Act or for remedying minor but specific breaches of the Act. The Act does not directly address the issue of compliance.

Other mechanisms for ensuring or encouraging general compliance with the Act could be considered, possibly in lieu of the broader ones that currently exist under the Act. For example, a continued breach of the Act could be grounds for the minister to require remedial action by the council in a manner similar to section 218(4) of the Act. And failure to comply with a ministerial direction could be evidence in relation to suspension under s219.

1. Under sections 209 and 218, the minister can appoint a commission of inquiry. On the basis of the commission's report the minister can recommend actions be taken by the council. If those remedial actions are not acted on to the minister's satisfaction, then the Treasurer may deny funds to the council and the minister may authorise persons (e.g., CEOs) to take steps to implement the recommended actions.

This is a cumbersome and multi-step process aimed at providing a remedy for serious and systemic dysfunction in a council rather than a mechanism for ensuring compliance with particular provisions of the Act.

2. Under section 219, the minister can suspend all of the councillors on a council if satisfied that the council is failing to deliver good government or is acting unlawfully in a serious respect. The threshold for being satisfied of either of these facts is extremely high.

Sections 209, 218 (a commission of inquiry) and 219 (suspension of a council) are rarely used and each is typically invoked only as a mechanism of absolute last resort for councils facing significant governance challenges.

3. A warning issued by the Local Government Investigations and Compliance Inspectorate when it believes a council has breached the Act is a less formal mechanism. The Inspectorate investigates breaches of the Act by councils and by individual councillors so is often in a position to direct councils' attention to a breach.

Issuing a warning is similar to the discretionary actions taken by other prosecutorial or investigatory bodies, such as Victoria Police. However, the Act does not contain an explicit process for this.

Key issues

Balance of normative, enabling and prescriptive provisions

An appropriate balance of normative, enabling and prescriptive provisions is essential for creating a coherent new Act. The current balance of these provisions reflects the history of the Act.

Prior to 1989, local government legislation in Victoria was almost entirely prescriptive and the Act contained detailed instructions about what councils were required to do and how they needed to do it.

The 1989 Act was designed to be broadly enabling. It intended to give councils more autonomy to be responsive to the needs of their communities. In the words of the minister at the time it was intended "to free councils from the restraints imposed under existing legislation"².

Many of the amendments made to the Act since 1990 have imposed detailed prescriptive requirements on council processes and appear to have been added *ad hoc* to address issues as they have arisen rather than as part of a broader policy framework.

The breadth and number of amendments to the Act over the past 25 years have left it without a consistent approach to regulating local government. As a result, it is neither primarily enabling nor prescriptive and is unclear about the degree to which particular prescriptive provisions are intended to be enforced.

The Constitution provides that there should be a legislative framework that allows councils 'to be accountable to their local communities in the performance of functions and the exercise of powers and the use of resources'. The Constitution does not outline the degree to which this legislation should regulate the performance of the functions of councils, nor the appropriate level of oversight that the state should exercise in administering that legislation.

There is an argument that imposing detailed statutory requirements is inconsistent with constitutional recognition of local government as a 'distinct and essential tier of government' and creates needless red tape requirements. On the other hand there is an expectation in the community that the state has an oversight role over councils.

² Hansard Victorian Legislative Assembly second reading speech, Local Government Bill (No. 2), 29 October 1987

Administrative decision making

Current arrangements

Administrative decisions

An essential characteristic of councils is that they function as administrative decision-making bodies. Administrative decisions are different from councils' other decisions in that they involve the exercise of statutory discretion and affect individual rights and interests. These statutory powers are granted under the *Local Government Act 1989* and by other pieces of legislation including, for example, the *Planning and Environment Act 1987*, *Public Health and Wellbeing Act 2008* and the *Infringements Act 2006*. When making administrative decisions councils are directly exercising a state power and these decisions must therefore be subject to checks and balances to ensure they are exercised appropriately.

Judicial review

Where a council decision affects an individual, the validity of that decision can be reviewed by a court under general administrative law principles. This would occur when a council is exercising a statutory power that directly affects an individual, such as a planning decision. It might also extend to other types of council decisions, such as the creation of a local law.

Example:

In *Winky Pop Ltd v Hobsons Bay City Council* [2007] VSC 468, the Supreme Court invalidated a council decision on the basis that a councillor had acted with apprehended bias in making a planning decision because the councillor had made a submission on the matter to council prior to participating in the council decision on the planning application.

Other grounds for judicial review of a council's administrative decision include:

- taking into account irrelevant considerations,
- improper purpose,
- *Wednesbury*³ unreasonableness (formulating a judgement on entirely unreasonable grounds)
- denial of natural justice which includes failure to provide a hearing to a person affected.

Merits review

In some cases, Acts which grant statutory powers to councils also grant jurisdiction to an external body to review the merits of a decision, typically the Victorian Civil and Administrative Tribunal ('VCAT'). For example, under the *Planning and Environment Act 1989* (Part 4, Division 2), applications can be made to VCAT to review council decisions on planning permits. This review can look at the actual merits of the application rather than the legality of the decision making process. This is a common mechanism for ensuring an avenue of independent review of decisions made by councils.

Key issues

Making correct decisions

When councils make administrative decisions they are exercising statutory functions that have been granted to them by the state. The state therefore has a significant interest in ensuring that their decisions are validly and appropriately made. Currently the Supreme Court and VCAT, where it has jurisdiction, exercise oversight of these decisions.

However, as the decisions of a collective body of democratically elected representatives and a distinct tier of government, council decisions might deserve to be granted greater weight than other statutory bodies, particularly where the council is exercising one of their core responsibilities (such as those specifically laid out in section 3E of the Act).

3 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223



Example:

As officials elected to represent constituents, councillors must be able to freely articulate political platforms and comment on matters of community concern when running for election. However, as the *Winky Pop* decision makes clear, they cannot be seen as pre-determining a particular matter when it involves making an administrative decision. This creates a tension between the nature of councils as a democratic forum and the requirements of administrative law.

Another view is that councils, in making decisions that directly affect individuals, are no different from government ministers or statutory bodies when they exercise authority granted by the Parliament and should not be granted any special consideration.

Something to consider is whether the Act should provide clearer guidance on the making of administrative decisions that accords with administrative law requirements but also recognises the uniquely democratic and constitutional status of councils.

There is a strong argument for including review provisions for council decisions in the Act that acknowledge the exercise of administrative powers by councils and clarify how reviews should be sought.

It might be worth considering whether a new Act should have default provisions addressing external review of councils' administrative decisions. These could include mandating the body, timing and criteria by which reviews should be conducted, while leaving it open for other legislation to require specific types of review, for example appeals to VCAT under the *Planning and Environment Act 1987*.

In addition, the Victorian Ombudsman recommended the Local Government Act be amended to require that all councils have an internal review function for reviewing complaints about council administrative decisions.

Ultimately, any approach to ensuring that council decisions are made appropriately will need to determine an appropriate balance between state oversight (external merits review), judicial oversight (judicial review) and deference to democratic council processes.



Questions on the role of councils

1. What should the key roles and functions of council be?
2. Does describing the key objectives, roles and functions of councils in the Local Government Act 1989 assist councillors, council staff and members of the community understand the role that councils play? Should these key objectives, roles and functions be retained in the Act or revised in any way?
3. What powers are required by councils to perform these roles and functions? Should there be any limitations to council powers?
4. Which provisions in the Act should be normative (setting out desirable behaviour) general (setting out broad principles to be followed) and which should set out prescriptive (detailed) requirements?
5. Should the legislation provide consequences such as penalties or sanctions, for any non-compliance with either the general and prescriptive provisions? If so, what form should these take?

Chapter 3:

How councils are elected



Chapter 3:

How councils are elected



In this chapter:

Representative structures and the conduct of local government elections

How councils are elected - including requirements for candidates and councils

The legal basis of local government electoral structures, the conditions for local democratic representation and the conduct of elections

Challenges arising from the structure of the electoral system - including optimising democratic participation and attracting appropriate candidates.⁴

Electoral representation

COUNCILLOR NUMBERS

s.5B(1)

Current arrangements

s.219D

Councillor numbers influence levels of representation and impact councillor workload. Councils must comprise between five and 12 councillors. In the absence of legislated criteria, the Victorian Electoral Commission (VEC) applies its own criteria when recommending council members to a minister as part of an electoral representative review for a council. The ratio of councillors to voters should not vary by more than 10 per cent between wards within a subdivided municipality. The number of councillors per council at the most recent general elections in 2012 and the change since 2003 are shown in Table 1.

Table 1: Spread of councillor numbers in councils across Victoria - 2003 compared to 2012⁵

	Number of councils by councillor numbers							
	Councillor numbers							
	5	6	7	8	9	10	11	12
2003	7	3	31	4	26	5	2	1
2012	6	1	34	0	26	2	9	1
Change	-1	-2	+3	-4	0	-3	+7	0

Note: These figures do not include the Lord Mayor and Deputy Lord Mayor of the City of Melbourne, or the Mayor of Greater Geelong City Council.

Key issues

Councillor to voter ratios vary dramatically across Victoria. At the 2012 elections, the lowest ratio was 804 voters per councillor (West Wimmera) and the highest 15,411 (Casey City Council). Victoria has amongst the highest average number of voters per councillor in Australia. Victoria and Tasmania have the lowest maximum councillor numbers per council (12) in Australia.

The Terms of Reference for this review of the Act rule out changing the allowable band of five to 12 councillors, but the process of determining councillor numbers within this band can be considered.

One option is to fix councillor numbers based on the number of voters in a municipality, removing the VEC's discretion when recommending councillor numbers.

⁴ A Local Government Electoral Review Panel undertook a review of council elections in 2013-14. The discussion paper (*Local Government Electoral Review Discussion Paper*) and reports (*Local Government Electoral Review Stage 1 Report* and *Local Government Electoral Review Stage 2 Report*) prepared by the panel provide additional information on electoral council issues. A number of the observations and proposals contained in this chapter were canvassed in this report.

⁵ DTPLI, 2013, *Local Government Electoral Review Discussion Paper*, p.75

ELECTORAL STRUCTURES AND REPRESENTATION

s.5B(2) Current arrangements

The current approach is a patchwork of different electoral structures across the state, as indicated in the two maps below. Four different structures are currently possible: Municipalities can be:

1. unsubdivided
2. divided into single member wards
3. divided into multi-member wards, each ward containing the same number of councillors
4. divided into wards containing different numbers of councillors in different wards.

Table 2 shows the patterns of change in electoral structures from 1978 to 2014. The numbers are shown as percentages of all councils, as the total number of councils changed significantly in the 1990s.

Table 2: Proportion of local government ward structures across Victoria, 1978–2014⁶

Council ward structure	1978 (%)	1993–94 (%)	1998 (%)	2003 (%)	2014 (%)
Unsubdivided	14.4	14.3	17.3	16.5	27.8
Uniform multi-member wards	85.6	83.3	10.7	12.7	20.3
Non-uniform multi-member wards	0.0	1.9	2.7	1.3	19.0
Single- and multi-member wards	0.0	0.0	18.7	15.2	19.0
Single-member wards only	0.0	0.5	50.7	54.4	13.9

Key issues

Significant policy questions relate to the design of the current electoral system.

The Proportional Representation Society of Victoria / Tasmania has argued that different numbers of councillors in different wards (Number 4 above) should no longer be allowable. This is because councillors require different quotas to be elected in the same council election in municipalities with a mix of single and multi-member wards or non-uniform multi-member wards. Removing this structure, it argues, would mean each elected councillor would have secured the same minimum level of community support.

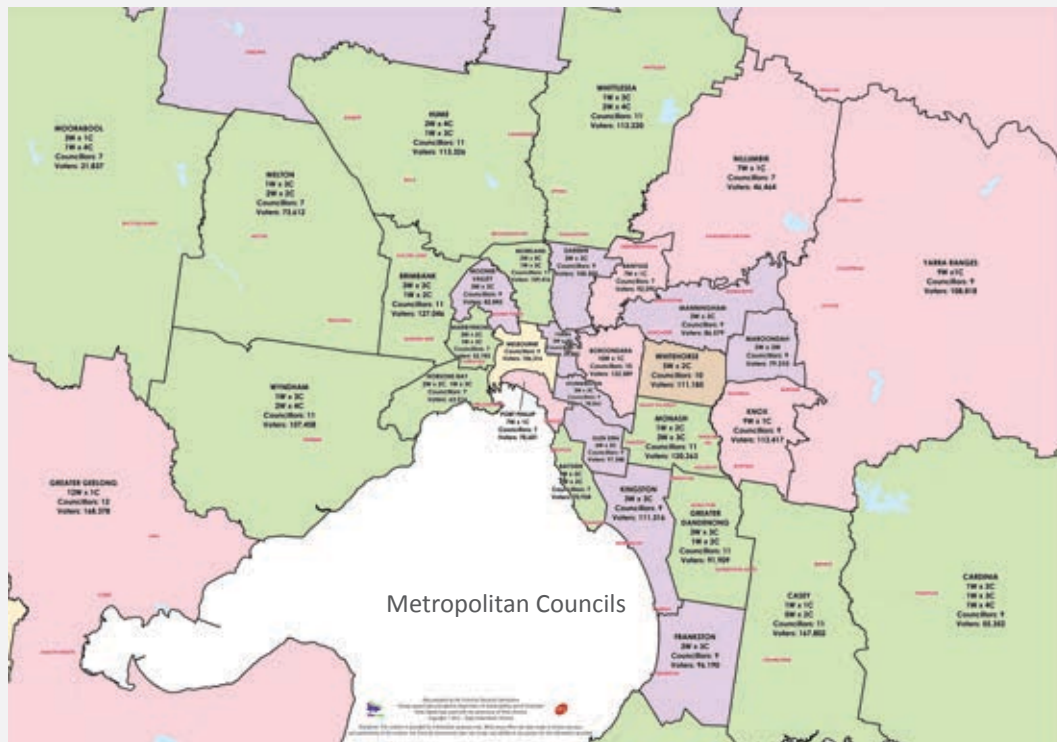
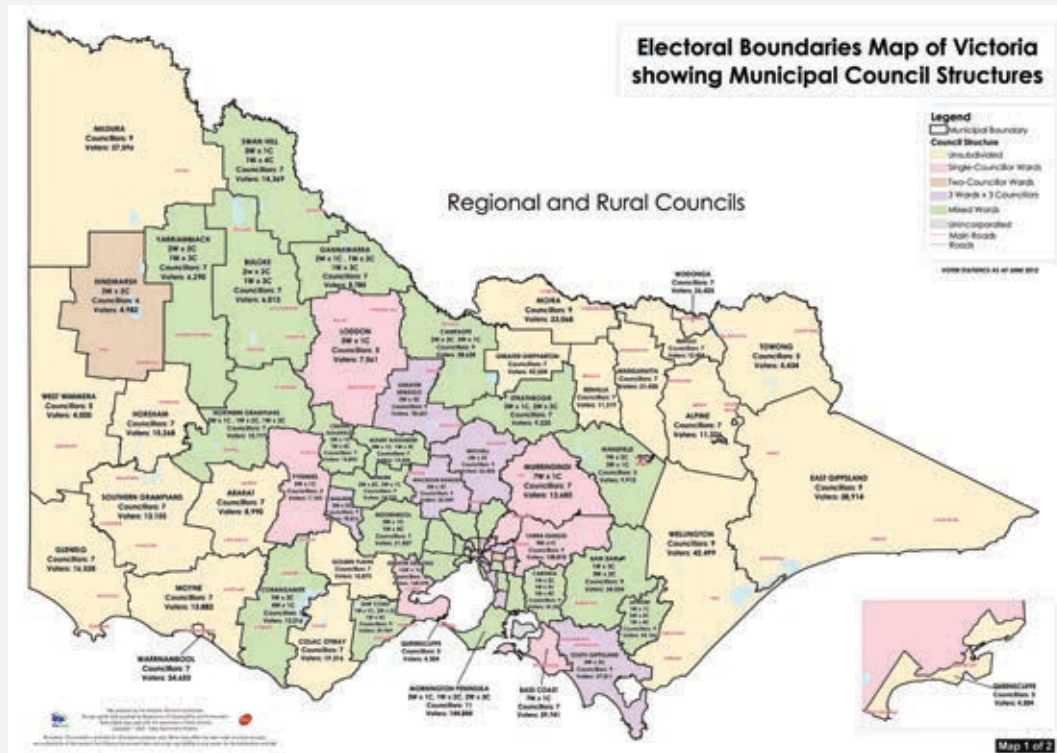
Fixing councillor numbers and reducing the number of allowable electoral structures from four to three would dramatically simplify VEC electoral representation reviews, making the decisions reached more consistent. On the other hand the VEC's scope to recommend a structure to fit a council's particular circumstances would be diminished.

During the period from the 1990s to the mid 2000s single-member wards became common. By 2003, 43 councils were comprised entirely of single-member wards. Supporters of single-member ward structures argue that they bring councillors closer to the people, and that the absence of single-member wards may diminish the accountability of elected representatives to their constituents.. Single-member wards work best where populations are evenly distributed and relatively stable, and distinct communities can be contained within wards.

Q: Should councils be able to be constituted by wards containing different numbers of councillors in different wards?

⁶ Department of Transport Planning and Local Infrastructure Victoria 2014, *Local Government Electoral Review Stage 2 Report*

Figure 1: Electoral Boundaries Map of Victoria showing Municipal Council Structures at 2012
[Source: Victorian Electoral Commission]



Elections at the City of Melbourne are in some aspects different from other councils:

- Voting is compulsory for all voters, even for people who applied for enrolment. The exception is voters aged 70 or over.
- The Lord Mayor and Deputy Lord Mayor are elected as a team by all Melbourne voters using preferential voting.
- The other councillors are currently elected at large by all Melbourne voters using the proportional representation system.
- Candidates may nominate in groups and voters may vote for those groups above the line on the Senate-style ballot paper.

The City of Melbourne shares with the City of Greater Geelong the distinction of having a directly elected Mayor. The Mayor is elected by fellow councillors in all other councils in Victoria (discussed in Chapter 4).

VOTING AND BALLOT COUNTING SYSTEMS

Sched.3, Cl.1

Current arrangements

Sched.3,
Part 3, 4A

To cast a valid vote in a council election in Victoria, voters must consecutively number every box on the ballot paper in their order of choice. The method of voting is the same, regardless of the ward structure and the number of vacancies to be filled. While the process for the voter is identical, the ballot counting systems differ for different ward structures. The council electoral review discussion paper of 2013 explains the ballot counting systems in detail.⁷

Elections in:

Single-member wards → preferential vote counting

Multi-member wards and unsubdivided councils
→ proportional representation vote counting.

Key issues

It is generally agreed that ballot counting systems for council elections should be the same as for state and federal elections to minimise voter confusion. By that logic preferential vote counting would be maintained for single-member wards. The Senate is considering a move to a partial preferential vote counting system for those voting below the line and this system already exists for Legislative Council elections in Victoria. Given this, the state government may also wish to consider the introduction of partial preferential vote counting for local government elections in multi-member wards and unsubdivided councils⁸.

Conduct of elections

VOTER FRANCHISE

s.11-20

Current arrangements

City of
Melbourne Act
2001, s.9–19

Who should have the right to vote at council elections is an important question for the review of the Act.

Voter entitlements for local government elections are broader and more complex than for state and Commonwealth elections. Table 2 lists the voter categories that make up council voters' rolls (other than the City of Melbourne), how each voter is enrolled and whether voting is compulsory.

⁷ Department of Transport, Planning and Local Infrastructure, 2013, *Local Government Electoral Review Discussion Paper*, pp.87-88

⁸ Partial preferential voting is already applied in the Victorian Legislative Council elections. In these elections, a voter is only required to mark the ballot paper with five consecutive preferences (the number of vacancies to be filled) below the line for the vote to be valid.

Table 2: The types of voters that make up council voters' rolls. Source: Local Government Electoral Review 2013-14

Basis of entitlement		How enrolled	Is voting compulsory?
Residents of the municipality			
Voters enrolled on the State Electoral Roll	aged 18 – 69	Automatically	Yes
	aged 70 and over	Automatically	No
Ratepayers of the municipality (Limited to one of the following categories for each rateable property)			
First two named owners of the rateable property who are not residents of the municipality or		Automatically	No
Up to two owners of the rateable property who live in the municipality but are not on the state roll (non-Australian citizens) or		By application	No
Up to two occupiers of the rateable property who pay council rates and are not otherwise enrolled (Commercial tenants) or		By application	No
One representative of the company that owns or occupies the rateable property (Director or company secretary)		By application	No

The franchise for the City of Melbourne, governed by the *City of Melbourne Act 2001*, is broader.⁹ Larger numbers of commercial tenants and corporation representatives are included on the voters' roll, as well as residents enrolled from the state roll.

Key issues

Given its complexity, consideration may be given to simplifying voting entitlement and compulsory voting arrangements for Victorian councils. This could be achieved by applying a less contingent set of eligibility criteria to simplify and broaden the franchise. Some stakeholders might support an expansion of the franchise, for example to include all citizens, property owners, lessees of non-residential property and rate payers. Others may argue that it simply be aligned with state and Commonwealth electoral rolls, with no additional voting rights conferred by land ownership.

In addition, the question of whether or not the distinct franchise for Melbourne should be maintained is an important consideration.

Example:

The Queensland council franchise, like state and Commonwealth parliaments, confers no additional voting entitlement on property ownership.

Q: Should only voters on the state roll be entitled to vote at council elections?

Automatic enrolment

Recent reviews have identified some anomalies in automatic and non-automatic enrolment. Principally, that *resident* property owners who are not on the state roll must apply to vote while *non-resident* property owners not on the state roll are enrolled automatically. The mix of automatic and non-automatic enrolment can have implications for equity and the accuracy and integrity of the voters' roll.¹⁰

Compulsory and discretionary voting

Some have proposed that voting be compulsory for all electors enrolled to vote (extending compulsory voting to include non-resident voters and voters over the age of 70). This proposed change would bring council elections into line with conditions for state and Commonwealth elections and would lift participation rates. Making voting compulsory for absentee and over 70s voters may become viable if voting was conducted universally by post, rather than in person. Most councils already conduct their polls entirely by post.

⁹ The Local Government Electoral Review Discussion Paper 2013 details the unique features of the City of Melbourne franchise on pages 93-96

¹⁰ Local Government Electoral Review Stage 1 Report (2014), pp25-31

THE VOTERS' ROLL

An accurate voters' roll is fundamental to the probity of elections.

s.21-27 **Current arrangements**

Compiling an accurate roll depends on sourcing reliable information on voters and updating that information when changes occur. For council elections, the complex make up of voters to be included on the roll and the different ways data is sourced poses challenges in creating a current and accurate roll. There are several phases in voters' roll production and exhibition.

The state roll

The VEC has the statutory authority for maintaining the state roll, which makes up around 86 per cent of all voters on the council voters' roll. The process for assembling the state roll, managed by the VEC, is generally recognised to be sound.

The CEO's list

The council CEO is responsible for maintaining records required to prepare the voters' roll. Other than voters on the state roll, there are four categories of voters who are eligible to vote in local government elections:

- non-resident owners
- occupier ratepayers
- corporation nominees and
- resident owners who are non-Australian citizens.

CEOs compile a list (commonly referred to as the 'CEO's list') from amongst these four categories.

Key issues

Recent reviews have found that existing arrangements for compiling the roll leave scope for failures of accuracy and integrity. This may be addressed by requiring all voters not on the state roll to actively enrol to vote rather than the VEC automatically enrolling some categories. However, requiring all categories of voters to compulsorily enrol may create its own challenges to maintaining an accurate roll and enforcing non-enrolment.

Inspection of voters' rolls

Unlike in any other Australian jurisdiction, voters and candidates in Victorian council elections can inspect a preliminary version of the voters' roll (called the 'exhibition roll') in the immediate lead up to the entitlement date. In practice, it appears that very few people visit their local council to check the exhibition roll.

The VEC is concerned about the security of hard copy exhibition rolls and has made recommendations to government on regulating roll availability. In 2012, there were three instances where copies were removed (each case was reported to the police and the Privacy Commissioner).

Voters in Australia can check their details on state rolls at any time. These rolls are used also for council elections and are continually updated. The Local Government Act also allows for a voters' roll to be subsequently amended before an election if errors or omissions are found after it has been certified.

One option is for provisions for inspecting the voter's roll to be the same as for the state roll, which can be inspected by any person, through the VEC, at any point in the electoral cycle. This would enable the removal of the requirement to prepare an exhibition roll from the Act. The removal of the exhibition roll is currently being considered under reforms at Appendix 2.

Candidacy

REQUIREMENTS AND QUALIFICATIONS OF COUNCILLORS

s. 28-30 Current arrangements

A candidate is qualified to contest a council election and become a councillor if they are enrolled on that council's voters' roll for that election. If a councillor loses this qualification, such as by moving out of the municipality, they continue in office for another 50 days, and then automatically go out of office and their position becomes vacant (unless another entitlement is gained).

There are also a number of circumstances that disqualify a person from running as a candidate and serving as a councillor. These include where the person:

- is a member of the Commonwealth or any state or territory Parliament or a councillor at another Victorian council
- is an undischarged bankrupt or owns property that is subject to control under bankruptcy laws
- is of unsound mind
- has not taken the oath of office within three months of being elected as councillor
- is not an Australian citizen (or British subject on the electoral roll before 1984)
- is disqualified after a finding of gross misconduct by VCAT
- has been convicted of certain offences¹¹
- as a councillor, is absent from four consecutive meetings of the council without leave
- as a councillor, has been removed from office by the Minister for Local Government for failing to attend or remain at a council meeting without reasonable excuse, when previously required by the minister or the council's CEO to do so.

Failing to sign the councillor code of conduct is also being considered as a possible disqualification under the reforms summarised at Appendix 2.

Reforms under consideration by the government and summarised at Appendix 2, propose three changes to the grounds for disqualification:

1. A tightening of the threshold for disqualification because of an indictable conviction (decreasing the period of imprisonment for an offence from five years to two). Lowering this threshold is sought because of concerns that there are serious indictable offences (e.g. firearms offences) that should preclude a person's participation in council because of recent undesirable behaviour.
2. Increasing the period of disqualification as a councillor following a conviction, from seven to eight years (two full councillor terms).
3. Introducing an additional disqualification – a person who is banned from being a company director cannot run as a candidate or serve as a councillor.

Ministerial, Parliamentary advisers, state and Commonwealth electorate staff and council staff can run as a candidate at a council election if they take leave from their position during the caretaker period. They must resign their position if elected to accept the position as councillor. This requirement was included in the Act in 2009.

A councillor charged with one of the offences described above, must take leave of absence from their role until the outcome of court proceedings¹². They must also take leave of absence if they appeal their conviction. A person disqualified from being a councillor for seven years may be granted relief from the disqualification by VCAT after four years from the conviction date.

¹¹ This includes offences relating to misuse of position, contravention of the conflict of interest rules, various electoral provisions of the Local Government Act and any other offence punishable on first conviction of five years' or more imprisonment. The person is also disqualified from being a councillor for seven years after the conviction

¹² If ordered to do so by VCAT following application by the Secretary of the Department of Environment, Land, Water and Planning

Key issues

Qualifications and disqualifications for candidacy at council elections are broadly in line with those for other governments in Australia and have been refined over time to reflect prevailing community standards. The current framework sets out behaviour considered so undesirable as to warrant disqualification, rather than codifying positive characteristics that need to be met.

Concerns have been raised over other aspects of the councillor qualification framework. Some of these arguments are presented below.

Councillor qualification framework: some different views

Non-Australian citizens (who can be property owners or occupiers) are entitled to enrol to vote but not to become councillors. This is inconsistent with state and Commonwealth jurisdictions where all voters have the right to stand for election.

As the voters' roll currently includes non-residents, it is possible for a councillor who does not live in the municipality to be elected. Some argue all councillors should be a resident of the municipal district; others even contend that the councillor must live in the ward to represent their communities effectively. An alternative is to require candidates to disclose whether they live in the municipality during the election campaign.

The disqualification for being of 'unsound mind' is unworkable. It is intended to preclude people whose mental condition would make them incapable of carrying out the duties of councillor, however, there is no precise legal meaning of 'unsound mind' and proving 'unsound mind' is extremely difficult.

The right of reversion of councillor disqualification from seven to four years is questionable – the grounds for disqualification are arguably sufficiently serious to warrant two full terms of ineligibility.

Another consideration is enforcement of eligibility requirements. Amendments to the Act and Regulations to strengthen enforcement of eligibility could require that:

- candidates nominate in person on a no exceptions basis¹³
- candidates demonstrate endorsement for their candidature by fellow electors
- candidates complete a nomination form which requires them to unambiguously confirm that no disqualification condition impedes their candidacy
- councils complete police and ASIC checks on elected councillors before their swearing in to confirm no legal or probity disqualifying conditions apply to them.

One important consideration is the imperative to give returning officers clear authority to reject the nomination application of a candidate not on the voters' roll. The VEC has sought this power for some time and it is being considered by the government (see Appendix 2).

INFORMATION ON CANDIDATES

It is important that voters in local government elections have sufficient information about candidates to make decisions and exercise choice. Communicating information to the electorate on individual candidates is particularly challenging in local government elections, which generally do not have the same level of media attention as state and federal elections. Also, most candidates are not supported by political parties and do not benefit from coordinated campaigns.

Q: What would be the best way for additional information on candidates to be provided by them to voters?

Key issues

A number of recent surveys have found that voters do not have adequate, objective and comparable information on candidates that allows them to vote in a fully informed way.

¹³ Currently being considered as part of reforms in Appendix 2.

Suggestions to improve these arrangements have included proposals that each candidate be asked a standard set of questions as part of the nomination process and their responses included in voter postal ballot packs. The challenge with this approach may be agreeing the most pertinent questions for candidate response. Arguably the very selection of the questions to ask may reflect value judgements not shared by the electorate.

The question as to whether candidate ‘how-to-vote’ material should be included in the postal packs circulated by the VEC also arises from time to time. Those who oppose the practice do so on the grounds that publishing candidate ‘how-to-vote’ material as part of the VEC postal pack may be an inducement to dummy candidates to stand for the purpose of siphoning preferences. This must be balanced with the challenge candidates face in campaigning in a postal election where candidate ‘how-to-vote’ preference cards cannot be issued at the polling station.

DONATIONS

s.62–62B

Current arrangements

There is no limit on the amount that can be donated for a political campaign at a council election. Currently donations of \$500 or more must be disclosed. All candidates must lodge a donation return whether they receive a disclosable donation or not. Where a donation of \$500 or more is received, a conflict must be declared at a council meeting, which requires the elected councillor to remove himself or herself from considering any matter where the donor has a direct interest.

Key issues

The scale of donations received at council elections may suggest that no major policy challenge exists. However, concerns have been raised that accepting a campaign donation may prevent a councillor discharging their responsibilities when conflicts of interest arise. The question of whether to ban donations, ban categories of donors, set an upper limit on donations or strengthen disclosure requirements are matters that may be considered.

Campaign donations

In 2012:

Candidates receiving a disclosable donation - 12.5 per cent

Municipalities with no candidates receiving a disclosable donation - one third

Total disclosable donations across the state - \$1.19 million (more than half of this for City of Melbourne campaigns)

Average value of individual donations (excluding City of Melbourne) – \$1,238 for large rural councils; \$2,119 for inner metropolitan councils.

Caretaker provisions

s.55D, s.93A

Current arrangements

s.94(7)

Councils must comply with special arrangements in the lead up to elections, commonly known as the caretaker period. These are intended to ensure that council actions do not compromise the probity of the election process and to safeguard the authority of the incoming council.

The Act regulates council activity before elections in two ways:

- councils are prohibited from making certain types of decisions
- material produced by councils must not contain matter that will affect voting at the election.

The caretaker period starts 32 days before the election, when nominations close, and ends at 6 pm on election day.

During the caretaker period before a general election, but not before a by-election or count back, a council cannot make ‘major policy decisions’, defined as decisions:

- (a) relating to the employment or remuneration of a CEO, other than a decision to appoint an acting CEO
- (b) to terminate the appointment of a CEO
- (c) to enter into a contract the total value exceeding the greater of:
 - (i) \$150,000 for the provision of goods or services or \$200,000 for the carrying out of works, or
 - (ii) one per cent of the council’s revenue from rates and charges levied in the preceding financial year

- (d) to undertake an entrepreneurial activity, such as participating in the operation of a corporation or acquiring shares, for a sum of more than \$100,000 or one per cent of the council's revenue from rates and charges levied in the preceding financial year.¹⁴

This prohibition also applies to delegated decisions by special committees of the council or council staff.

In addition to (a) and (b) above, before an election a council is prevented from reducing the term of the current CEO's contract (due to expire after the election) and then renewing the contract.¹⁵

A council may apply to the Minister for Local Government for an exemption if the council considers that there are extraordinary circumstances that require a major policy decision to be made during the caretaker period. If the minister is satisfied extraordinary circumstances exist, the minister may grant the exemption subject to conditions/limitations.¹⁶

During the caretaker period before a general election or a by-election, a council must not print, publish or distribute any advertisement, handbill, pamphlet or notice unless it has been certified, in writing, by the council's CEO. The CEO's certification cannot be delegated to anyone else. The reforms at Appendix 2, under consideration by the government, would extend these provisions to situations when an act to dismiss the council is being considered by the Parliament.

Key issues

The government is considering options to strengthen caretaker conventions in line with good practice identified by the Inspectorate. This would support probity in the sector by addressing deficiencies in the way each council approaches their activities during the caretaker period. The reforms at Appendix 2, under consideration by the government, would require all councils to have such a policy.

Similarly consideration could be given to suspending non-essential council publications during the caretaker period. Combined with the codification, this would allow removal of onerous publication certification requirements on council CEOs during the caretaker period.

If reforms are made, it is important caretaker arrangements are reconciled with statutory planning timelines imposed on local government.

Conducting elections

POLLING METHOD

s.41A Current arrangements

As discussed earlier, council elections may be conducted using postal voting or by voting at a voting centre on election day (attendance voting). Under the Act, councils decide which polling method to use.

Rural councils have not used attendance voting for some time. In 2012, eight out of 78 council elections used attendance voting and these were all in metropolitan Melbourne: Banyule, Glen Eira, Greater Dandenong, Knox, Moreland, Port Phillip, Stonnington and Yarra.

Key issues

Arguments have been advanced that attendance voting should be discontinued and postal voting applied uniformly for future council elections. This recognises that Victorian council postal elections consistently achieve both a higher participation rate and a higher rate of formal votes than attendance elections, and are less expensive to conduct. Such a reform is more attractive if coupled with introduction of compulsory voting for over 70s and non-resident property owners. Having a single voting method would enable a simpler, clearer and more effective voter information campaign and obviate the risk of voters in neighbouring electorates being confused by the availability of different voting methods.

¹⁴ *The Local Government Act 1989*, Section 93A (Vic)

¹⁵ *op cit*, Section 94(7)(c)

¹⁶ *op cit*, Section 93A(2) & (3)

A slight extension in the timeline for accepting postal votes would also increase the participation rate without significantly delaying the swearing in of the council¹⁷. An extension of this kind has been requested by the VEC in recognition of changes in postal delivery services (including a possible move to different mail frequency deliveries).

Opponents of uniform postal voting argue that it limits the full expression of local democracy. The contraction in postal services, as email becomes the dominant mail form, may also have implications in the future for the reliability and cost of transporting ballots by mail.

COMPLAINTS HANDLING

Key issues

The adequacy of the existing offences and complaint handling provisions of the Act was called into question by a significant increase in both complaints and breaches of the Act in the 2012 general elections.

Breaches of the Local Government Act at elections

2008 elections: 28

2012 elections: 84

Of 456 complaints made at the 2012 general elections, only 84 constituted breaches of the Act.

- 13 were unable to proceed due to insufficient evidence
- 2 warranted no further action
- 1 warranted a request for formal compliance
- 49 resulted in a formal warning
- 19 resulted in criminal investigation for failure to lodge a donation return.

Despite the increase in breaches identified in 2012, none of them were so serious as to result in an election being declared void.

A possible way of decreasing the number of breaches would be through greater provision of advice to help candidates avoid certain actions particularly in relation to two sections of the Act that accounted for 55 per cent of complaints at the 2012 elections:

- Section 55A - misleading or deceptive material
- Section 55 - lack of authorisation of electoral material.

The extent of regulation of candidate behaviour at council elections will be examined as part of the review. There may be merit in the VEC using the nomination process to reinforce candidate understanding and compliance with their responsibilities under the Act. Training by peak organisations can also strengthen candidates' understanding of the offences framework and mitigate the risk of prosecution.

Sched.2, Cl.1 **Election service provider**

The government has signalled its intention to make the VEC the statutory election service provider. On the premise that a statutory role be established for the VEC to conduct elections, it would be a natural extension for complaint handling, investigation and prosecution to be included in that role.

There is a strong argument for the VEC to be the statutory election service provider for future council elections. This recognises that the VEC has conducted all council elections since at least 2003 and that the integrity of the electoral system is best served by appointing a single, expert, impartial provider. This reform is being considered by the government for implementation (see Appendix 2).

¹⁷ The VEC received 107,611 late ballot pack returns in the first three working days following election day at the 2012 general elections. Some of this material would have been posted on or after election day (Source: Victorian Electoral Commission: Report on Conduct of the 2012 Local Government Elections (April 2013))



NON-VOTING ENFORCEMENT

s.40, Local
Government
(Electoral)
Regulations
2005. r.119

Current arrangements

Compulsory voting for council elections is required to be enforced in Victoria. Residents under 70 who are enrolled to vote and fail to do so are subject to a fine. The fine for failing to vote at council (and also Victorian state) elections is \$76 (half a penalty unit).¹⁸ The CEO of each council is required to appoint a prosecution officer to enforce compulsory voting.¹⁹ Prosecution officers can serve infringement notices for failure to vote, but only councils can prosecute non-voters in court.

Voters whose voting entitlement is linked to non-resident property ownership (around 14 per cent of voters) are not compelled to vote and, like people aged 70 years and over, are not subject to prosecution.

Most councils engage the VEC to appoint a prosecution officer to enforce compulsory voting – 74 of 78 councils conducting elections in 2012 did so.

Key issues

Many people accept liability and pay their fine or provide an acceptable reason for not voting. In instances where non-voters fail to pay the fine, many councils decide not to prosecute them through the courts.

This can be an inconsistent and inequitable arrangement. It therefore makes sense for:

- the role of the VEC as prosecutions authority to be formalised as part of its statutory role
- the VEC to assume this responsibility for all aspects of the prosecution process, including prosecution for failure to pay fines for failing to vote.

These reforms would reinforce the responsibility of compulsory voting and ensure consistency of practice in prosecution of those failing to vote. These reforms are being considered by the government (see Appendix 2).

ELECTION VALIDITY

s.45 Current arrangements

A Municipal Electoral Tribunal consists of a magistrate who is appointed by the Attorney-General, to consider disputes arising from local government elections. Tribunals are constituted under the Act, and are intended to provide a forum for the settling of such disputes. Applications may be made for an inquiry into an election by a Municipal Electoral Tribunal. Such applications must be made within 14 days of the result of an election being declared.

The Act is silent on what grounds a Municipal Electoral Tribunal (MET) can declare an election void. The Common Law is therefore applied, which consists of two criteria:

¹⁸ For federal elections the fine is \$20. AEC, 2013, *Voting within Australia – Frequently Asked Questions* <http://www.aec.gov.au/FAQs/Voting_Australia.htm>

¹⁹ *Local Government Act 1989*, Section 40 (Vic)

1. *There was no real election at all* – an election will only be declared void if it can be shown that the voters did not have a fair and free opportunity of electing the candidate that the majority might prefer.
2. *The election was not really conducted under the requirements of the relevant legislation* – an election may be declared void if a majority of voters may have been prevented from voting by reason of breaches of the relevant legislation. It is not enough to say mistakes were made in carrying out the election under the relevant laws. What must be proved is that the election was not carried out under those laws.

Key issues

These arrangements appear to be essentially sound but the fact that the election service provider does not have the authority to make an application to the MET to conduct an inquiry into the validity of an election appears anomalous. Should the VEC or one of its returning officers discover an irregularity in some aspect of an election, it believes it ought to have the power to request an MET. The VEC sought this right as part of its report on the *Review of the Conduct of the 2012 Local Government Elections*. This appears to be a reasonable request and is under consideration (Appendix 2).

Local Government (Electoral) Regulations

A number of electoral processes are contained in the Local Government Electoral Regulations 2005, not the Local Government Act. These processes include:

- the content of voter enrolment forms, nomination forms and ballot papers*
- information to be included in postal ballot packs sent to voters (candidate statements, indication of preferences, voting instructions)*
- how-to-vote card registration processes at attendance elections
- when postal ballot papers must be received in order to be included in the count*
- grounds for exemption from compulsory voting (including an exemption for voters 70 years old and over)*

The government will be considering amendments to these regulations separately.

*These processes are discussed in this chapter.



Questions on how councils are elected

1. What are the key elements of a system aimed at ensuring the integrity of council elections that should be included in the Act?
2. To ensure integrity of the electoral system should additional powers be provided to:
 - a) the Minister for Local Government?
 - b) the Victorian Electoral Commission?
 - c) council CEOs?

Chapter 4:

How councils operate



Chapter 4:

How councils operate



In this chapter:

The legal operational framework for councils

Procedures for electing the mayor and employing the chief executive officer and senior staff

How councils make decisions and create local laws

Deciding which processes are critical to ensuring councils operate effectively and whether penalties should apply if they are not followed

Deciding on possibly redundant details regarding council proceedings

Accountability measures to ensure public consultation and disclosure

Most of these provisions are normative, in that they describe what is expected of a council. Further these provisions do not specify a penalty if a council does not comply with the processes set out in the Act.

The mayor

Current arrangements

ss.71-73, 84(1),
106(2)-(3),
218(1)-(2),
79(6)-(7), 901

s.6, City of
Melbourne Act
2001, s.7, City of
Greater Geelong
Act 1993

s.25A, City of
Melbourne Act
2001

s.11E, City of
Greater Geelong
Act 1993

The councillors elect the mayor at an open council meeting between the fourth Saturday in October and the end of November, for a one or two year term.²⁰ The office of mayor becomes vacant on the morning of a council election or on the day scheduled for the election of the mayor.²¹ If there is a vacancy or the mayor is absent, incapable of acting or refusing to act, the council must appoint an acting mayor.

The mayor 'takes precedence at all municipal proceedings' including taking the chair at all council meetings at which he or she is present.

The mayor has a number of additional specific functions including:

- calling a special council meeting
- receiving advice about the appointment of a probity auditor in relation to a complaint about the CEO
- receiving a report of a commissioner's inquiry from the minister and, if required, report on the council's proposed response
- as chair, managing the meeting when a councillor declares a conflict of interest
- having a second 'casting' vote in the event of a tied vote.

Apart from these functions, the mayor has no additional powers to those of any other councillor.

²⁰ The qualifications of councillors and the processes by which they are elected to office are described in Chapter 3.

²¹ Or if the mayor dies, resigns, is suspended, ousted or becomes ineligible to serve as a councillor. The mayor cannot be removed from office in any other circumstance.

The Lord Mayor and Deputy Lord Mayor of the Melbourne City Council, and mayor of the Greater Geelong City Council, are directly elected by voters, not by other councillors. The Lord Mayor and Deputy Lord Mayor at Melbourne are elected as a joint team. At Greater Geelong, the council must elect the Deputy mayor. At Melbourne and Greater Geelong, additional functions can also apply.

At Melbourne, the council may delegate to the Lord Mayor the ability to:

- appoint councillors to chair committees, or to external organisations, committees and working parties
- determine on councillors' travelling arrangements and expenses.

At Greater Geelong, the mayor has discretion to:

- appoint councillors to non-remunerated positions on bodies where the council is entitled to be represented
- appoint councillors to chair special committees where at least one member is a councillor.

Key issues

The Act sets out the position of mayor and various administrative arrangements relating to his or her election, term of office and processes for filling the position in the event of a vacancy. The Act also refers to the precedence of the mayor at council meetings and other proceedings. Beyond this there is little detail on the role of mayor, reflecting the long standing position that, as a councillor, the mayor does not hold executive authority over other councillors.

Limited statutory recognition for the mayor as leader of the council may diminish the capacity to formally promote effective communication between councillors, the CEO and the rest of the organisation, particularly when leadership is critical, such as when the council faces difficult circumstances.

Reforms at Appendix 2 propose clarifying the role of mayor to include:

- providing guidance to councillors about what is expected of a councillor including obligations and responsibilities
- acting as the principal spokesperson for the council
- supporting good working relations between councillors
- carrying out the civic and ceremonial duties of the office of mayor.

Comparisons with other jurisdictions on the mayor's powers or functions are useful.

Limiting a mayoral term to a maximum of two years continues a long standing practice for councillors to regularly rotate the position among themselves (although a mayor can still be appointed for multiple terms). It may be argued that the Act should not prescribe such limits at all and instead leave it up to each council to decide how long their mayor should serve.

The directly-elected mayor models at the Melbourne and Greater Geelong city councils recognise the position of those municipalities as the capital city and a prominent regional city respectively, along with the important role played by the mayor in promoting the interests of these major centres.

In New South Wales the role of the mayor includes:

- where necessary, exercising urgent policy-making functions of the governing body of the council between meetings of the council
- exercising other functions of the council as the council determines²⁴.

In Queensland (other than Brisbane), the role of the mayor, who is directly elected and full time, goes further to involve direct executive authority over staff and includes:

- preparing a budget to present to the council
- providing strategic direction to the CEO
- directing the CEO and senior executive employees
- conducting annual performance appraisal of the CEO²⁵.

22 Section 26, *Local Government Act 1993 (NSW)*

23 Section 12(4), *Local Government Act 2009 (QLD)*

Victoria is the only state in Australia where only the councillors elect the mayor (except for Melbourne and Greater Geelong).

In Queensland, all mayors are directly elected.

In New South Wales, Tasmania, Western Australia and South Australia, the council may have direct election or election by councillors.

Some have advocated that other councils should have a directly elected mayor, citing the importance of the mayor as leader and spokesperson for the council. With the direct election model, there is often an expectation that the mayor will be able to implement his or her own priorities for the council. However this is not always achievable given the absence of additional formal authority.

Although the Act does not provide for the position of Deputy mayor, a number of councils elect a councillor to this role. Even so, councils are still obligated to appoint an acting mayor each time the mayor is not able to assume the role under the Act.

Q: How effective are the directly-elected mayor arrangements at Melbourne and Greater Geelong city councils?

Councillor allowances and expenses

Current arrangements

ss.73A, 73B, 74,
74B, 74C, 75,
75A, 75B, 75C

ss.26, 26A City
of Melbourne
Act 2001

ss.12, 13 City of
Greater Geelong
Act 1993

Mayoral and councillor allowances are set by order of the Governor in Council on advice of the Minister for Local Government. This order can specify:

- categories of councils for allowance purposes (three categories exist)
- allowance amounts, or ranges or limits on the amounts
- how those amounts are paid.

Allowances are then reviewed annually by the minister, who might decide:

- whether existing allowances should be adjusted, taking into account movements in remuneration of executive officers in the Victorian Public Service
- whether any individual council's category requires change, given movements in their population and recurrent revenue compared to other councils.

Each council must review and determine the existing level of their councillor and mayoral allowances within a set period following the general election, or after their category has been changed. Public submissions must be considered. The amounts determined cannot be reviewed again for the remainder of the council's term.

The minister may appoint a local government panel to advise on allowances, and determine applications from councils for a reclassification of their category. If the panel recommends a category change, the minister must allow it.

On application, a council must reimburse a councillor (or council committee member) for reasonable expenses incurred while performing duties in their role. Councils adopt and make public a policy on expense reimbursement for councillors and council committee members. A council must also make available the minimum resources and facilities which have been prescribed in regulations.

Key issues

Orders setting mayoral and councillor allowance levels continue to be based on the state government's position that these allowances are 'viewed not as a form of salary but as some recognition of the contribution made by those elected to voluntary part time roles in the community'²⁴. Opinion is divided over whether councillors should be instead paid a salary. Some also argue that councillors and/or mayors should be full time like members of Parliament.

Local government panels in 2000 and 2008 recommended that in determining different councillor allowance categories 'population size was a reasonable indicator of the representational workload involved in a councillor's role' and that 'total revenue is an indicator of the size and complexity of the governance role'²⁵. This formula, which remains current, means that councillors from rural councils with lower revenues and population are paid lower allowances than those from councils with larger populations and budgets.

It has been argued that allowances based only on population and revenue do not reflect the complexity of councillor roles. This argument claims similar planning, budgeting and governance processes apply in all councils, requiring equivalent skills and expertise by every councillor. If this is accepted the question arises whether the demands on a councillor in a smaller rural setting are any less onerous than for a larger metropolitan municipality, where more extensive officer and policy support may be available.

Another view is that any allowance formula that recognises the 'busyness' of councillors may be inadvertently reinforcing unnecessary councillor involvement in operational matters, to the detriment of their intended strategic and policy focus.

Councils may set their allowances within a range to suit their individual circumstances. Many councils have for some time chosen to set levels at the maximum allowable. By contrast, allowances for all councillors at the Melbourne City Council and the mayor and deputy mayor of Greater Geelong City Council are fixed with no range applicable.

Noting that councillors are paid an allowance, not a salary, the boundary between those expenses to be met from their allowance and those that may be reimbursed is not clear to some and may cause confusion and inconsistent application. The system for reimbursement of councillor expenses should seek to:

- ensure that councillors are not out of pocket for expenses reasonably incurred while performing their duties as a councillor
- ensure that other expenses associated with the functions of the role are met from their allowances
- require councils to adopt a consistent, transparent policy position.

The Act is silent on other expenses that council may pay its councillors up front (i.e. not as a reimbursement) for example, conference expenses, pre-paid travel, professional development courses and training. Concerns are often raised over significant funding allocations, which may be set aside for such activities in the council's budget, without sufficient scrutiny or without a policy adopted by the council on such expenditure.

To provide greater transparency over councillor expenses, recent amendments to the Local Government (Planning and Reporting) Regulations 2014 will require details of all payments made to councillors for a financial year to be disclosed in all councils' annual reports (from 2015-16).

On minimum resources and facilities for councillors, the state government recommended in 2008²⁶ that a minimum 'toolkit' be provided to all mayors and councillors, including elements such as mayoral administrative support, office and related equipment for the mayor, mayoral vehicle and computer, phone and stationery for councillors. This remains a policy position only, and regulations to prescribe such minimum resources have not been made. It is debatable whether such matters need to be legislated for at all.

Q: Should mayors and councillors be part time or full time?

²⁴ *Recognition and Support. The Victorian Government's Policy Statement on Local Government Mayoral and Councillor Allowances and Resources*, April 2008.

²⁵ 'Review of the Remuneration of Mayors and Councillors': Victorian Councillor Allowances Review Panel (June 2000)

²⁶ *Recognition and Support, The Victorian Government's Policy Statement on Local Government Mayoral and Councillor Allowances and Resources*, April 2008.

The chief executive officer

Current arrangements

ss.93A(6),
94, 94A, 95A,
95B, 97A

ss.94C, s.95,
s.95AA, 94D,
s.96 schedule b,
s.76, s.97B

A council must appoint a chief executive officer (CEO) and fill that position as soon as reasonably practicable after a vacancy occurs. Applications for the CEO position must be invited by notice in a newspaper circulating generally throughout Victoria. The exception to this is if the council wishes to reappoint its existing CEO without advertising the position. In this circumstance, the council must give public notice two weeks in advance of its intention to put a resolution to reappoint. Details of the reappointed CEO's total remuneration under the new contract must then be made public.

A council may not re-contract its incumbent CEO earlier than six months before his or her current contract is due to expire. Prior to a general election, the council is prohibited from cutting short its CEO contract and then entering into a new contract to extend the CEO's employment beyond that election. Nor can a council make any decisions with regard to CEO employment during the caretaker period before a general election²⁷.

The CEO has a number of statutory responsibilities including:

- establishing and maintaining an organisation structure
- ensuring council decisions are implemented without undue delay
- the day to day management of the council's operations in accordance with the council plan
- developing a code of conduct for council staff
- providing timely advice to council.

The CEO is also responsible for appointing as many staff as necessary to enable the council and CEO to perform their statutory functions and all aspects of staff employment including directing, managing and dismissing them.

A CEO's contract cannot extend beyond five years, but there is no limit on how many times a CEO can be reappointed and enter into a new contract. The CEO's contract must specify performance criteria, and the council must review the CEO's performance at least once a year. The minister may exempt a council from employing a CEO under contract, and may also forbid a council from employing a CEO or entering into a new contract with an incumbent CEO²⁸.

Key issues

The current arrangements give full discretion to councils on how they employ their CEOs and under what conditions, with minimum regulation based around ensuring that the public is notified if a reappointment is to occur and that the CEO's performance criteria are specified and regularly assessed by the council.

The Act makes a clear distinction between the council (as employer of the CEO) and the CEO (as the employer of council staff) making it explicit that councillors have no role in staff employment issues. However, while the CEO has discretion over staffing levels, this is ultimately contingent on the funds allocated by the council in the annual budget.

Despite this demarcation in reporting lines between councillors, CEO and staff, conflicts often occur over day to day interaction between them. Another concern is there may be insufficient guidance in the Act for CEOs to advise councillors where the council's proposed actions may be unlawful.

In response to these concerns, the reforms at Appendix 2 include specifying additional functions of the CEO in the Act including:

- ensuring that the council receives timely and reliable advice about its legal obligations under any Act
- managing interactions between council staff and councillors including by ensuring policies, practices and protocols are in place.

²⁷ The 32 days before the general election

²⁸ These powers are discussed in more detail in Chapter 9.

While the CEO is an employee and entitled to hold tenure as long as their employer (the council) desires, criticisms are nevertheless levelled that the CEO's term should be limited and at the least, their position market tested at the end of their contract. Other common criticisms include that a CEO may wield too much influence on councillors or, over time, become entrenched in their role and unresponsive to community concerns.

The Act sets no express limitations on the CEO's decisions over staffing matters and there is no redress if such decisions are unreasonable. This is despite the Act requiring a council to establish employment processes that ensure employment decisions are based on merit, employees are treated fairly and reasonably and they have a reasonable avenue of redress against unfair/unreasonable treatment. Arguably this should be left to ordinary contract and employment law.

The way in which both new and reappointed CEOs' contracts are negotiated, prepared and executed has proved to be problematic, perhaps prompted in part by a misunderstanding by councillors of their roles and obligations in this process. Instances may occur in which the proposed contract has not been subject to proper consultation with councillors, both the proposed appointment and contract may not be subject to a proper report and recommendations to the council, or the council has not formally adopted or executed the contract.

Similar issues have arisen with CEOs' performance reviews. Instances of reviews not involving proper consultation with all councillors, or not being formally reported and adopted by the council, are not uncommon. Other concerns are that performance reviews are sometimes influenced by subjective and political, rather than objective, considerations.

It is standard practice for company boards to engage independent expertise to help them appoint CEOs, negotiate contracts and evaluate their performance. Councils may benefit from similar arrangements. A question arises whether this should become a legislative requirement.

Council staff

ss.3(1), 81, 95A,
94B, 95A, 97A

Current arrangements

Members of council staff are employed by the chief executive officer to carry out the council's functions. This does not include contractors or volunteers.

A council must establish processes ensuring that employment decisions are based on merit, employees are treated fairly and reasonably, equal opportunity is provided and employees have reasonable avenue of redress against unfair/unreasonable treatment.

Members of council staff are subject to conduct principles requiring them to act impartially and with integrity, avoiding conflicts of interest, accepting accountability for results and providing responsive service. A CEO must develop, implement and disseminate a code of conduct for council staff and give them the opportunity to apply for vacant full time positions that arise. A council must implement an equal employment opportunity program for staff. It must indemnify members of staff against actions/claims for tasks done in good faith during their employment. Indemnities and insurance are discussed in more detail later in this chapter.

Staff who either have a total annual remuneration beyond a threshold annually set by the minister (currently \$136,000/year – indexed to percentage rises in councillor allowances) or have management responsibilities and report directly to the CEO, are defined as 'senior officers' and must be employed under contract by the CEO.

Senior officer positions must be advertised in a newspaper circulating generally throughout Victoria. Contracts must not exceed five years, however the CEO is allowed to invite an incumbent senior officer to enter into a new contract when their existing contract expires. The CEO must review senior officers' performance at least annually and their contracts must contain performance criteria. They must submit returns of interest in the same way as councillors. Details of senior officer numbers and remuneration (listed in bands of \$10,000) are publicly disclosed in the council's annual report.²⁹

²⁹ Local Government (Performance and Reporting) Regulations 2014 – Reg 14(2)(i) and 19(6).

Key issues

With the exception of senior officers, the Act provides minimum regulation of staff employment, other than providing general principles on staff conduct and requiring codes of practice and ‘fair treatment’ processes. Specific issues on staff employment are otherwise dealt with under employment law.

The arrangements for senior officers were introduced in the 1990s to bring local government into line with modern corporate practice, requiring certain senior positions (including the CEO) to be compulsorily employed under contract for the first time.

The Act continues to attempt to define the type of position that should be subject to contractual arrangements, leading to complaints from some councils that these rules are not always in step with the marketplace and can restrict them from attracting the best employees in certain fields (for example, some mid-level IT positions not normally subject to contract can be above the senior officer remuneration threshold).

Councils have also criticised the requirement that senior officer positions must be advertised in state wide newspapers, which some argue is costly and out of step with current recruitment practices for such positions.

It is debatable whether councils should continue to be required to follow mandatory rules on who they can employ under contract. Councils argue that removing restrictions would free them to recruit the right senior workforce to suit their needs. At the same time, residents and ratepayers take a keen interest in senior management numbers employed at some councils and the remuneration paid to those staff. The Act provides no guidance on staff levels or salaries – like other public sector bodies, these matters are left to the CEO to determine, subject to the funding allocated in the council budget.

Other concerns have been raised that the process for reappointment of senior officers mandated under the Act may not always be documented adequately, or at all.

The requirement for an equal employment opportunity program and other staff issues to be regulated in the Act may now be redundant given that other legislation now deals with equal opportunity and other employment matters.

Example:

In Scotland, the Convention of Scottish Local Authorities (COSLA) has established a central portal for council vacancies for all 32 municipalities (www.myjobscotland.com). COSLA receives around 2.5 million visits from jobseekers annually, and estimates cumulative council savings of 12 million pounds (c. AU\$24 million) in advertising costs annually. In 2012 COSLA won the UK Public Sector Design Award for the ‘best example of shared services in practice’. COSLA points out other benefits of this approach – improved candidate experience, improved profile of councils as employers and expansion of the available pool of jobseekers.

Delegated decision making

ss.3(6), 81, 86,
86(6), 98, 98(6)

Current arrangements

The Act recognises that given the large and complex range of activities demanded of councils, it is impractical for all council decisions to be made by councillors at council meetings only. Like other legislation relating to statutory bodies, the Act allows for councils to delegate many of their statutory decision making powers to other committees or to staff at appropriate levels, generally depending on the significance of the matter. An exception is the *Planning and Environment Act 1987* (s.188), which prohibits a council from delegating its power to adopt planning scheme amendments.

When a council is empowered by legislation to take action or make a decision it must make a council resolution through:

- a resolution at an ordinary or special council meeting
- a resolution at a meeting of a special committee established by the council, or
- a member of council staff delegated to exercise a power, duty or function.

A council may establish a special committee consisting of councillors, council staff or other people, or any combination of these.

The council may delegate its powers or functions to a special committee except the power to declare a rate or charge, borrow money or enter into contracts or incur expenditure above limits set by the council. Special committee meetings are bound by the same rules as council meetings. Special committee members are bound by the conflict of interest rules and must submit returns of interest (unless the council exempts them from doing so).

A council may also delegate any of its statutory powers or functions to a member of council staff, except the power to declare a rate or charge, borrow money, approve unbudgeted expenditure or hear or determine submissions³⁰. A delegation of any council powers to the council's chief executive officer may be sub-delegated to other council staff.

All council delegations to special committees and staff must be reviewed in the first year after a general election.

Key issues

Decisions made by special committees or staff under delegation, are decisions 'of the council'. The council can however place limits or conditions on individual delegations. Further, the existence of a delegated power does not prevent the council from also continuing to exercise that power itself.

At the same time, a council is a 'body corporate' under the Act and carries out a range of operational functions that are not explicitly conferred by legislation, e.g. operating equipment, fitting out buildings and undertaking general administrative tasks incidental to council's operations. These functions do not need an instrument of delegation, but many councils formally include them anyway to provide clarity on roles between councillors and staff.

Many councils establish special committees to undertake a variety of tasks, ranging from considering planning permit applications and public submissions, through to managing sporting and recreation facilities. While the main purpose of these committees is to exercise councils' statutory powers and functions, in practice many special committees undertake a number of non-statutory, operational roles for example, managing sporting pavilion hire, collecting and banking fees. Further, some councils establish committees from existing organisations, which raises an issue of possible conflicts between those members' duties to their organisation against their duties as decision makers of the council.

It is questionable whether the rules applying at council meetings would always be followed in the case of committees undertaking non-statutory operational roles, in part because members may not be fully aware of their legal obligations. This frequent blurring of the lines between what special committees were intended to do under the Act and what many are set up to do in reality, raises two issues:

1. Whether or not councils should apply the special committee framework at all for committees they establish solely for non-statutory activities.
2. Alternatively, whether the Act should separately recognise this category of committee and apply different rules for its activities.

There are currently no restrictions on how many members a council may appoint to a special committee. In theory, a council could appoint a small number of people to a committee delegated significant decision making powers that should remain within the ambit of the councillors, acting as the council.

³⁰ received under section 223 of the Act



Q: Do you think the current requirements governing council meetings are necessary in the Act and if so what sanctions are appropriate for councils that do not comply with these requirements?

Council proceedings

ss.3(1), 80A, 83,
84, 89, 90,
90(2), 91

Current arrangements

Councils may hold 'ordinary' and 'special' council meetings. Ordinary meetings are held to transact general business, whereas special meetings are usually called for matters arising outside the normal meeting cycle. Special meetings may be called by the mayor, three councillors or the council itself. Only business specified in the notice of these meetings may be dealt with, unless all councillors are present at the meeting and unanimously agree to deal with other matters.

All council meetings must be open to the public unless the council resolves to close all or part of a meeting if considering confidential items that are listed in the Act. These include personnel, industrial or contractual matters, proposed developments, legal advice, or the personal hardship of a resident or ratepayer. There is however a 'catchall' provision enabling meetings to be closed to deal with any other matters the council considers would prejudice it or any person. Public notice of meetings must be given at least a week before unless urgent or extraordinary circumstances apply.

The mayor chairs all meetings. All councillors present at a council meeting are entitled to one vote. The mayor has a second vote when the vote is tied except when the matter concerns the election of the mayor and the appointment of chairperson to a special committee. In these cases the matter is determined by lot. A councillor may abstain from voting, however a motion cannot be passed unless a majority of councillors present vote in favour. Voting at an open meeting must not be in secret.

Certain non-decision making meetings involving councillors are referred to in the Act as 'assemblies of councillors'. These include meetings of formal advisory committees and other meetings involving a majority of councillors and at least one staff member. Records must be kept of these meetings and councillors with conflicts of interest must disclose them and leave the meeting.

Assemblies of councillors include regular council briefings. These are normally chaired by the CEO and are designed to give councillors information on current and developing issues. Briefings can also be used to provide details about matters to be dealt with at council meetings.

Councillors are expected to attend council meetings. A councillor who fails to attend three consecutive meetings without leave can be disqualified. If a council cannot maintain a quorum to enable it to make a decision, the minister or the CEO may require all councillors to attend a 'call of the council'. The minister may disqualify a councillor who is absent from a call of the council without a reasonable excuse. Councils must make local laws governing their meeting procedures. These set out how meetings are to be conducted, for example the order of business and time given to speakers. The conduct of the meeting will be otherwise up to councillors voting at the meeting. The rules governing council meetings also apply to special committees established by council.

Key issues

The council meeting framework is intended to give councils the ability to schedule and conduct meetings to transact their business and make timely decisions. The Act, however, places accountability and transparency obligations on councils, requiring them to have meetings open to the public or explain why they have to be closed in certain instances. They must give reasonable notice of all meetings and keep adequate records of proceedings.

Q: Should councillors be required to be physically present at council meetings or is it sufficient to attend via electronic means? How frequently should council meetings be held and should there be a formal requirement for public participation at these meetings?

The Act requires public disclosure of discussions held in an assembly of councillors by tabling a record of the relevant meeting at an ordinary meeting of the council. This requirement was introduced in 2008 in response to widespread concerns that matters at many councils were being routinely considered, and sometimes determined, at forums other than council meetings away from public scrutiny.

The requirement for either ordinary or special meetings to make council decisions reflects long standing council practice that pre-dates the current Act. There is a question whether the Act needs to be so prescriptive in continuing with such a distinction. As an alternative, the Act could leave councils to decide what meetings to hold, who can call them and when they are scheduled.

The ability of the mayor to have a 'casting vote' if voting is tied was intended to enable timely decision making and prevent deadlocks that are more likely because of the small number of decision makers in a council (compared to State Parliament). Some hold the view that giving the mayor a second vote is undemocratic and gives the mayor unequal influence over council decisions in a way likely to promote divisions between councillors. On the other hand casting votes are a traditional prerogative of the chairperson.

Arguments are frequently made in the sector that councils should be treated as a genuine separate tier of government and be given maximum autonomy to conduct their affairs with minimum regulation by the state.³¹ Applying this policy position to council meetings could see a total deregulation of the current framework, where councils would set rules on how they meet, including how and when the public may attend, and how decisions are made and conveyed to others. Removal could be counterbalanced by general obligations relating to transparency and public accountability.

Others argue that the current rules should be tightened, particularly around public participation. Some believe for example, that legislative rights should be provided to members of the public to put questions to councillors and make them publicly accountable for their decisions and actions. Others believe that the mandatory requirement for councillors to vote when present at meetings (removed in 2012 in part to align with rules in the Victorian Parliament and also because it was unenforceable) should be restored; arguing that abstaining from voting on issues diminishes their accountability.

Consultation and engagement

s.208B(e)

Current arrangements

The Act places significant emphasis on requiring local government to represent their communities. This legislated role for councils implicitly requires that they regularly and meaningfully consult with their constituents to inform decisions on proposals, whether of a long term strategic nature or over specific matters affecting individual sections of the community.

The Local Government Charter provides that the role of a council includes 'acting as a representative government by taking into account the diverse needs of the local community in decision making'³² and 'fostering community cohesion and encouraging active participation in civic life'³³.

³¹ Refer to Chapter 2 which involves a wider discussion of this debate

³² Section 3D(2)(a)

³³ Section 3D(2)(f)

The Act confers a formal right for a person to make a submission³⁴ when a council is proposing to exercise certain statutory powers. These concern major strategic, financial and law making proposals that impact on residents and ratepayers, including local businesses³⁵ – for example the budget, council plan and local laws.

The right also applies to certain proposals that deal with council property and assets and which may be more local in nature³⁶ – for example, the sale and lease of land, road closures, special rates and charges.

Councils must give public notice of the right to make submissions, and allow those who have requested it, the right to be heard in support of their submission. The public notice must be published in a newspaper circulating generally in the municipality.

If the council is considering submissions on a matter which affects an individual's interests and rights, it is bound by the common law rules of natural justice that require all councillors to approach decisions with an open mind and provide a fair hearing to any person making a submission.

Other than the above circumstances, specific review, appeal and objection rights in various legislation³⁷ and a best value principle that each council 'must develop a program of regular consultation with its community in relation to services it provides'³⁸, the Act does not prescribe how councils should consult on individual proposals. It is generally left to each council to decide how they will engage their local community as they see fit.

Key issues

Consistent with the general 'enabling' nature of many of its provisions, the Act recognises that councils are best placed to determine the extent of consultation. The requirement for formal consideration of public submissions is limited to significant strategic proposals and specific matters that may affect the rights of individuals.

Many councils make community consultation a priority in their business planning and successfully elicit meaningful input on important projects, leading to informed decision making. However the approach to consultation across the sector is not consistent. Other councils are criticised for a perceived system failure in involving the public. This can result in calls for the minister to intervene and oblige councils to consult. Failure to consult can also open councils to legal challenges of their decisions.

For strategic documents such as the budget and council plan, some councils consistently receive low numbers of submissions, often despite their best efforts to engage communities. This could reflect local communities' general interest, their sense of connection with the council or level of satisfaction with its proposals. Whatever the reason, the question arises if alternative approaches to improving engagement and feedback should be considered and if so, mandated in legislation.

The period for which submissions must be received under the Act was extended from 14 to 28 days in 2008. This was in response to concerns that residents were afforded insufficient submission preparation time over proposals that in some cases significantly affected their individual rights and impacted on their amenity. Some councils at that time were critical of this change arguing that it unreasonably delayed their decision making, particularly on matters where timing of decisions is limited, for example the proposed adoption of the budget.

Q: Should the Act provide a more general requirement for councils to consult and engage with their communities? If so, what sanctions are appropriate for councils that do not do so, such as sanctions affecting the validity of council decisions?

Q: As part of the public consultation process, is giving notice through a local newspaper the most effective way of notifying the community, or are electronic notifications sufficient?

34 Section 223

35 The Act also requires documents for such proposals to be available for public inspection during the submission period.

36 A list of all provisions conferring a right to make a submission under the Act is in Chapter 10 [to be checked]

37 For example, objections to planning permit applications, objections to property valuations.

38 The best value principles are discussed in further detail in Chapter 7.

Local government is a representative democracy and the local community has an integral role to play in shaping council decisions. Many councils endeavour to adopt innovative platforms in which to successfully interact with sections of their constituencies and receive informed input on issues of importance to them.

A recent interesting example of engagement occurred at the City of Melbourne, which convened a 43 member 'People's Panel' to make recommendations for that council's ten year financial plan. The Panel – a form of 'citizen's jury' – was selected following a broad ranging invitation to businesses and households, and reflected the city's demographics - residents, rate payers, businesses and students. The Panel was given extensive access to council data and expert advice and was guided on major projects planned over the financial plan period. It made a number of recommendations ranging from appropriate rate rises through to initiatives to mitigate climate change, containing capital expenditure levels and advocating more bike paths.

There may be potential to formalise in the Act the involvement of citizens' bodies like the City of Melbourne in the framing of certain major policy decisions of council.

Complaint handling

Part 4,
Division 4

Current arrangements

Councils are responsible for a wide array of activities, including service delivery, preparing overarching strategic visions for communities, and operating municipal institutions such as libraries and recreation centres. As bodies corporate, councils are responsible for many day-to-day actions in relation to these responsibilities, which are not administrative decisions but nonetheless, are at the core of a council's role.

Sometimes these actions will have a limited impact on particular individuals, such as the broad strategic decisions of council, but at other times individuals may have an interest in the outcome of a particular decision.

Due to the structure of council operations, the vast majority of these decisions and actions are in actuality taken by members of council staff acting on behalf of a council or under the delegated authority of a council.

Example: Decisions on contracting out garbage collections services may not directly impact an individual but the performance of that contract could.

Key issues

General complaint handling

Councils are expected to respond to broad community concerns and to specific issues raised by individual residents and ratepayers.

Individuals whose interests are affected by a decision of council under statutory authority may be able to appeal these decisions in courts or tribunals, for example appeals against planning decisions to VCAT.

However, councils should be able to address the full range of complaints and concerns that their constituents might have, even if many decisions are open to judicial or administrative review.

Example: Several missed garbage collections may not be an administrative decision of council as such, particularly where the service is provided by a third party contractor. However, these circumstances may give rise to a legitimate grievance for a resident and councils should be responsive to these types of complaints.

In a 2015 report, *Councils and complaints – A report on current practice and issues*, the Victorian Ombudsman identified concerns with council complaint handling processes, particularly in defining complaints and tracking outcomes.³⁹ The report suggested that a definition for ‘complaint’ be included in the Act and that councils are expected to adopt complaint handling procedures.

At a minimum, councils should have mechanisms for handling complaints. There would be merit in adopting a uniform approach to recognising what a complaint is and appropriate ways for addressing them.

Complaints against the CEO

Currently only one part of the Act squarely addresses complaint handling, and this specifically deals with complaints against the CEO of a council alleging bullying, victimisation or harassment (including sexual harassment). This provides that the Secretary responsible for Local Government (currently the Department of Environment, Land, Water and Planning) can appoint an independent probity auditor to ensure a council undertakes a proper process for handling these complaints. The probity auditor does not investigate the complaint, but seeks to ensure the process is appropriate.

A special provision for the CEO, as opposed to other council staff, was deemed necessary because the CEO is responsible for all administrative matters of a council, including complaints against staff members. An external and independent process for investigating complaints against the CEO was put in place. However, this provision has been used rarely, is cumbersome and directly involves the state (through the appointment of the probity auditor) in what could be considered an internal council matter.

Local laws

Part 5,
ss.111-124

Current arrangements

A council must make local laws governing its meeting procedures and the use of its common seal. A council can also make a local law on any matter for which it has a power or function under any Act. A local law is inoperative if it is inconsistent with any Act, regulation or planning scheme in force in the municipality.

The minister may make guidelines on the preparation, form and content of local laws and any explanatory documents relating to proposed local laws. A council must pay regard to those guidelines. To date no such guidelines have been issued.

A local law can prescribe a penalty of up to 20 penalty units for contravention. It can also provide for infringement notices to be served. Penalty units for local law breaches are set at \$100 under the *Sentencing Act 1991*.

Notice of proposed local laws must be published in a newspaper circulating in the municipality and the Government Gazette. The notice must include the purpose and general purport of the proposed law, indicate how copies of it can be accessed and allow for submissions to be received within 28 days⁴⁰.

Public notices in the same media must also be made when a local law is made and council must send a copy of the local law to the minister.

Local laws must be available for public inspection and purchase during office hours. If this does not occur, or it is proven that the council did not give the required public notice of the law being made, a person cannot be convicted of an offence against that law. Incorporated documents in a local law must also be available for inspection.⁴¹ Local laws must be also available on the council’s website.

A local law may:

- determine fees, charges, fares, property rent, goods, service or anything else
- prescribe or regulate purposes and conditions for granting permits, licences, authorities and registrations and for the supply of goods and services
- confer discretionary authorities or impose duties on a class of people and bodies
- delegate to council staff the power to execute documents on behalf of the council.

³⁹ Victorian Ombudsman: *Councils and complaints – A report on current practice and issues*, February 2015

⁴⁰ Under section 223 of the Act

⁴¹ Other documents, codes, standards etc that are referenced in the local law

Local laws are automatically revoked (or ‘sunset’) ten years after coming into operation.⁴²

There are a number of principles concerning local laws in the Act (Schedule 8), including that they:

- not be inconsistent with the principles or intent of the Act
- not unduly trespass on a person’s existing rights and liberties
- not be inconsistent with the principles of natural justice or unreasonably restrict competition.

The minister⁴³ may revoke a local law if there has been a substantial breach of Schedule 8, or if the contents of the local law should be more appropriately contained in a planning scheme, or for any other reason the minister considers appropriate.

A person can challenge the validity of a local law in the Supreme Court.

Key issues

Like a range of other ‘enabling’ provisions in the Act, councils are given flexibility to make local laws on practically any matter within their purview, with the main limitation being that local laws cannot be inconsistent with other legislation or planning schemes. However, the Act mandates accountability on how these powers are exercised, among other things requiring public consultation during the preparation phase and ensuring ready access to existing laws.

Because many councils have local laws on common matters, some argue that these matters should be dealt with as state laws. The argument is this would result in a common approach to these issues, be less confusing and reduce the administrative burden for people or organisations required to comply with local laws in different councils.

One option is for the state government to provide ‘model’ local laws that councils can choose to apply to suit their circumstances.

Unlike at state level - where proposed statutory rules or other subordinate legislation require a Regulatory Impact Statement to be undertaken in specific instances - a community impact statement for local laws is not compulsory. In the past, the department has produced a resource manual for councils to encourage better practice in making local laws, including a proposed ‘community impact statement’ when advertising proposed new local laws⁴⁴.

Concerns have been raised that penalty units for local law offences are not regularly indexed, as are penalties for state law offences. A penalty unit at the state level is now \$151.67 compared to \$100 for local government. The penalty for local law breaches is capped at a low level and may be an insufficient deterrent to ensure compliance with important provisions such as unlawful activity on private property.

The local law principles outlined in Schedule 8 of the Act have largely remained unchanged since the Act came into operation. Some of these principles may be superseded by other legislation, for example the *Charter of Human Rights and Responsibilities Act 2006*.

The way external documents are incorporated into local laws and how they are made publicly available has proven problematic at some councils. This puts enforceability at risk and exposes the laws to potential challenge. Sometimes an incorporated document referred to in a local law may not exist at the time the law is made. In other instances, incorporated documents are not always made readily available to the public in the same way as the local laws themselves (for example, they are not published on the council’s web site) so it can be impossible for a person to know if they are complying with a legal requirement. Further, councils do not always publish notice of amendments to incorporated documents as required by the Act, rendering those amended local laws unenforceable.

Most council local laws cover similar topics, principally centred on regulating activities that can adversely affect public safety or local amenity. These include:

- controlling activities on roads, council parks, foreshore areas
- controlling behaviour on private property that may affect neighbourhoods such as keeping pets, burning off and dangerous or unsightly land.

⁴² Unless revoked sooner by the council

⁴³ Through the Governor in Council. See Chapter 9: Ministerial Powers for further discussion on this power.

⁴⁴ Better Practice Local Laws Strategy, December 2008, Department of Planning and Community Development, Victoria

Indemnities and insurance cover

ss.76, 76A Current arrangements

A council must indemnify its councillors, committee members, staff and anyone acting on its behalf against actions taken in good faith in carrying out its functions. It must hold public liability insurance cover of at least \$30 million, and professional indemnity of at least \$5 million. Higher amounts may be set by Order in Council. A council can comply by becoming a member of a scheme approved by the minister.⁴⁵

Key issues

The requirement for councils to indemnify their councillors and employees recognises that those in public life (carrying out decisions by elected officials), should not be found personally liable for actions taken in performing their roles in good faith and according to council processes.

There is arguably insufficient clarity in the Act as to whether, in addition to powers and functions, indemnities also cover the carrying out of a statutory duty, for example if there is a claim by a person aggrieved by a planning permit decision.

While the policy rationale for indemnity requirements is sound, concerns occasionally arise over how council grant indemnities in individual cases. For example, a council can decide to pay the legal expenses of a councillor convicted in court proceedings. This could be considered a misappropriation of public funds and a potential misuse of position. However, there is no specific sanction applicable if an indemnity is granted in such circumstances, despite being at odds with the Act. The Act may be strengthened by a framework in which:

- indemnity is specifically excluded by councillors for actions taken while, for example, they are campaigning or for staff or councillors found driving over the speed limit or incurring a parking fine while on council business.
- any indemnity is not considered until proceedings against a councillor or staff member in a court, tribunal or other disciplinary body (for example a Councillor Conduct Panel) have been determined.

A question arises whether the Act should continue to regulate insurance for local government.

The requirement for councils to hold insurance was introduced by the state Government in 1993, at a time when the cost of liability insurance was prohibitive for them. This amendment provided a legal mechanism to establish a local government liability pool when some councils were unable to source appropriate coverage. The new provision was accompanied by an amendment to the *Municipal Association Act 1907* which required the Municipal Association of Victoria to establish and manage a mutual liability insurance scheme to provide public liability and professional indemnity insurance. Although this scheme was voluntary 'with each council able to assess its attractions against commercial insurers'⁴⁶, it now has almost universal take up by Victorian councils⁴⁷.

The environment in which the insurance industry operates has changed significantly since 1993. All councils are likely to insure themselves whether or not legislation requires them to do so. All councils also now have a range of other insurance not required by the Act, for example, for property, motor vehicle, personal accident for councillors and volunteers, fidelity guarantee and consequential loss, and theft of artworks.

The indemnity provided under the policies councils are required to hold may not equate with their indemnity obligations under the Act. Also some have observed that, once the council's insurance policy is triggered, the rights of the person who is subject of the claim are in effect subrogated to the insurer, regardless of the statutory indemnity requirements.

⁴⁵ Or otherwise it does not need to comply with other requirements of the Act, for example the compulsory tendering arrangements

⁴⁶ Local Government (General Amendment) Bill 1993: Minister's second reading speech, (Legislative Assembly, 29 April 1993)

⁴⁷ In 1993 the Minister for Local Government, acting under Section 76A(3) of the Local Government Act, approved the liability insurance scheme established and maintained by the MAV (known as Civic Mutual Plus)



Questions on how councils operate

1. What are the critical elements of a council's operations that should be governed by the Local Government Act 1989 (e.g. requirements for mayoral elections, notice of, and requirements for open meetings)?
2. What penalties or sanctions should be imposed on councils which do not comply with the requirements relating to their operations?

Chapter 5:

Planning and reporting



Chapter 5:

Planning and reporting



In this chapter:

The core processes of the existing planning and reporting framework for councils – the four-year council plan and associated strategic resource plan, the annual council budget and the council annual report

Timing, consultation, comprehensiveness and integration of the existing components of the planning and reporting framework

Opportunities to give the current framework a longer term focus and improve its scope and integration.

The council planning process

Unlike in state and federal politics, there is generally no party platform outlining what policies will be enacted if either individual councillors or groups of councillors are elected.

Councillors come to office with ideas they would like to implement during their term, but they are not entering a policy vacuum. Incoming councillors inherit an existing four-year plan and many councils now also have a 10 or 20-year vision in place. An incoming council inherits some of the legacy of the previous council's plan, as well as other longer term strategy and vision documents.

The first three months post election are spent in induction, planning and consultation. This culminates in a new four-year council plan within eight months of the general election.

An early challenge for newly elected councillors is to understand how their priorities relate to the existing vision of the council and how that vision may be advanced and modified by their own ideas and programs.

Current arrangements

The most recent planning and reporting requirements were introduced as part of the *Local Government Amendment (Performance Reporting and Accountability) Act 2014*. This included a requirement for councils to undertake annual mandatory performance reporting and to ensure that their Strategic Resource Plans take into account *all* resources to implement *any* plan a council formally adopts.

Figure 2 outlines the current requirements for the four key planning and reporting requirements. Despite making the planning process and products mandatory in the Act, there are no consequences or penalties should a council disregard these requirements. However, councils generally comply with both the processes and timelines set out in the Act.

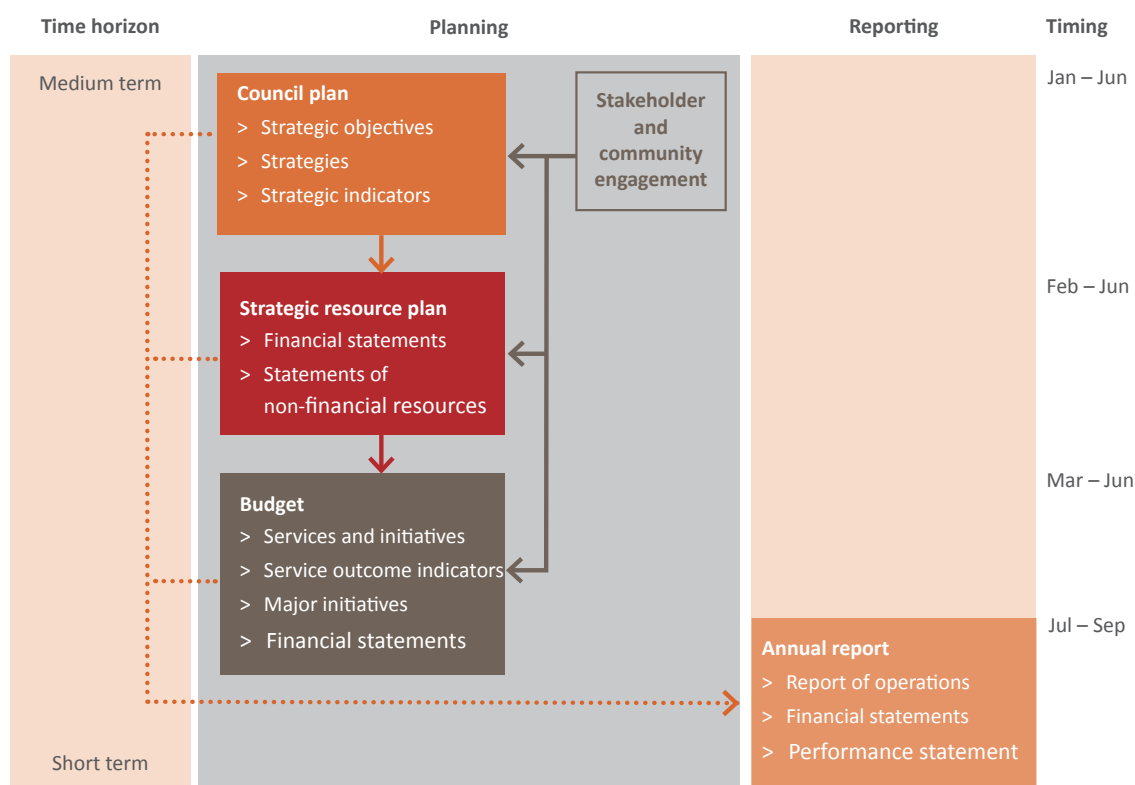


Figure 2: Planning and Accountability Framework

s.125 Council plan

Council planning and budgeting tends to follow a linear process that begins by identifying municipal needs and aspirations. Council then decides at the beginning of its term of office how it will respond to these needs and aspirations in its four-year council plan. This is council's key medium-term strategic plan and is intended to reflect the outcome of stakeholder and community engagement.

The council must make its proposed council plan available for public consultation and submissions before adoption. At least once in each financial year, councils are required to consider whether their council plan needs adjustment. If councils elect to make changes to their strategic objectives, strategies or indicators, they must make their revised plans available for public consultation.

Section 125 of the Act sets out the requirements for a council plan.

The council plan describes:

- the council's strategic objectives
- strategies for achieving the objectives for at least the next four years
- indicators for measuring progress of the objectives.

s.126 Strategic resource plan

The strategic resource plan forms part of a council plan and must be adopted no later than 30 June each year.

The strategic resource plan outlines the financial and non-financial resources that council requires to achieve the strategic objectives described in the council plan. It must also take into account the resources required to deliver services and initiatives outlined in any other plan adopted by the council.

The strategic resource plan contains:

- financial statements
- statements of non-financial resources including human resource requirements
- other information such as a detailed plan for all planned capital works as prescribed by the regulations⁴⁸.

⁴⁸ Local Government (Planning and Reporting) Regulations 2014.



A council must always have a strategic resource plan that covers, at least, the next four years (s126(2)). So this makes it a rolling four-year plan that must be updated by 30 June each year. It extends beyond the initial period of the council plan from the second year onwards. Changes to the strategic resource plan are not subject to the public submission process.

ss.127-130 **Annual council budget**

Councils must prepare and adopt a budget by 30 June each year (Section 127 of the Act). The budget always reflects the first year of the four-year strategic resource plan. It describes the services and major initiatives to be funded, including indicators for monitoring performance. It must contain financial statements and other information including planned capital works and human resources expenditure and grants and rating information as prescribed by regulations⁴⁹.

Before adopting a budget, a council must give public notice and invite public submissions. A member of the public may request to be heard in relation to their submission.

ss.131-135 **Council annual report**

Section 131 of the Act contains detailed requirements in relation to the council annual report.

The annual report outlines the council's performance for the year as measured against the strategic indicators in the council plan and the services and initiatives funded in the budget.

The annual report contains information on what the council has achieved during the financial year in the report of operations including service performance indicator outcomes, progress of major initiatives and a governance and management checklist. It must also contain financial statements and a performance statement to report against service performance outcomes, financial performance and sustainable capacity indicators. The financial statements and performance statement in each council's annual report are audited at the end of the financial year by the Victorian Auditor-General's Office.

Section 133 requires councils to provide a copy of the annual report to the minister and make it available for public inspection.

The Act does not require the annual report to be formally adopted by council, but it must be considered by council soon after its public release. This is on the basis that the annual report's performance and financial statements have been audited by the Auditor-General, and approved in principle and certified by the council.

⁴⁹ Local Government (Planning and Reporting) Regulations 2014.

ss.136-142 **Sound financial management**

The Act defines principles of sound financial management, which require council to manage their finances responsibly. This includes councils establishing a mandated budget and a reporting framework (described above) consistent with the principles of sound financial management and financial risk management.

The principles also include the need for spending and rating policies that are consistent with a stable rates burden (rates and charges are discussed in Chapter 6).

Council CEOs must comply with records and auditing obligations by presenting their councils with a quarterly statement comparing budgeted with actual revenue and expenditure. This is distinct from and additional to the reporting requirements of the council annual report.

Councils must also keep proper accounts and records of their transactions and affairs and do all things necessary to ensure money is properly expended, and assets adequately managed. All councils must establish an audit committee to oversee council financial decisions and affairs. Reforms in Appendix 2 propose that these have independent chairs. This reflects the current practice for many councils.

Councils have the discretion to apply finances to exercise any aspect of their powers and functions under the Act, and this must be reflected in their planning and reporting. They also have the power to waive or defer payments owing to the council under certain circumstances.

Key issues

Council plan - community plan and council plan

Many Victorian councils now prepare community plans which provide a 10-year strategic vision. A community plan typically describes the community's long term vision and aspirations and is a way to directly involve the community in the lead up to council plan preparations. The visions and aspirations identified in community plans are typically broad and may not be costed. By contrast, a council plan moves from the aspirational to the deliverable, with initiatives broadly costed as part of the Strategic Resource Plan. Perhaps a 10-year financial plan would also be useful to supplement a 10-year community plan.

It is not a current legislative requirement for councils to prepare a long-term community plan, and such a plan could complement the existing council plan. However, the 10-year time period goes beyond councillor terms of office and might have implications for council mandates.

The medium term nature of the council plan (four years), means it tends to focus on delivering election promises rather than achieving the primary objective of local government being '...to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions' (s. 3C(1)).

Community plans generally include strategies that involve council action, while some involve partnerships and some will be taken up by community agencies, businesses and government. Councils that develop long term community plans argue that they enable better alignment between the medium term objectives of the elected council and the long term vision and aspirations of its community.

Long term financial, asset and human resource planning is important for ensuring that a council remains sustainable over time and that future plans take account of changing demographics and service delivery models as well as long lived assets such as road and drainage infrastructure.

A comparative study of planning frameworks in 2013 by the Australian Centre of Excellence in Local Government (ACELG) found that most jurisdictions⁵⁰ require councils to have integrated 10-year financial plans.

In this regard, Victoria may be considered out of step with other states.

As local government moves into a more disciplined rating environment, long term financial sustainability and delivery programs that detail the services that are affordable over the long term will be a key focus. A plan that only projects out for a minimum of four years might be insufficient for assessing long term sustainability.

Q: How could councils be encouraged to undertake longer term planning that is integrated into existing annual or four-yearly planning and reporting requirements?

⁵⁰ Tan, SF and Artist, S 2013 Strategic Planning in Australian Local Government: a comparative analysis of state frameworks

Strategic resource plan

In its current form, the strategic resource plan is only required to disclose a council's forecast financial statements and supporting information on planned capital works and human resources. It is not required to include an explanation of how it responds to the objectives of the council plan, how it was developed, or the key assumptions underlying the forecasts.

Strategic resource plans are not formally subject to public submission as a separate document under section 223 of the Act. Given the importance of the strategic resource plan as the key medium term financial plan for councils, it should arguably be a stand-alone document subject to the same public scrutiny as the council plan and Annual Budget. Further, it may be desirable that councils report on variations to the strategic resource plan from one year to the next.

A consideration for this review is whether councils in Victoria should also be required to develop the supporting plans identified in the ACELG report, either as stand-alone plans or as part of an integrated long term financial planning framework.

The 2013 ACELG report also found that other jurisdictions require councils to have the following supporting plans, either as stand-alone documents or integrated into their strategic planning framework:

A workforce plan: providing the community with information about how the council plans to manage issues such as an ageing workforce, competition from other sectors, skills shortages.

An asset management plan: allowing council to properly engage with the local community on the long term and cumulative effects of future infrastructure commitments.

A service delivery plan: detailing the services to be undertaken by the council to implement the strategies established by the council plan within the resources available.

Council annual budget

The council annual budget describes the mix and cost of services that a council will provide its community, along with the mix of revenue to provide these services. Council rates and charges (discussed in Chapter 6) are part of the revenue picture, along with other components such as fees, other charges and state and Commonwealth grants.

Q: Should rates be set four years in advance as part of a council's priority setting?

Setting rates and charges to be paid for each property in the municipal district is a key consideration in budget preparation. Rates and charges are a major source of revenue for councils.

The government has announced a Fair Go Rates System, to be implemented from financial year 2016-17. It proposes a cap on rate increases and an exemption process that will require councils to justify higher rate increases. Councils will need to consider this system in determining increases in their rates and charges.

Current regulations already require disclosure of the rate revenue and the size of any increase or decrease over previous years⁵¹. Consideration should be given to whether the current disclosure conditions help inform communities sufficiently or simply serve to hold council administrations accountable for delivery of service within a price.

Community consultation on the budget through public submissions provides the main opportunity for ratepayers to voice their opinions about changes to rates and charges. Arguably, the budget should therefore include a distinct and identifiable section on rates and charges. This would include the proposed increase in the total amount of rates and charges to be raised (including justification) and the rating structure to be used for allocating the burden to the different types or classes of land. It is good practice to underpin decisions about rates and charges with a rating strategy⁵². To be amenable to scrutiny, the rating strategy should be transparent in the budget. Rating is discussed in more detail in Chapter 6.

⁵¹ Local Government (Planning and Reporting) Regulations 2014.

⁵² Institute of Chartered Accountants in Australia (2014), Victorian City Council Model Budget 2014-2015

The continued alignment of the budget with the strategic resource plan and a 10-year financial plan could further improve accountability.

The budget also requires proposed council borrowings to be identified. However, there are other emerging sources of long term financing such as operating and finance leases that do not currently need to be disclosed in the same way. Greater consistency in these disclosures might be desirable.

Q: How should consultation over the council plan, strategic resource plan, budget and the declaring of rates occur, and at what frequency?

Annual report

The preparation of the council annual report reflects the new performance reporting framework introduced in 2014, which is considered to be at the forefront of local government reporting in Australia. The recent changes ensure greater transparency, enable benchmarking of council performance, and modernise existing practices for the sector. The department provides the sector with extensive guidance material and training on these reporting requirements to ensure compliance by councils.

Reporting to the minister

An overarching issue regarding these planning and reporting documents is whether councils should continue to be required to submit copies to the minister. These documents are all now publicly available on council websites. It may be argued that modern information and communications technology renders this requirement redundant.

Questions on council planning and reporting



1. What requirements should be imposed in the Act on councils in relation to planning and reporting on their strategy, budget and operations?
2. Can council planning and reporting processes be streamlined? If so, how?
3. What rights should be granted to ratepayers to better contribute to council planning and reporting processes?
4. What sanctions should be imposed on councils not complying with planning and reporting requirements?

Chapter 6:

Council rates and charges



Chapter 6: Council rates and charges



In this chapter:

Council revenue source

Councils' capacity to raise revenue through rates and charges

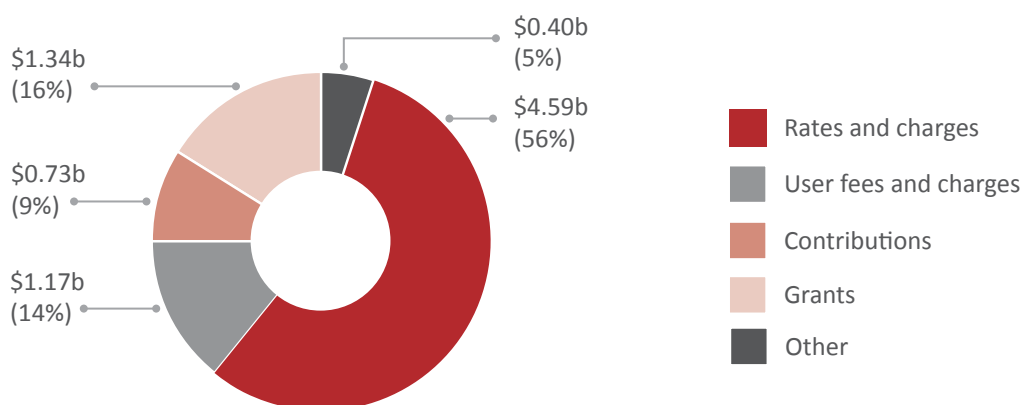
How rates and charges can be structured

Payment conditions and recovering outstanding amounts

Council revenue sources

It is acknowledged council rates and charges are, and are likely to remain, councils' primary source of revenue. However, local government rates and charges are just two of the sources of revenue available to a council. They are supplemented by state and Commonwealth grants and, on occasion, from other sources such as developer contributions in growth areas and other levies and payments from non-government and philanthropic organisations. Figure 3 below shows the average composition of revenue for Victorian councils in 2013-14.

Figure 3: Council Revenue Composition 2013-14⁵³



Rates are generally calculated once all other sources of revenue have first been considered. As a result councils usually determine the total amount of revenue that needs to be raised from rates each year by first deducting all other planned sources of revenue.⁵⁴

The annual council budget describes the mix and level of services to be provided and where council is going to raise the revenue to finance these services. This is discussed in Chapter 5 'Planning and Reporting'.

Local government rates and charges are detailed in Part 8 of the Act.

⁵³ This is derived from the Victorian Auditor General's Office, Local Government: The Result of the 2013-14 Audits (2014), Melbourne, p.17

⁵⁴ Milbur Consulting Pty Ltd, Rates and Charges Impact Statement for Victorian Councils – Issues and Options Paper February 2003.

Declaring rates and charges and rateability of land

Current arrangements

s.155 What rates and charges may be declared

Councils may declare the following rates and charges in relation to 'rateable' land to raise revenue:

- general rates
- municipal charges
- service rates and charges
- special rates and charges.

Councils can also apply other legislated charges⁵⁵ or general fees and charges for services it provides.

Q: For the purposes of general rates, should uniform rates be set or should preferential rating systems be mandated? Why?

s.154 Rateable land

Councils can apply rates and charges to all land, with the following exceptions:

- unoccupied land or part of any land used exclusively for public or municipal purposes⁵⁶
- part of land used for charitable purposes, with certain exceptions⁵⁷
- land vested or held in trust for any religious body and used exclusively as a residence of a practising minister of religion, and/or for the education and training of persons to be ministers of religion
- land used exclusively for mining purposes
- land held in trust and used exclusively by veterans or returned service personnel.⁵⁸

Exemptions also exist under some other legislation.⁵⁹

⁵⁵ For example, section 197 of the *Planning and Environment Act 1987* allows councils to charge a fee in relation to an application for a planning certificate.

⁵⁶ that is owned by or vested in the:

- Crown;
- Government minister;
- council;
- public body; or
- trustees appointed under an Act to hold that land for public or municipal purposes.

However, land or part of land is not used exclusively for public or municipal purposes if:

- it is used for banking or insurance;
- a house or a flat is on the land that is used as a residence and exclusively occupied by a person who lives there to carry out duties of employment; or
- it is used by the Metropolitan Fire Brigades Board.

Further, part of any land does not cease to be used exclusively for public purposes only because it is leased to a rail freight operator or to a passenger transport company within the meaning of the *Transport (Compliance and Miscellaneous) Act 1983*.

⁵⁷ land is not used exclusively for charitable purposes if:

- it is separately occupied and used for a purpose not exclusively charitable;
- a house or a flat is on it that is used as a residence and exclusively occupied by a person who lives there to carry out duties of employment;
- it is used for the retail sale of goods;
- it is used to carry on a business for profit (unless that use is necessary for or incidental to a charitable purpose).

⁵⁸ Land exclusively used:

- as a club for or a memorial to persons who performed service or duty as defined under the Veterans Act 2005;
- as a sub-branch of the Returned Services League of Australia; or
- by the Air Force Association (Victoria Division); or
- by the Australian Legion of Ex-Servicemen and Women (Victorian Branch).

⁵⁹ See, for example, section 94(2) of the *Electricity Industry Act 2000*.

Key issues

Council rates are a type of land tax based on the value of land within the council's municipal district where the landowner is liable, regardless of where he or she resides. Land taxes have long been used as a means of raising revenue, and there continues to be some debate over the extent to which a land tax should represent 'ability to pay' or reflect use of services, or both⁶⁰. These issues are discussed later in this chapter (types of rates and charges).

Q: Should owners be legally liable to pay council rates and charges in all instances? If not, is section 156(2) and (5), which provides that occupiers of land in certain instances are liable to pay rates and charges, appropriate?

Exempting some land from rates and charges accounts for the special status or needs of certain groups in the community. However, a review of the exemptions from rateability is overdue and the appropriateness of the exemptions is contestable. Getting exemptions right is important because Victorian councils may be foregoing considerable sums in rate revenue.⁶¹

In 2013 Deloitte Access Economics was commissioned by Local Government NSW (LGNSW) to conduct an analysis of the current local government rating exemptions in New South Wales and, based on the findings of this analysis, make recommendations for reform.

The subsequent report concluded, in part, that:

Exemptions from local government rating in New South Wales have typically been motivated by notions of equity, concession for charitable activities or public good/service provision. Over time, these exemptions have evolved and, when analysed against an appropriate public policy framework, it is apparent that the principles of optimal taxation are compromised in a variety of respects⁶².

The report identified such principles as efficiency, simplicity, equity, fiscal sustainability, cross border competitiveness and competitive neutrality. This suggests considerable scope may exist for reform of the Victorian framework.

Types of rates and charges

Current arrangements

ss.156-158A Declaring and levying rates and charges

A council must declare the amount it intends to raise through rates and charges by 30 June each year (s.158).

A person liable to pay a rate or charge can request in writing that the levy notice be sent to another person, such as the occupier of the land where there is an agreement between the owner and occupier.

A council must separately levy a rate or charge for each portion of the rateable land for which council has a separate valuation, whether or not each portion is a separate legal title.

State legislation requires that all properties in every municipality are re-valued every two years⁶³, and the council determines the amount to be paid in rates by applying an annually declared 'rate in the dollar' to the assessed value of each property.

In declaring a rate in the dollar a council must use one of three systems for valuing land. These are:

- site value
- net annual value
- capital improved value (s.154).

⁶⁰ Office of Local Government, *Rates - Proposals to improve Victoria's Municipal Rating System*, August 1993.

⁶¹ See 'Churches reap the benefits of belief', *The Age*, 29 April 2006.

⁶² *Review of local government rating exemption provisions*, May 2013, Deloitte Access Economics

⁶³ *Valuation of Land Act 1960*



Council must publish a notice of any decision to change the particular system they use and a person may make a submission on any change.⁶⁴

ss.160-161A **General rate – uniform and differential rates**

Although a council may determine that general rates will be raised by applying a single uniform rate for all rateable properties, they may also choose to apply a ‘differential’ rate to different land types. If they do so, they must use the Capital Improved Value (CIV) system. Applying uniform or differential rates is essentially a policy decision made by a council based on taxing to a higher or lesser degree for certain types of property on land. Under the CIV system there is a more detailed assessment of the total improved value of the property, so the wealth of the owner is more transparent and applying different levels of charging on a capacity to pay basis is more easily and systematically achieved.

Where a council does not use the capital improved value system, it may declare differential rates only in relation to three classes of land:

- farm land
- urban farm land
- residential use land.

This form of limited differential rating appears to have been created primarily to ensure that those councils wishing to use the site value system – valuing the land only without improvements – instead of CIV, had the ability to create a unique rate for certain land, such as broad acre farms. Under such systems specific land types would be likely to carry more of the rating burden than the rest of the community.

Where a differential rate is applied, a council must specify its objectives, and identify the types or classes of land subject to the differential rate. It must also have regard to any ministerial guidelines on differential rates in doing so.⁶⁵ When setting a differential rate the highest differential rate must be no more than four times the lowest differential rate in the same municipal district.

s.159 **The municipal charge**

A council may also declare a municipal charge in relation to all rateable land, which will be levied against all rate payers, as a general contribution to the administration cost of the municipality. The Act prescribes that total revenue from municipal charges cannot exceed 20 per cent of the sum total of revenue from municipal charges and general rates in the financial year.

In Victoria, the vast majority of councils (73) currently use the capital improved value system to set rates.

The remaining six councils use the net annual value system.

Although no councils currently use site value for rating purposes, the State Revenue Office uses this valuation base for land tax purposes.

The use of the net annual value system of valuing land is most common in inner metropolitan councils, though historically its use was more widespread. The rating basis chosen impacts the distributive burden of who pays rather than the total quantum of revenue raised.

⁶⁴ Under section 223

⁶⁵ *Local Government Better Practice Guide: Revenue and Rating Strategy 2014*, Department of Transport, Planning and Local Infrastructure

s.162 Water, waste disposal and sewerage service charges

A council may declare a service rate or annual service charge or a combination of these for providing water supply, collection and disposal of refuse, and sewerage services. These charges can also be applied to non-rateable land.⁶⁶

ss.163-166 Special rate and charges

A council can also declare a 'special' rate or charge or a combination of both on rateable land. This is to pay specific council expenses or repay an advance, a debt or loan, for performing a function or exercising a power the council considers of special benefit to the people required to pay the rate or charge. Before a council levies a special rate or charge to recover more than two thirds of the total cost of a service or works it must allow affected ratepayers to object and may not proceed if a majority of those ratepayers object. Councils may declare a special rate or charge for street construction on any land, including non-rateable land (except Crown land).

ss.163A and 163B Public notice and submissions

Members of the community are given the opportunity to provide submissions over any aspect of a proposed budget, including the revenue the council intends to generate through its rates and charges (see Chapter 5 'Planning and Reporting'), and other means. However, with the exception of special rates and charges, there is no specific right of individuals to make a public submission in relation to the formal declaration and levying of rates and charges, which is a separate process from the budget.

The right to seek a review and appeal in relation to rates and charges is a separate matter, and is discussed later in this chapter (review and appeals of rates and charges).

Key issues

In considering the local government rating regime, it is important to take account of best practice principles for taxation. These have been identified as:

- equity and fairness
 - taxpayers in similar circumstances are treated in a similar way
 - taxpayers who earn more pay higher rates of tax
- clarity and simplicity
- efficiency
- user pays
- consistency with other goals – economic, social and/or environmental.⁶⁷

Achieving all of these principles under one taxation system can be difficult, as some principles will conflict. The challenge is to prioritise and balance the principles to achieve the best outcome for the community as a whole. The following discussion addresses some of these ideas. A more detailed discussion on applying best practice principles for local government taxation can be found in the Local Government Better Practice Guide 2014.⁶⁸

The current rates and charges regime aims to apply a rating based on land value (general rates and charges), and the user pays system (municipal charges, service rates and charges, and special rates and charges).

In the case of general rates, land values are used to levy the annual rates paid by landowners. This is based on their capacity to pay, and reflects the principle that the amount paid should reflect individual economic circumstances.

Councils' capacity to raise general rates through imposing a differential rating system is an application of the principle of equity in taxation. Councils must conduct an analysis, specifying the objectives of the differential rate, to better ensure they establish a rating structure that is appropriate to the needs of their community. While in theory the objective must be equitable, in that the amount a landowner pays is determined by their capacity to pay or the extent they benefit from the service available to them, there can be inequity in the way differential rates are imposed in some municipalities in practice.

⁶⁶ Section 221.

⁶⁷ Milbur Consulting Pty Ltd, *Rates and Charges Impact Statement for Victorian Councils – Issues and Options Paper* February 2003.

⁶⁸ *Local Government Better Practice Guide: Revenue and Rating Strategy 2014*, Department of Transport Planning and Local Infrastructure

The municipal charge is a set amount imposed on each land owner, irrespective of the landowner's value of property and their capacity to pay, or the extent to which the land owner benefits from the services. The distributional impact on ratepayers may be viewed by some as unfair.

This raises the issue of liability. The levying of rates as a form of land tax is long standing and was developed to reflect councils' traditional role of providing services that benefit or directly service properties, for example road and drainage construction and refuse collection. However, since the 1970s, there has been an expansion of local government services to include, not just property-based functions, but others such as community health, well being and amenity, economic development, and recreation facilities.

A question arises whether continuing to make land owners primarily liable for paying rates and charges may be considered out of step with the broad range of services councils now provide. Some may argue that the current system of liability is inequitable in that a specific section of the community (property owners) bears a greater responsibility for funding council services, not all of which are necessarily used by them. In reality councils already apply the user pays principle in many instances, so that those sections of the municipality who directly use a particular service often share the burden of its cost.

The current power of councils to declare municipal charges may also no longer be required. Instead, councils could provide specific charges for specific purposes, such as infrastructure levies to fund particular infrastructure projects of general benefit to those within the municipal district. In considering charges of this kind, legislative safeguards about expenditure of the proceeds and the transparency of the funding process may be necessary.

The counter view is that property owners bear greater liability because they have a long-term interest in the infrastructure of their municipality, not necessarily shared by those without a long-term connection to the place.

Thought could also be given to whether the current arrangements allowing councils to declare service rates and charges in relation to water, refuse disposal and sewerage are appropriate.

Finally, consideration could also be given to whether members of the community should be given a greater opportunity to make submissions prior to councils formally declaring and levying rates and charges, either within or separate to, the budget public submission process. This is reinforced by the fact that councils have a range of options for applying rates and charges. The larger question of whether all of these categories of rates and charges should continue to be available to councils also deserves consideration.

Payment of rates and charges

Current arrangements

As well as addressing the payment of rates and charges, this section also looks at actions councils can take to recover unpaid rates, and transitional processes such as when land ceases to be rateable or when the land use changes.

s.167 **Payment**

A council must allow a person to pay a rate or charge (other than a special rate or charge) by four instalments or as a lump sum on a date fixed by the minister. In the case of a special rate or charge, the amount is due and payable on the date specified in the notice issued by the council. This must be at least four weeks after the notice is issued on in instalments over at least four years for capital works projects.

ss.168-171A **Incentives for Early Payments, Rebates and Concessions, Deferral and Waiver**

A council can provide incentives for early payment of a rate or charge before the due date. A council may also grant a rebate or concession for a rate or charge in circumstances that benefit the municipal district and community. It may also defer payment in cases of hardship or waive the whole or part of any rate or charge for people entitled to a concession⁶⁹ or suffering financial hardship.

69 For the purposes of the *State Concessions Act 2004*



s.172 Interest on unpaid rates and charges

A council may require a person to pay interest on any amount of rates and charges that have not been paid by the due date.⁷⁰ Interest becomes payable from each missed instalment date, whether or not the rates or charges are payable by instalment or lump sum. A council can also exempt a person from paying interest and can recover interest in the same way it recovers rates and charges.

ss.173-175 Acquiring rateable land

A person who becomes the owner of rateable land must pay any current rate or charge on the land, and any arrears due and payable. If land becomes rateable after 1 July, the rate or charge payable is for the proportion of the year for which it is rateable. Where a council is awarded legal costs for rates or charges owed by a previous owner, the new owner is liable to pay the legal costs as if they were in arrears of rates and charges.

ss.177-179 Requiring occupier to pay rent to council

A council may send a notice to the person liable to pay any rate or charge due, stating that the occupier of the land may be required to pay council rent until the amount of the rate or charge owing is paid. The occupier in this case becomes legally liable for the debt. Where the occupier has agreed to pay the rate or charge, the occupier is entitled to deduct the amount from the rent.

s.180 Unpaid rates or charges

A council may sue for debt in the Magistrates' Court if a rate or charge remains unpaid after it is due.

If any rate or charge is recovered from the owner where the occupier is liable to the owner, the owner can recover the rate or charge from the occupier in the same way the owner recovers rent. In such cases, the occupier is not required to pay more than the amount of rent owed.

s.181 Council may sell land to recover unpaid rates or charges

Where rates are more than three years overdue, a council may sell the land or have it transferred to the council. This applies so long as no current arrangement exists for the payment and the council has a court order requiring the payment. Any amount remaining after the sale of the land must be used to discharge any mortgages and other charges on land and any amount remaining to each person who appears to have an estate or interest in the land. Further, all mortgages or charges are cancelled by the Registrar of Titles.

Key issues

Provisions relating to penalty interest on unpaid rates and charges were amended in 2012 to remove an inequity that resulted in excessive penalty interest charges for people who paid interest in a lump sum. Currently, penalty interest is always charged from the due date for each instalment, irrespective of whether a lump sum option is available.

⁷⁰ Interest is calculated at the rate fixed under the *Penalty Interest Rates Act 1983* that applied on 1 July immediately before the due date.

The circumstances under which a council can grant a rebate or concession on rates or charges may need to be broadened and should be reviewed. Granting a rebate or concession may be the only way in which a council can, for example, confer a commercial advantage on a business. This may be desirable when a business is proposing to move to the municipal district or which may shed jobs unless some form of financial relief is provided. To give greater certainty in relation to the granting of rebates and concessions, consideration could be given to introducing a power for councils to enter into rating agreements with owners and/or occupiers of rateable land, for a specific term, with appropriate legislative safeguards to ensure that:

- there are reasons recorded for entering into the rating agreement
- transparency and accountability accompany the grant or rate relief.

In a similar way, a review of the deferral or waiver arrangements on the grounds of financial hardship is desirable in light of contemporary circumstances.

In relation to unpaid rates and charges, while an owner of land is liable to pay rates and charges, the issue of whether an owner can in turn require an occupier to pay may appropriately remain a matter to be negotiated between the owner and occupier. Providing a council an automatic legal right to pursue an occupier for unpaid rates and charges by the owner may therefore, be seen as contentious.

A further challenge is the difficulty encountered by some councils in exercising the power of sale of land for unpaid rates⁷¹. Concerns have been raised that the current provision may not guarantee councils or purchasers can obtain vacant possession from a person who has an existing estate or interest in the land, such as a tenant. This creates difficulties when a person occupying the land prior to the sale refuses to vacate it after the sale.

Q: How could the processes for payment of rates and charges in the Act be amended to remove unnecessary restrictions and/or red tape on councils and on ratepayers?

Review and appeals of rates and charges

ss.183-185AB

Current arrangements

There are grounds for which reviews and appeals of rates and charges may be raised. The appropriate body and time periods for lodgement vary according to the nature of the appeal.

A person aggrieved by a rate or charge may appeal to the County Court for a review on specific grounds such as that the land in question was not rateable land.⁷² The appeal must be lodged within 60 days after receipt of the first notice.

Where a council applies differential rates, an owner or occupier affected by a decision of a council to classify or not classify the land as belonging to a particular type or class, can apply to VCAT for review within 60 days of receipt of the notice.

People can apply to VCAT on special grounds for review of a decision of a council imposing a special rate or charge. This must be done within 30 days of receiving the first notice.

People can apply to VCAT for a declaration regarding the validity of a decision to impose a special rate or charge. In determining an application, VCAT must take into account any relevant planning scheme.

⁷¹ conferred by section 181 of the Act

⁷² This is additional to rights of appeal under the *Valuation of Land Act 1960*.

Key issues

The different grounds and appeal mechanisms currently available under the Act can confuse people seeking a review of rates and charges decisions. The lack of a consistent approach may result in people not effectively using the appeal process to exercise their rights.

This is compounded by the fact that councils are not required to disclose all the different appeal rights on rate notices.

Q: Are the current review and appeal rights of ratepayers in relation to rates and charges in the Act appropriate? If not, how should they be changed?

Questions on council rates and charges



1. Is the current method of declaring rates and charges based on “land” still appropriate?
2. What powers do councils require in relation to levying rates and charges?
3. What obligations or restrictions should be imposed on councils in relation to these powers?
4. What rights should rate-payers have in relation to the exercise of councils powers in relation to levying rates and charges?
5. Should there be detailed legislative provisions regarding processes associated with levying rates and charges? If so, are the current processes for levying rates and charges in the Act appropriate? If not, what changes should be made?
6. What sanctions should be imposed on councils failing to comply with the requirements relating to levying rates and charges?

Chapter 7:

Service delivery and financial decision making



Chapter 7:

Service delivery and financial decision making



In this chapter:

Councils' ability to make financial decisions through:

- determining best value service delivery
- exchanging or selling land
- the power to borrow funds, procure goods, services and works
- engaging in business investments and other entrepreneurial activities

Revenue raising and the expenditure of funds in accordance with council plans and budget

Collaborative arrangements with other councils

Best value principles

ss.208A-208J

Current arrangements

Councils plan, fund and deliver up to 120 individual service types for their communities. The current best value provisions in the Act are high-level principles councils must follow in providing council services. A council must comply with best value principles and report annually that they are doing so.

The best value principles as outlined in section 208B of the Act are:

- all services provided by a council must meet the quality and cost standards required by section 208D (which defines the scope of these standards)
- subject to sections 3C(2)(b) and 3C(2)(c), all services provided by a council must be responsive to the needs of its community
- each service provided by a council must be accessible to those members of the community for whom the service is intended
- a council must achieve continuous improvement in the provision of services for its community
- a council must develop a program of regular consultation with its community in relation to the services it provides

A council must report regularly to its community on its achievements in relation to the above principles.

Detailed requirements for best value principles are contained in Division 3 of Part 9 of the Act.

Key issues

Cost effectiveness and quality of service are important components of municipal service delivery. The current best value provisions aim to increase the focus on benchmarking and ensure services meet minimum standards. However, the principles are applied in a widely varied manner, and there are few service level reviews published that show the actual cost and quality of a service comparing similar groups of councils.

Where fees are charged for service delivery, councils are required to declare the amount of each in a schedule attached to their annual budget. Requiring publication of comparative service level data for all services delivered might enable councils and their communities to see standards achieved in neighbouring municipalities and encourage greater collaboration to achieve best value.

Investments and borrowing

ss.143-150 **Current arrangements**

A council is empowered to invest money in certain securities, including Commonwealth and Victorian Government securities, and deposit-taking institutions.

A council can borrow money to perform its functions or exercise its powers and obtain an advance by overdraft from an authorised deposit-taking institution subject to sound financial management principles.

From the Act:

Section 143 – power to invest

Section 144 – power to borrow

Section 136 – sound financial management principles

Key issues

The constraint on councils to undertake only those investments specified in the Act may be considered an unreasonable limitation. An alternative might be for councils to prepare an investment policy or strategy, which could be reviewed and approved annually by its audit committee.

Updating the range of available borrowing arrangements, such as finance and operating leases, could strengthen the existing power to borrow and the ways borrowings can be applied.

Further, the current controls over authority to use overdraft facilities might be redundant as they appear to be adequately covered by councils' requirement to conform to sound financial management principles.

Exchange and sale of land

ss.187-192, 194-195 **Current arrangements**

A council may purchase or compulsorily acquire land in connection with its functions or powers. If a council has acquired any land for a particular purpose, it can use the land for another purpose if it is satisfied the land is not required for that original purpose.

A council must usually notify the public of its intention to sell or exchange land at least four weeks in advance and obtain a valuation of the land. Further, a council's power to lease council land is limited to a term of 50 years or less and it must notify the public of its intention at least four weeks before the lease and must allow public submissions in response. There are limitations to this power where the transfer, exchange or lease of the land is to the Crown, a minister, public body or statutory trustee.

A council's power in relation to property allows a council to accept a donation, gift or bequest of land. In doing so it agrees not to carry out any unlawful condition of that gift.

A council can sell, buy or lease a dwelling to or for a member of council staff or provide a loan or other assistance for this purpose.

These requirements are set out in Division 1 of Part 9 of the Act.

Key issues

A decision of the Supreme Court of Victoria in 1998 has led to councils becoming considerably more careful in selling land or using it for another purpose.⁷³ Councils now commonly execute contracts for the sale or exchange of land conditional on a satisfactory outcome of mandatory public consultation. This is to put beyond doubt that a failure to comply with the notice requirements will invalidate such a contract.

Q: Should the Act contain provisions limiting the powers of councils in relation to the sale or purchase of property?

There are a number of areas that have been problematic for councils in the exchange and use of land. A key example is the use and sale of 'public open space'. The *Subdivision Act 1988* imposes restrictions on the use and sale of public open space and may require its replacement as a condition of sale.⁷⁴ Such issues may be resolved by 'cross-referencing' a council's power of sale in section 189 of the Act with the restrictions imposed by the *Subdivision Act 1988*.

Procurement

ss.186-186A Current arrangements

Councils must have a procurement policy that sets out the principles, processes and procedures they will apply to all purchases of goods, services and works. They must follow compulsory competitive tendering requirements, publicly tendering for goods or services valued at \$150,000 or more or \$200,000 or more for works. These requirements aim to ensure that councils and their communities achieve value for money through open and fair competition. They also seek to ensure councils follow high standards of probity, transparency, accountability and risk management. They enforce an element of market testing before public funds are spent and ensure council staff advise council on the merits of entering into a particular arrangement.

Key issues

The financial threshold for going to public tender allows for indexation, but this is rarely invoked. This can lead to the thresholds becoming too low over time, especially for large metropolitan councils. Instead, public tender thresholds could be tied to a percentage of the council's rate revenue or a specific dollar amount whichever is higher⁷⁵. Another issue is whether the public tender threshold should be pegged at a different level for goods, services and works.

From the Act:

Section 186A – adopting and publishing a procurement policy

Section 186 – compulsory competitive tendering requirements

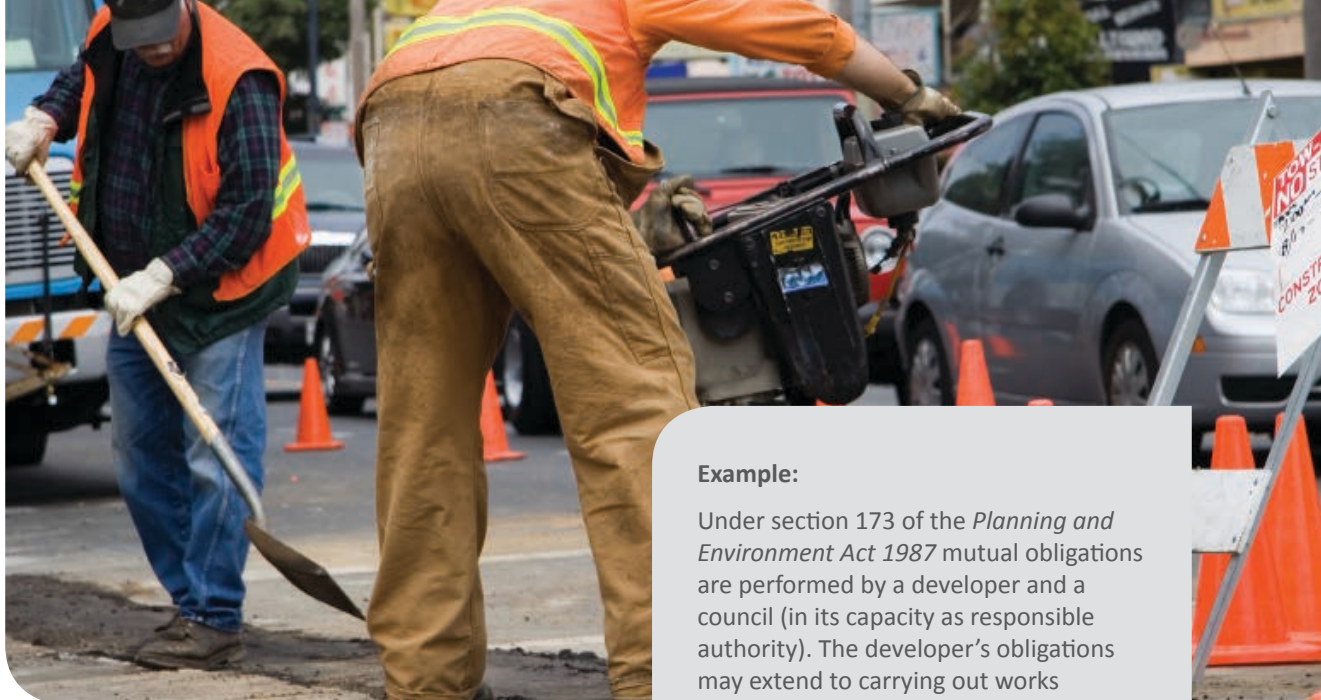
A possible flaw in the current framework is that if a council believes that a tender process, where currently required, will not produce the best outcome, its only option is to seek a ministerial exemption (see Chapter 9 'Ministerial Powers'). An alternative may be for councils to follow a transparent process that records the basis for the decision. Council procurement policies for transactions below public tender thresholds could be used for councils to develop a fair and transparent process for all contracts. Council audit committees are also usually capable of independently assessing council procurement policies and processes, and determining whether a proposed contract will achieve value for money.

A further contested issue is whether tendering requirements should apply to goods, services or works stemming from other statutory requirements.

⁷³ *Bycon Pty Ltd v Moira Shire Council* [1998] VSC 25

⁷⁴ See the definition of that term in section 3(1) of that Act. Section 20(4) of the *Subdivision Act 1988* provides that "public open space" can be sold "only if the Council has provided for replacement public open space". Further, section 24A(8) of the *Subdivision Act 1988* imposes restrictions on the application of the proceeds of sale of a "reserve" if the land sold under section 24A of the *Subdivision Act 1988* was "public open space".

⁷⁵ An example of this is provided in section 193 of the Act.



A final issue is the lack of consequences for non-compliance. The Act provides that each council ‘must comply with its procurement policy’, but the consequences of non-compliance are unclear. Although a legislative obligation will have been breached in cases of non-compliance, this may not necessarily invalidate the contract into which the council has entered.

Example:

Under section 173 of the *Planning and Environment Act 1987* mutual obligations are performed by a developer and a council (in its capacity as responsible authority). The developer’s obligations may extend to carrying out works to create infrastructure, such as constructing a car park or access roads. There is an element of procurement on the council’s part but the procurement is linked to an agreement that has been validly entered into under another Act.

Q: Should councils be required to undertake a public tendering process in all circumstances?

Entrepreneurial activities

s.193 Current arrangements

Councils are given the power under section 193 of the Act to enter into commercial arrangements. Subject to strict requirements the level of approval depends on the total value of the investment and the corresponding gradation of risk involved.

Councils must also obtain the minister’s approval where the commercial venture includes a partnership, or similar arrangement, with an entity with the power to borrow money in its own right, regardless of the scale of the investment.

Key issues

Entry into a commercial activity may provide a council with an alternative source of revenue, allowing rates and charges to potentially be reduced. The approval framework attempts to balance this benefit against the fact that, unlike private companies funded by shareholders who agree to assume the risk of investing, council entrepreneurial ventures are funded by the collection of compulsory rates paid for the benefit of the community.

Ministerial oversight cannot remove the risk of commercial ventures failing but provides an external check to ensure that councils have properly considered high risk activities. It is designed to ensure that the council is able to manage the project and any risks prior to entering into the arrangement.

For investments of:

- more than \$100,000 or 1% of council revenue → a risk assessment must be considered
- more than \$500,000 or 5% of council revenue → the risk assessment must be accompanied by the minister’s approval
- more than \$5 million → the Treasurer’s approval must accompany the assessment and the minister’s approval.

In the discussion paper *Risky Business: Improving Councils' Management of Entrepreneurial Risk*⁷⁶, the example of the Footscray Quay West Development was used to illustrate a council that entered into a high risk commercial venture and suffered substantial financial losses as a result.

The commercial activities councils can enter into are limited⁷⁷. While some of the legal relationships listed in the Act are familiar to councils, such as publicly listed companies, joint ventures and trusts, others may not be, such as 'union of interest' and 'co-operation'. If these less familiar relationships are to remain in the Act, further clarification of their precise legal meaning might be needed.

There are no geographic restrictions on commercial activities that can be undertaken by a council under section 193 of the Act. It is not necessary that the activities take place within the council's own municipality, or even within Victoria. Some may question whether this is appropriate given a council's mandate to deliver good government to its own geographic area. Conversely, councils may argue that successful entrepreneurial activities carried on elsewhere can provide revenue or a commercial benefit that may also result in lower rates within the municipality.

The requirement to obtain the approval of the minister⁷⁸ where the arrangement is with an entity with the power to borrow money in its own right has, at times, been problematic. Typically, when a company is formed it has a power to borrow. Approval cannot be applied retrospectively, therefore ministerial approval cannot rectify any failure to obtain approval where the power to borrow has been exercised. Although the Act does not provide consequences for failing to seek approval prior to entering into such an arrangement, councils face the risk that the contract may be found to be voidable because entering into it was outside council powers.

Q: Should the assessment and approval of applications relating to entrepreneurial activities of councils be broader than only an assessment of risk and liability?

Collaborative arrangements – libraries and other services

LIBRARIES

ss.196-197G

Current arrangements

Sections 196 and 197 of the Act provide a process for a group of councils to enter into an agreement to form a Regional Library Corporation. These entities are used to provide library services to local libraries in the municipalities of the member councils.

Once an agreement is approved by the minister and published in the Government Gazette, regional library corporations become bodies corporate and have many of the functions, powers and restrictions of a council under the Act, including those relating to conduct and governance procedures, planning and reporting, financial management and procurement.

Regional Library Corporation boards are formal in nature and generally comprise representatives from each of the member councils.

Key issues

Collaborative arrangements under the Act are designed to provide member councils with a higher level of library services than they could achieve on their own and provide economies of scale and cost savings. However, the requirement to adopt an overly elaborate corporate structure for what is often a simple service sharing function constrains these arrangements. The alternative of adopting less formal structures such as

⁷⁶ *Risky Business: Improving Councils' Management of Entrepreneurial Risk* (Discussion Paper, Local Government Division, November 2000).

⁷⁷ Section 193(1) of the Act.

⁷⁸ Section 193(5G) of the Act.

service level arrangements or memorandums of understanding (MoUs) - where one council provides services on behalf of a group of councils – is also problematic.

Where councils elect to enter into service level arrangements (or MoUs), they have to comply with ministerial approval and exemption processes relating to procurement (s.186) and entrepreneurial arrangements under the Act (s.193).

Whichever option councils adopt to collaborate in purchasing or delivering library services, existing provisions are complex and onerous and may serve as an impediment to sensible reform. There may be merit in simplifying processes for collaborative arrangements and removing the need for ministerial approval where simple co-operative arrangements between councils are supported by business cases.

OTHER SERVICES

Current arrangements

Current collaborative arrangement provisions only relate to library services. However councils may participate in collaborative arrangements for other services. In doing so, this is likely to require councils to seek ministerial approval in accordance with sections 186 and 193 (see pp 77 and 78)

Key issues

There is an argument that provisions relating to library services could be broadened to accommodate other types of collaborative arrangements. These arrangements may be used by smaller regional councils to provide services through a larger scale operation, increasing the level of the services provided to the communities involved and reducing employment and resource costs incurred by councils. There are sound policy reasons for supporting a wide range of collaborative, shared service models among councils designed to improve services to communities and reduce costs.

Q: Should collaborative arrangements between councils be broadened beyond library services. Should these arrangements require ministerial approval?

Questions on council service delivery and financial decision making



1. What powers do councils need to undertake their financial decision-making functions?
2. What obligations or restrictions should be imposed on councils in relation to their financial decision-making functions?
3. Should the Act contain detailed processes regarding councils financial decision-making? If so, what sanctions should apply for non-compliance with these requirements?

Chapter 8: Councillor conduct, offences and enforcement



Chapter 8:

Councillor conduct, offences and enforcement



In this chapter:

The framework for dealing with councillor misconduct

Improving the ability of councils, external tribunals and the minister to deal with councillor behaviour

Offences under the Act relating to councillor behaviour, including conflict of interest

The Chief Municipal Inspector's role in investigating and prosecuting breaches of the Act

Part 4 Division
1A and 1B

Councillor conduct

The current framework is aimed at dealing with councillors who fail to conduct themselves properly. It was acknowledged at the time it was introduced, and remains the case, that this applies to very few of the over 600 councillors in Victoria, who work hard to serve their communities.

When it does occur, councillor misconduct has serious consequences for:

- individual councillors – both those alleged to be engaging in misconduct and their fellow councillors
- the councils they serve
- the sector as a whole
- the community.

The damage can be disruptive to council functioning, reputational and costly. It is important that misconduct is addressed effectively, but the legislative framework must reflect a balance between the autonomy of the local government sector and the responsibility of the state government to ensure integrity and probity.

The framework for dealing with councillor misconduct is in divisions 1A and 1B of Part 4 of the Act. It has been operating since 2008 with some changes made in 2010 regarding the Dissolution of Conduct Panels⁷⁹; the constitution of VCAT⁸⁰; and payment of VCAT costs⁸¹.

The current framework has not effectively managed councillor conduct issues to prevent reputational damage to individual councils and the sector as a whole. In some instances the capacity to bring complaints and apply for panel hearings seems to have exacerbated behavioural issues and elevated misconduct as a problem. This is borne out by an increase in the number of requests for panels to be established.

The minister has indicated that she intends to bring forward reforms to the framework. An overview of the reforms being considered is at Appendix 2. Consultation is currently underway and the minister has flagged that legislation may be introduced into Parliament this year. Possible changes are flagged in the relevant section in the discussion that follows.

⁷⁹ new clause 12(1)(b) of Schedule 5 of the Act

⁸⁰ amended cl.46E of Schedule 1 to the VCAT Act

⁸¹ amended cl.46F of Schedule 1 to the VCAT Act

Definitions of different levels of misconduct

A framework for setting councillor behaviour standards needs clarity about the types of behaviour that fall below this standard. Definitions of misconduct must be clear and reflect a hierarchy of offences in ascending levels of seriousness.

s.81A Current arrangements

- Councils deal with behaviour that represents a breach of council codes.
- Councils, groups of councillors or an individual councillor can bring applications alleging misconduct or serious misconduct against a councillor that are determined by a councillor conduct panel
- The secretary of the department can bring an application for a finding of gross misconduct against a councillor.

The definitions of the different levels of misconduct are contained in section 81A of the Act.

Current definitions

Misconduct – breach of a code or failure to comply with a panel direction

Serious misconduct – failure to comply with a panel direction after a finding has been made, failing to cease conduct about which a panel finding has been made or which contravenes the conduct principles in the Act after a finding by a panel or VCAT

Gross misconduct – conduct contravening the principles and being a contravention of the Act, which has a penalty of at least 60 penalty units or demonstrates the councillor is not of good character or is not a fit and proper person to be a councillor

Key issues

These definitions do not encompass all behaviour that could rightly be considered as misconduct. They do not capture conduct that may give rise to serious concern including bullying, directing staff and releasing confidential information. The reforms at Appendix 2 propose new definitions aimed at better capturing a range of behaviour and enabling the hierarchy of issues to be observed, with:

- councils dealing with breaches of council codes
- panels dealing with the majority of cases
- VCAT dealing with exceptional cases.

Proposed definitions (Appendix 2)

Misconduct – failing to comply with a council’s internal processes, including failure to abide by any decision of council in relation to a breach of the code

Serious misconduct – refusing to comply with panel processes, bullying, improperly directing staff and releasing confidential information

Gross misconduct – behaviour that demonstrates lack of character to be a councillor

Table 3: Hierarchy for management of various levels of councillor behaviour

Seriousness of Misconduct	Responsible Agent
Breach of Councillor Code	Council
Misconduct	Panel
Serious Misconduct	Panel
Gross Misconduct	VCAT

Councillor responsibilities

The current framework places responsibility for conduct on individual councillors themselves. This is based on the principle that individuals who are democratically elected members of council should be prepared to perform the role expected of them in a manner as befits the office.

ss.76B, 76BA

Councillor conduct principles

Current arrangements

The Act sets out principles of conduct with which councillors must comply, both with each other and in their interactions with members of the public. These are divided into two (see Box below).

Section 76B: primary principle

A primary principle of councillor conduct requires councillors, when performing the role of councillor to act with integrity, be impartial in exercising their responsibilities and not seek to confer advantage or disadvantage on any person.

Section 76BA: General principles

This sets out further general principles when performing the role of a councilor, including: to avoid conflicts of interest, act honestly, be respectful, exercise care and diligence, use public resources in the public interest, act lawfully and to promote these principles by leadership and example and act in a way that preserves public confidence in the office of councillor.

Currently the Act requires these principles to be replicated in all councillor codes of conduct developed by individual councils. The reforms being contemplated would remove this requirement.

Key issues

There appears to be no good reason to have two distinct types of conduct principle – primary and general. It is also hard to discern whether the principles have had any practical effect on councillor conduct. This may be because they are couched in very broad terms. Alternatively it may be that councillors do not feel obliged to adhere to them because enforcement is inadequate. There appears to be little evidence that inclusion of the principles in councillor conduct codes has achieved any practical impact.

Q: How can adherence to the conduct principles by councillors be improved?

Role of councillor

Current arrangements

Currently there is no description of the role of a councillor in the Act. The Local Government Charter instead sets out the role of a council, that is, the role that councillors perform collectively. The role of the councillor as an individual would be set out in the Act under the reforms to the conduct framework detailed at Appendix 2.

Key issues

Arguably, some instances of misconduct – alleged and substantiated – against individual councillors have arisen because of a misunderstanding by councillors of their role. For example, a belief that they should have a role in administering council affairs, and, in some cases, directing the CEO or other staff on operational matters. Describing the role of a councillor in the Act could lessen these misconceptions.

Council processes

If individual councillors do engage in misconduct, the intent of the current framework is that councils themselves should deal with these matters where possible. This tries to preserve councils' independence to manage their own affairs.

Councillor code of conduct

s.76C Current arrangements

The primary vehicle for councils to manage conduct issues is a Councillor Code of Conduct. The Act requires individual councils to establish a Councillor Code of Conduct with a set number of requirements. They **must** include the legislated principles (ss.76B and 76BA) and may include internal dispute resolution procedures (s. 76C). Since 2008 all councils have formulated their own codes and have updated them following elections. The department published a Guide to Councillor Conduct Arrangements in 2009 to help councils develop their codes and build understanding of the system.

Key issues

Signing codes of conduct

While many councils impose a requirement for councillors to sign codes when they are agreed, some councillors refuse to do so. Notwithstanding all councillors are bound by decisions of council which includes any code adopted; refusal to sign the document signals a lack of commitment to abiding by its substance and its processes. The reforms at Appendix 2 propose requiring all incoming councillors following an election to sign the existing council code prior to taking the oath of office. Thereafter councillors would be required to sign any revised code to remain qualified to be a councilor.

Lack of enforcement mechanisms

The lack of effective enforcement mechanisms in the codes is a key weakness of the current framework. There is no effective way of compelling councillors to participate in the complaint handling processes (if any) contained in them. There are inadequate mechanisms for imposing and enforcing sanctions against councillors found to be in breach of a code. This is one of the reasons for an increase in applications for panels to be established. The reforms in Appendix 2 propose internal resolution processes in all codes, including an independent arbitrator. They also include specifying the sanctions a council may decide to impose following a finding of breach of the code.



Primacy of internal resolution

Another proposed reform is to refuse applications for panels to be established if the internal resolution processes in a council code have not been fully exhausted. This reinforces the primacy of having councils manage conduct issues internally so far as possible. This complements a proposal to clearly demarcate the definitions of misconduct, serious misconduct and gross misconduct. This would also clarify how a councillor conduct panel is to be convened or a VCAT process initiated.

Mandatory codes

Another issue is whether regulations should be made to specify mandatory provisions for all codes. To some extent this is contrary to the view that codes should be tailored to specific councils. However, the principles that govern people behaving properly do not change according to location or circumstance. In the past, various model codes of conduct have been prepared and circulated in the sector. Another approach is to specify matters that should be addressed in council codes. This recognises common elements that all councils deal with but allows each council to decide how these matters should be managed.

Timely intervention

Finally, there is a significant absence of a timely external intervention in cases where the health and safety of individuals or the effective functioning of a council are at risk. Current processes have been found to be too rigid and slow to act as an effective moderator of behaviour in all cases. The current arrangement encompasses informal dispute resolution, then arbitration processes, followed by a councillor conduct panel. The human and financial costs associated with this warrant attention. This issue is addressed in the commentary below under 'Enforcement'.

Councillor conduct panels

Part 4 Division
1B, ss.81A-81S

Current arrangements

The councillor conduct framework introduced into the Act in 2008 was designed to provide as much sector autonomy as possible. The Municipal Association of Victoria was given administrative responsibility for the councillor conduct panels system in accordance with strict processes that are set out in *Schedule 5* of the Act. The system allowed councillors to be judged by their peers - ensuring cases of alleged misconduct were dealt with by people with knowledge and experience of the role and responsibilities of councillors alongside people with legal qualifications.

Section 81A defines a panel.

It comprises two people established by the MAV under *Schedule 5*. One panel member must have legal qualifications and the other must have sector expertise. Panels are automatically convened once a complaint of misconduct or serious misconduct is made to the MAV.

The process for making an application is set out in section 81B of the Act and can be made by a council, councillor or a group of councillors. Panels can dismiss applications that are frivolous or vexatious but they must be convened in order to do so. The conduct of panels is largely determined by the panel but is meant to be informal and not legalistic and hearings are closed to the public (s.81I).

In making an adverse finding, panels can either make a finding of misconduct or authorize an application to VCAT if there are reasonable grounds for a finding of serious misconduct.

A panel is only able to issue a reprimand, requirement for an apology or direct a councillor to take leave of absence of up to two months. It can also direct a councillor to undertake training, mediation or counselling (s. 81J). Respondents to applications are given the right to have a matter before a panel referred to VCAT before it is heard (s. 81D).

Key issues

The mere convening of a panel where complaints have no evidentiary foundation or are frivolous causes reputational damage to a respondent, heightens existing conflict and is wasteful of scarce resources. Lack of means to require councillors to participate in panel processes has been a problem in having matters dealt with expeditiously. The lack of a clear pathway, as evidenced by the ability of respondents to bypass panels, even at the last moment, by going directly to VCAT has undermined the capacity of panels to deal with complaints. Having panels refer serious misconduct matters to VCAT has also meant delays.

The reforms at Appendix 2 aim to deal with these issues by bringing administration of panels into government with a new officer (Principal Councillor Conduct Registrar) acting as a gatekeeper on applications for panels and by giving panels more powers to require participation and the ability to hear serious misconduct matters. In these cases panels will be able to suspend a councillor for up to six months.

An issue that may not have been completely addressed in the proposed reforms is the reputational damage that surrounds allegations of misconduct. The role of the Registrar is designed to ensure panels are not established when claims are without evidentiary foundation. Panel hearings remain closed to the public, but the release of panel decisions and findings have implications for the respondent. It is proposed that the Registrar be a central repository of decisions. It is an open question whether panel findings or reasons for decisions should be publicly available. They are provided to councils and to the parties to an application and are sometimes leaked to the press in an attempt to inflict political harm.

Victorian Civil and Administrative Tribunal (VCAT)

ss.81D-81F,
81K-L, 81Q-R

Current arrangements

VCAT plays three key roles in the councillor conduct framework:

- Any party affected by a decision of a councillor conduct panel may apply for a review of the decision.
- The secretary of the department may apply to VCAT for finding of gross misconduct against a councillor.
- The respondent in a matter may request the councillor conduct panel to refer the hearing of the matter to VCAT.

In the reforms under consideration at Appendix 2 the Chief Municipal Inspector would be the official to apply to VCAT in cases of gross misconduct.

VCAT has also been responsible for hearing cases of serious misconduct, which had to be referred by a panel. Under the reforms at Appendix 2, consideration is being given to panels dealing with serious misconduct matters instead of VCAT.

VCAT's role in any appeal from a panel finding is limited to reviewing the merits of the case and not considering questions of law. If a finding of gross misconduct is made VCAT may disqualify a councillor from holding office for up to four years. There has been only one application for a finding of gross misconduct since the framework commenced. This proceeding took a number of years punctuated by adjournments and appeals.

Key issues

The timelines and costs associated with VCAT hearings have impeded timely resolution of serious misconduct applications. It is appropriate that gross misconduct matters continue to be dealt with by VCAT, however it is appropriate that the definition of gross misconduct be clarified as set out earlier in this chapter to reduce the complexity of those proceedings.

Offences

CONFLICT OF INTEREST

Q: How can the conflict of interest provisions be made simpler?

ss.77, 77A, 77B,
78, 78A-E, 79,
79B- D, 80

Current arrangements

Detailed conflict of interest provisions are set out in Division1A of Part 4 of the Act. Covering 26 pages, there are 17 separate sections related to this issue which includes direct and indirect interests, indirect interest by close association, indirect interests due to financial interests, conflicting duties, receipt of gifts, becoming an interested party and due impact on residential amenity. The conflict of interest framework requires disclosure of conflicts by councillors, staff with delegated functions and persons providing services to council.

Requirements include:

- disclosure of conflicts of interest at meetings of council and special committees, and at assemblies of councillors
- the keeping of a register of interests by the CEO or a nominated council officer
- persons with an interest disclose those interests and refrain from voting on matters related to that interest.

Numerous guides have been produced providing additional advice to councillors on conflict of interest requirements.

Outside of this prescriptive framework, a councillor who does not have a conflict of interest at such a meeting or an assembly of councillors may apply for an exemption from voting on the ground that he or she has a 'conflicting personal interest'. This mechanism allows 'perceived interests', that presumably do not fall within the definitions of 'conflicts of interest' to be addressed.

Key issues

The current framework provides a comprehensive regime seeking to capture key instances of conflict between a councillor's role and their private interests, rather than a more general test of 'material personal interest'.

A general test of 'material personal interest' is contained in local government legislation in Queensland.

A narrower concept of pecuniary interest is used in New South Wales and Tasmania.⁸²

Given the detail in the Act and supporting guidance material available, it may be that some councillors have trouble understanding the extent of these provisions and their responsibilities in relation to them.

Coverage of conflicts of interest framework

The current conflicts of interest framework does not intend to cover every situation involving a possible conflict, but rather seeks to capture the key scenarios that give rise to a conflict of interest. Further, section 79B of the Act provides that councillors may exempt themselves from voting where they consider they have a personal interest in a matter. This serves as a catch all provision, where the Act is otherwise silent on a particular circumstance, putting the onus on the councillor to identify their personal interest.

ss.77A, 77B

Direct interest concept is unclear

The concept of 'direct interest' in section 77B(1) may appear uncertain in that the concept of a direct alteration in a person's 'benefits, obligations, opportunities or circumstances' is broad.⁸³ The intention of this provision, however, is to address the various possibilities arising from a conflict, whereby the councillor may not only directly benefit from a decision, but may, for instance, have a new opportunity arise as a result.

⁸² Queensland - *Local Government Act 2009*; New South Wales - *Local Government Act 1993* and Tasmania - *Local Government Act 1993*.

⁸³ *Stuart v Price [2011]VMC*

Determining a direct or indirect interest

When the interest under question directly relates to the councillor, the identification of the interest may be more straightforward. However, other indirect interests may be less so. It is not always obvious to the councillor whether a third person who the councillor has some relationship with, has a direct interest in a matter.

Section 78A(3) attempts to ensure that certain shareholdings do not give rise to a conflict of interest. There is a question as to whether the monetary thresholds specified should be indexed.

When describing the circumstances that will constitute an indirect interest because of conflicting duties, section 78B(1)(b) refers to a person who is:

a partner, consultant, contractor, agent or employee of a person, company or body that has a direct interest in a matter ...

Councillors need to be aware that these types of indirect interest extend beyond financial interests, and include where the councillor's duties or role, or even loyalty, may be in conflict as a result of his or her relationship or position in question.

s.78C Gifts and hospitality

There is some uncertainty across the sector as to whether reasonable hospitality received at an event or function should be treated as a gift. This depends on whether the event was attended in "an official capacity" as the mayor, councillor a member of council staff or a member of a special committee (s.78C(1)(a)). This can sometimes be difficult to determine.

.... attended in an official capacity as the mayor, a councillor, a member of council staff or a member of a special committee ...constitutes an 'applicable gift' under 78C(1)(a) where it is unclear if the event is attended in an 'official capacity'.

Example:

Councillors who accept invitations to the opening night of a local theatre company production or to match day luncheons at a local football club and receive hospitality beyond the specified monetary threshold would need to establish whether they were invited in their official capacity or merely as a courtesy.

s.79B Conflicting personal interest

Section 79B permits a councillor who does not have a conflict of interest in a matter to seek an exemption from the obligation to vote. Given there is no obligation to vote contained in the Act, this provision may need to be reconsidered.

s.79C Situations where a councillor is taken to not have a conflict of interest

The breadth of all of the exemptions in section 79C(1) would indicate that more matters should be captured as direct or indirect conflicts thereby removing the requirement for a councillor to decide whether to trigger the conflicting personal interest provision. At a broader level there are good public policy reasons to ensure that elected officials will transparently address perceived conflicts of interest. The question remains as to how best to require disclosure and establish a point of demarcation beyond which participation in decision making should be precluded.

Where participation in the decision making process may not be in the public interest:

Currently, the exemption allows a councillor to remain in a meeting or an assembly of councillors when consideration is being given to the progress of a disciplinary process involving him or her. While such a councillor should be able to present a case in the matter, it is difficult to reconcile why the councillor who is the subject of the disciplinary process should be permitted to deliberate and (in the case of a meeting) vote.

The conduct of councillors with a conflict of interest outside meetings or Assemblies of Councillors is also central to public confidence. The Act does not specifically regulate this. However, this behaviour may give rise to an allegation of serious misconduct and the establishment of a Councillor Conduct Panel if it is associated with a breach of the councillor conduct principles contained in the Act. Alternatively, if the conflict of interest is shown to be associated with an attempt by the councillor to gain a personal advantage or cause detriment to the council or another person, it could give rise to the offence of misuse of position under section 76D. A policy decision could be considered about whether the conflict of interest framework should be confined to what takes place during meetings or assemblies of councillors or extended to other activities.

CONFIDENTIAL INFORMATION

s.89 Current arrangements

Section 89 of the Act requires all meetings of council, and special committee meetings, to be open to members of the public. At the same time the Act recognises it is important that councils be able to deal with sensitive matters appropriately. It also recognises that people who provide councils with sensitive information of either a commercial or a private nature can be assured that this information will be kept confidential after having been used to inform council for the purpose of council decision-making.

s.77 *In camera* matters

Section 89(2) sets out the matters that can be dealt with by council, at either a council or special committee meeting, in private – so-called ‘*in camera*’. These matters include:

- personnel, industrial and contractual matters,
- proposed developments,
- legal advice,
- ratepayer hardship
- “any other matter” which would prejudice the council or a person.

A council CEO can also designate certain information to be confidential on any of these grounds.

It is a breach of the Act for a councillor to disclose information which he or she knows, or should reasonably know, is confidential (s.77). Prior to 2008, this breach was a criminal offence that could be prosecuted in a court and subject to a fine. However when the councillor conduct framework was introduced, this penalty was removed. It was thought that disclosure of confidential information could be effectively dealt with by councillor conduct panels. However this has proven not to be the case. Under the reforms at Appendix 2 it is proposed to reintroduce a penalty for breach of this section. Disclosing confidential information is also to be specifically included in the definition of serious misconduct. This means that it will be up to the Inspectorate whether to have unlawful disclosure of information dealt with as breach of the Act and prosecuted through the Magistrates Courts, or treated as serious misconduct and dealt with by a councillor conduct panel.

Key issues

One argument is that too many councils are deciding that too many matters should be decided *in camera*, leaving them without effective scrutiny by the community. The overall scheme of the Act is to have council affairs conducted openly and transparently with the matters set out in section 89(2) isolated as exceptions not the norm.

At present a breach of section 77(1) is not, by itself, an offence in that there is no penalty applicable. It is only if confidential information is released in order to gain a personal benefit or to inflict detriment on the council or another person that a prosecution for this behaviour would be brought under section 76D for misuse of position. Alternatively the release of confidential information could give rise to an allegation of serious misconduct if it is associated with a contravention of the councillor conduct principles contained in the Act. The reforms outlined in Appendix 2 propose making the release of confidential information an offence in its own right.



There is evidence that councillors are, in increasing instances, taking matters deemed confidential by council into the public arena. Many councils adopt a protocol that the content of ‘briefing’ type assemblies of councillors will be confidential until considered at a subsequent meeting of council. A question remains regarding the gravity of any breach of that ‘convention of confidentiality’.

It is also worth noting that from time to time councillors hold information that is not ‘confidential’ as defined by section 77, but may be considered ‘private’ and requires discretion. Going further, advice on the discussions held during closed meetings is not necessarily captured by the confidentiality provisions. The lines of confidentiality can also be blurred when certain information regarding a matter is already in the public arena. This raises questions regarding the effectiveness of the current framework in maintaining confidentiality, balanced against the policy intent that local government should be as open and transparent as practicable.

Finally, section 77(1) applies only to councillors and members of special committees. It does not regulate the conduct of staff who are privy to confidential information. Although such staff may have obligations under their contracts of employment and notwithstanding that the disclosure of confidential information could breach the conduct principles set out in section 95, consideration could be given to widening the reach of section 77(1).

That said, in many cases staff are required to disclose confidential information to other parties to give effect to the decisions of council. Those nuances suggest a case for managing staff obligations in the context of section 95, which deals with their employment contracts.

IMPROPER DIRECTION

s.76E Current arrangements

The Act makes clear that “day to day management” of the council is the role of the council CEO (s. 94A). This includes directing council employees in the performance of their duties. Councillors should play no role in directing such staff.

Having the CEO alone responsible for directing staff will be reinforced by the reforms set out in Appendix 2. This will specify that it is the CEO’s role to manage interactions between councillors and council staff including putting in place appropriate policies, practices and protocols for that interaction. It is intended to also describe the role of the councillor and note that this does not include the functions of the CEO.

It is also proposed to include a penalty for breach of section 76E, similar to the penalty to be prescribed for disclosing confidential information. Improperly directing staff will be included in the definition of serious misconduct leaving it up to the Inspectorate to determine whether breach of this section should be prosecuted through the Magistrates Court or treated as misconduct and dealt with by a panel.

That councillors should not improperly direct or attempt to influence a staff member in the exercise of any power or the performance of any duty or function is specified in section 76E of the Act.

Key issues

The strict delineation of responsibilities between CEO (responsible for all administrative matters including staff oversight) and councillors (strategic directions and statutory decision-making) is often not understood by councillors. The reforms are aimed at strengthening the Act so that all parties better understand the distinction.

MISUSE OF POSITION

s.76D **Current arrangements**

Section 76D provides that councillors must not misuse their position:

- to gain advantage for themselves or for any other person
- to cause, or attempt to cause, detriment to themselves or another person.

Q: Should the 'misuse of position' offence be broadened or clarified? If so, how?

The penalty of up to five years imprisonment reflects the seriousness of this offence. It is critical to the overall integrity of the sector that councillors act with the utmost propriety in their role as elected representatives of their communities.

The section sets out circumstances that would amount to misuse of position. These include making improper use of information acquired as a councillor, disclosing confidential information, directing or improperly influencing staff and performing unauthorised functions.

Key issues

Prosecutions under this section of the Act have been rare. In part this may reflect the difficulty in establishing that the alleged behaviour constituted a prohibited purpose. Establishing that a councillor's office was used for either of the purposes contained in the section (advantage or detriment for the councillor or another person, noted above) may prove difficult.

Establishing that a councillor's office was misused to cause detriment to the council is also difficult. A councillor so accused, could contend that he or she was, through the alleged 'misuse' of office, seeking to save the council from undertaking, or committing to, an undesirable transaction. Alternatively the misuse may not result in personal advantage but be for some entirely different reason.

Enforcement

CHIEF MUNICIPAL INSPECTOR

ss.223A,
223B, 223C

Current arrangements

The office of Chief Municipal Inspector (CMI) is not referred to in the Act. This is the title conferred on the person leading the Local Government Compliance and Investigations Inspectorate. The Premier currently appoints this position, as the Inspectorate is a separate administrative office. The CMI and other Inspectorate employees have until recently also been appointed inspectors of municipal administration by the Minister for Local Government (s.223A).

All inspectors so appointed have the extensive powers set out in section 223B which include power to compel the production of documents and the taking of evidence under oath.

The Inspectorate is responsible for investigating and prosecuting breaches of the Act.

Types of complaints made to the Inspectorate:

- breaches of election rules e.g. campaign donation returns
- conflict of interest
- disclosure of confidential information
- procurement processes
- direction of council staff by councillors
- a range of other governance matters e.g. the operation of mayoral funds.

The most serious offence investigated by the Inspectorate is misuse of position. Allegations of corruption made to the Inspectorate are referred to IBAC. Complaints about administrative actions and decisions of council staff are referred to the Victorian Ombudsman.

The Inspectorate also performs a compliance role, undertaking a round of council inspections aimed at ensuring compliance with the Act across a range of regulatory matters. It provides a report back to council but there are no penalties imposed for breaches of these compliance issues. The Inspectorate has from time to time issued reports into various compliance matters, for example its 2013 report into councillor discretionary funds.

In 2014 responsibility for sections 223A and 223B of the Act were transferred to the Special Minister of State and the Inspectorate transferred to the Department of Premier and Cabinet. The reforms at Appendix 2 propose a more modern administrative arrangement for the Inspectorate, but are not intended to alter its overall role and functions except to enlarge them as follows. First, by giving the CMI a specific role investigating and bringing applications in respect to serious misconduct. Secondly, by giving the CMI a role in providing advice to the minister on issuing directions to a council on governance matters and in relation to providing advice to the minister regarding standing down a councillor while awaiting a councillor conduct panel hearing.

The reforms propose providing a statutory appointment of the CMI and specifying the role of the CMI in the Act as set out in section 223A and powers set out in section 223B. The CMI would be able to delegate those powers to persons employed in the Inspectorate who would continue to be known as Inspectors of Municipal Administration.

Key issues

Investigating, charging and prosecuting elected councillors for breaches of the Act are important and sensitive roles requiring forensic skills and the exercise of policy judgement. However there are significant evidentiary burdens impeding successful prosecution of breaches of the Act. Determining the facts often pits the word of one councillor against another. Adducing proof of a personal advantage motive in prosecuting 'misuse of position' presents a challenge. The exercise of judgement is required as to whether the expense and resources involved in prosecuting will be to the public benefit. In some instances the Inspectorate has decided instead to issue a warning, despite not having a specific power to do so in the Act. Some in the sector have expressed disquiet at the practice although it is similar to those applied by other enforcement agencies such as Victoria Police.

MUNICIPAL MONITOR

ss.223A,
223B, 223C

Current arrangements

Until the transfer of responsibility for inspectors of municipal administration to the Special Minister of State, the Minister for Local Government used section 223A to appoint inspectors for monitoring governance at particular councils. This is a different role to that undertaken by an inspector employed in the Inspectorate. A monitor is employed with all the powers of an inspector but is charged with observing governance practices at a council and reporting back to the minister. In many cases the appointment of a monitor has preceded action to either suspend or dismiss a council.

The reforms at Appendix 2 propose providing the minister a continuing power to appoint monitors. However, the distinct role of the monitor would now be specified in the Act.

Ministerial action

As previously noted, councils are ‘creatures of the state’. That is, despite being a separate tier of government they are legislated into existence by the state government. Therefore, the state government has two distinct interests in the performance of the sector:

- ensuring that the legislative framework is effective in enabling councils to perform the role and functions expected of them.
- ensuring individual councils perform those roles and functions to the appropriate standard expected.

Therefore, the Act has always provided power for the minister to intervene in appropriate cases to ensure councils achieve and maintain high governance standards. The broad powers of the minister under the Act are set out in Chapter 9. The reforms at Appendix 2 propose two new ways for the minister to intervene in the functioning of councils relating to governance and conduct. Both are designed to prevent conduct issues resulting in the suspension and / or dismissal of a whole council.

Governance direction

The first proposal is to have the minister empowered to issue governance directions to a council. Directions will be made on the advice of a monitor following the identification of governance issues that require attention. In these circumstances it is proposed the minister could issue a direction to a council that it take action as required or that it amend or discontinue an existing policy or process.

Councillor stand down

The second proposal is to have the minister empowered to seek an Order in Council standing down a councillor who has been charged with serious misconduct and is awaiting a councillor conduct panel hearing. This would only apply in circumstances where a complaint has been made and a monitor advises the minister that the councillor’s actions are presenting a threat to health and safety, obstructing the business of council or are inconsistent with the councillor’s role as a councillor.

On the advice of a monitor the minister would be able to seek an Order in Council standing down the councillor until the panel hearing takes place. During this time the councillor would not be able to attend at the council premises or act in any way as a councillor and his or her councillor allowance would be held in escrow until the hearing. Subject to the outcome of the hearing the allowance would be either returned to the councillor or forfeited.

Questions on councillor conduct, offences and enforcement



1. Do standards of councillor conduct need to be improved? If so, how can this be achieved?
2. What powers do councils need to deal with instances of councillor misconduct?
3. Does the system of councillor conduct panels need to be improved? If so, how?
4. Is there a need for additional offences to be included in the Act? If so, what are they?
5. Is there a need to improve investigation and enforcement of the Act in any way? If so, how?

Chapter 9: **Ministerial powers**



Chapter 9:

Ministerial powers



In this chapter:

The powers currently available to the Minister for Local Government under the Act

The extent to which these powers are sufficient

The appropriate balance between sector independence and state government intervention

Role of the Minister for Local Government

Current arrangements

The Minister for Local Government is responsible for protecting the state's interest in maintaining an effective and efficient local government sector. As indicated in Chapter 2, local government is a distinct tier of government recognised in the Victorian Constitution. As the state has created and empowered councils, the state has a responsibility to ensure councils perform their role and exercise their powers appropriately, and councils remain accountable to the state in a number of respects.

The Act gives the minister extensive powers in relation to a number of matters, but arguably very limited powers in relation to issues that are of greater importance to the state.

The minister protects the state's interest in councils primarily through his or her administration of the Local Government Act and other related legislation.

The minister's role is to both oversee the operation of the system of local government and to act as an advocate for local government within government.

Key issues

While the minister has responsibility for oversight of the sector, the Act does not provide an absolute power to intervene over all the actions taken by individual councils. It is a common misconception that the minister has power to direct a council in the conduct of its affairs. Residents and ratepayers unhappy about an aspect of council performance regularly call on the minister to direct a council to take, or cease, a particular action. Often the request is for the minister to direct the council to comply with the Act. Often it is to direct the council to consult with its community over a particular decision or action. The minister does not currently have the power to issue these types of directions.

Power to provide exemptions from requirements under the Act

Current arrangements

The minister is specifically empowered in certain circumstances to exempt a person from compliance with specific provisions of the Act.

Under current arrangements, the minister can exempt any person who is not a councillor from complying with the **conflict of interest** rules on the grounds that there are extraordinary circumstances and it is in the

ss. 80,
95B, 186

public interest to do so. The minister can also grant an application by a council or a chief executive officer to exempt councillors from these rules after consideration of the extent of the conflict and the public interest.

Under **competitive tendering** provisions, councils are required to go to public tender before entering into a contract for goods or services of \$150,000 or more, or for works of \$200,000 or more. The minister can approve an arrangement for a council to directly contract with another party, exempting the council from the Act's public tender requirements.

The minister may also exempt a council or a CEO from complying with the requirement for each senior officer to have an **employment contract**.

Key issues

Exemption from conflict of interest

The requirement to declare a conflict of interest and leave the room while the matter is being considered may impede the council's ability to perform its functions in circumstance where the council is unable to form a quorum. Where a pre-existing power of delegation to a committee or member of staff is in place, the inability to maintain a quorum will not prevent the decision from being made under delegation. However, a councillor with a conflict of interest cannot vote to delegate a decision in which he or she has a conflict.

Applications for exemption however do arise in decisions involving planning scheme amendments. This is because under the *Planning and Environment Act 1987* the final adoption for an amendment may only be made by the council and cannot be delegated. While infrequent, the minister does receive requests to grant exemptions in planning scheme decisions, most recently to councillors who had received electoral donations from developers affected by council decisions.

Exemption from public tenders

The requirement to go to public tender does not always provide a council with the best sourcing strategy. Approvals to directly contract are provided by the minister where the integrity of the general principles of seeking best value can be achieved another way such as by the council demonstrating that the proposed alternative arrangement represents best value for money; or there is no competitive market for the proposed goods, services or works; or the council is restricted to contracting with only that provider.

This is one of the most frequently used sections of the Act.

Since the establishment of the section of the Act prescribing tender requirements (s.186), open and effective competition has become common business practice. Council audit committees have also been established that are capable of assessing council procurement policies and processes, and determining whether a proposed contract represents best value for money.

No other state in Australia provides a process for ministerial exemptions from the requirement to go to public tender.

Exemption from requiring an employment contract for a senior officer

Senior staff contracts were introduced to move council administration towards a more corporate structure. The introduction of performance appraisal processes was a bid to improve efficiency and provide staff with better opportunities in the workplace.

Q: Should the requirement for councils to seek ministerial exemptions from a public tendering process be removed, leaving it to councils to develop, and comply, with their own procurement strategies aimed at ensuring public tendering?

In 2014 there were 38 applications received from individual councils for direct contracts. Councils seek exemptions from public tender most commonly in circumstance where:

- funding is linked to a specific provider
- there is a monopoly over the provision of services
- council is seeking to upgrade an existing system
- council is seeking to vary an existing contract.

When these provisions were introduced in 1993 many councils did not have written contracts in place for senior staff.⁸⁴ The ministerial exemption option was intended as a reserve power to help the transition of existing staff onto contracts. Regulating the employment of CEOs and senior officers by contract is now standard practice. The minister is rarely called upon to grant this exemption. The exemption arrangements therefore appear redundant.

The exemption process

A ministerial exemption process provides for circumstances where compliance with the requirements of the Act is not in the public interest. However, exemptions are discretionary and are considered by the minister on a case-by-case basis. The Act does not set out the grounds on which the minister is to make a decision. The department provides guidance to the sector on applying for a ministerial exemption and provides advice to the minister on whether approval of an application is recommended.

Many in the sector have long argued that, consistent with councils' status as a separate tier of government, they should be able to decide issues without ministerial intervention. In this regard, it could be argued that councils should be left to determine exemptions as long as they report to their communities clearly the reasons for the relevant exemption.

Power to make appointments

ss.9, 223A,
223B, 223C,
74C, 209 -
218, 69A, 219
and Part 10A

Current arrangements

Under current arrangements, the minister can make appointments to a range of different bodies that are charged with providing recommendations on matters affecting councils or to perform the functions of the council in the absence of elected councillors. Arguably, these mechanisms have proliferated over time and their purposes and functions overlap. A number have not been invoked for some time.

Boards of inquiry

Boards of inquiry are appointed by the Governor in Council on the recommendation of the minister to inquire into and determine any dispute between a council and another public body, such as another council. Determinations by boards of inquiry are binding and can save councils incurring the high costs associated with litigation. Their use has also been considered in instances where councils have been involved in litigation in relation to contractual disputes. Boards of inquiry tend to be lengthy and expensive.

The most recent use of a board of inquiry is believed to be a case following the local government amalgamations in the 1990s to resolve superannuation liability disputes between councils.

Local government panels

Local government panels are appointed by the minister to carry out a review and advise the minister on councillor allowances, local government restructuring and any other matters.

Local government panels were introduced in 1997 to replace the Local Government Board, which was specifically tasked with conducting reviews into local government boundaries that led to the major council amalgamations at that time. The minister must appoint and consider a report from a local government panel prior to making a recommendation to the Governor in Council to create or abolish a council or alter the external boundaries of a council.

These panels were intended to be analogous to those established under the *Planning and Environment Act 1987* and were seen at the time of their creation to be more flexible and cost effective than the previous board structure because they could be appointed and dissolved as needed⁸⁵. They have proved expensive in practice.

⁸⁴ *Local Government (Miscellaneous Amendment) Act 1993*.

⁸⁵ Second reading speech, *Local Government (Further Amendment) Bill 1997*.

Commissioners

Commissioners can be appointed by the minister to conduct an inquiry into the affairs of a council and report to the minister. Commissioners have the powers to examine witnesses and access any building, place, goods, books or documents for the purpose of carrying out an inquiry.

Administrators

When a council has been suspended or a new or reconstituted council has been established the Governor in Council appoints administrators on recommendation of the minister. Administrators operate as the council until an election is held and democratic representation is restored.

Key issues

The Act provides mechanisms for establishing a number of different bodies that either have similar structures (boards of inquiry, local government panels) or perform similar functions (commissioners, municipal monitors). The powers of these bodies and the processes for establishing them differ for each body.

The provisions relating to boards of inquiry and commissioners have not been used in many years and may be redundant, outdated or inconsistent with current council needs.

Appointments made by the minister under the Act are at the discretion of the minister.

A commissioner has not been appointed since the late 1990s.

Where there are concerns about the operations of a council or where there has been an Ombudsman report highlighting governance issues in a council, ministers have instead appointed inspectors of municipal administration under section 223A of the Act to carry out an investigation and report to the minister on governance issues.

This occurred at Brimbank (2009), Buloke (2012), Wangaratta (2013) and Darebin (2013 and 2015).

Power to issue guidance

s.161

ss.111, 111A,
139, 163,
186A, 193,
208I, 208J

Current arrangements

The minister has the power to make guidelines in relation to:

- audit committees
- matters to be considered when preparing special rates and special charges
- the objectives and uses of differential rates
- preparation, content and format of local laws and any accompanying explanatory documents
- the form or content of a procurement policy
- the total investment and risk exposure assessment and approval processes for proposed commercial activities
- best value principles.

The minister has released guidelines under the Act only in relation to the first three of these matters - audit committees, special rates and charges and differential rating.

Key issues

Guidelines are intended help councils perform their functions and powers in accordance with the Act. However the minister can issue guidelines without specific power being provided in the Act. The department also issues circulars and other guidance material and the peak sector bodies provide guidance to the sector.

There is little consistency between the provisions allowing the minister to make guidelines.

Under two provisions the minister **may** publish the guidelines in the Government Gazette, in others the minister **must** publish the guidelines in the Gazette.

Q: Does the minister need specific legislated powers to make guidelines at all?

In one provision the minister **must** consult with any local government body that the minister thinks appropriate, but no other provisions require consultation.

In some provisions councils **must** have regard to the guidelines, however there are no sanctions for a failure to do so. Other provisions do not specify compliance.

However, compliance with guidelines referred to in the Act will carry weight in any court proceedings regarding a council's liability to pay damages.

Power to restructure

Part 10C,
ss.3B,
4 and 5B

Current arrangements

The minister may recommend to the Governor in Council that a council be restructured by altering an external council boundary, creating a new council, abolishing a council, creating or amending wards or altering the number of councillors assigned to a council or ward.

If the restructure is a major one, involving the creation or amalgamation of a council or a major boundary change, the minister must first appoint and consider a report from a local government panel.

Recommendations to alter councillor numbers and internal electoral structures of a council usually follow an independent electoral representation review conducted by the Victorian Electoral Commission (VEC). Each council is subject to such a review every 12 years.

The Act enables restructure orders to specify a broad range of matters that the minister considers necessary to give effect to a restructure. For example setting the date for a new or restructured council's first election and apportioning staff and resources between councils that are being separated.

Key issues

The current process for council restructures was introduced prior to the amalgamations that took place in the mid 1990s. Some have questioned whether major restructures such as council amalgamations and separations should be a matter to be determined by Parliament instead of, as at present, dealt with by the Governor in Council upon the recommendation of the minister. Another issue is whether there should be any constraints on a minister's absolute discretion regarding any restructuring order.

Power to make statutory rules

s.243 and
Schedule 12

Current arrangements

The minister has a general power to recommend to the Governor in Council that regulations be made on any matter necessary to give effect to the Act. Regulations set out specific details in relation to provisions under the Act and councils must comply with regulations in the same way as an Act of Parliament.

Local government regulations currently address a number of areas under the Act including:

- provision of long service leave and other benefits to council staff
- exemptions (from purchasing contract conditions) under section 186(1) of the Act
- forms
- fees and deposits
- notice requirements
- documents to be made available for public inspection
- enrolment and preparation of voters' rolls
- matters relating to candidates and scrutineers
- matters relating to the holding of a poll of voters
- matters relating to the counting of votes

- exemptions from and the enforcement of compulsory voting
- matters a council must include in its financial statements and annual report.

Some provisions of the Act also provide a specific power to prescribe in the regulations further detail relating to that section.

Example:

The minister has the specific power to exempt a type of contract from the competitive tendering requirements and has exempted contracts for legal services under this provision.

The minister also has the power to prescribe additional information in regulations that must be contained in council rates notices.

Key issues

As ‘subordinate’ legislation, regulations implement policy reflected in the enabling legislation and normally include details liable to frequent change. Some prescriptive provisions currently in the Local Government Act could instead be set out in regulations. This would allow for greater flexibility in updating provisions to keep pace with changing circumstances.



Power to direct councils

ss.95B
and 185B

Current arrangements

Employment of CEOs and senior staff

Under the current arrangements, the minister may forbid a council from employing a new CEO, entering into a new contract with an existing CEO or entering into a contract that expires after a specified time. The minister can also forbid a CEO from employing a new senior officer, entering into a new contract with an existing senior officer or entering into a contract that expires after a specified time. A contract entered into in contravention of a direction given by the minister is void.

Q: Should the minister have the power to intervene in the employment of CEOs and senior staff?

Key issues

The power to intervene prior to an employment contract being entered into is discretionary and was intended to be used in situations where the CEO or senior officer are not meeting performance benchmarks or where the remuneration arrangements for the CEO or senior officer do not represent best value for money for the council. It is believed this power has never been exercised.

The reforms being considered (described at Appendix 2) include providing the minister with a general power to issue a direction to a council requiring it to address governance issues on the advice of a monitor. A failure to comply with a direction can then be taken into consideration when the minister is exercising the power to suspend a council based on a serious failure to provide good government.

Rates and charges

The Minister for Local Government may recommend to the Governor in Council that an Order in Council be made to limit the amount of income a council intends to raise in the next financial year. This includes the amount raised through general rates, municipal charges, service rates and service charges. The recommendation can stipulate that the amount must either:

- be equal to its general income in a financial year
- be a specified percentage (expressed either as more or less than 100 per cent) of its general income for a financial year.

The minister may also remove or reduce a restriction on rating placed on a council by an Order in Council. If a council does not comply with this direction, the rate of charge declared for the following financial year is invalid without the approval of the minister.

Fair Go Rates System

In January 2015, the minister announced that a new system capping rates, the Fair Go Rates System, would begin in the 2016-17 financial year. This implements a government election commitment. The government has commissioned the Essential Services Commission (ESC) to consult and make recommendations for the framework's implementation. The ESC will also be responsible for assessing any exemptions from the cap.

Power to suspend a council

s.219

Current arrangements

Suspension of a council

The minister can recommend that an Order in Council be made to suspend all councillors of a council and appoint administrators. The minister must be satisfied on reasonable grounds that there has been a serious failure to provide good government or the council has acted unlawfully in a serious respect. The Act does not set out the steps the minister must take to be satisfied that there has been a serious failure to provide good government. The minister must however give the council an opportunity to defend any allegations made against it and rectify any governance issues.

The Order in Council may be disallowed by either Houses of Parliament and can only remain in place for a maximum of one year. Once the Order has expired, the suspended councillors resume office unless a Bill to

dismiss them has been introduced into Parliament or the minister has fixed a date for a general election of the council within a hundred days of the expiry of the Order.

Under these arrangements, the administrators appointed under the Order take the place of the councillors and perform all the functions, powers and duties of the council in the same way that an elected council would under the Act.

The possible reforms considered in Appendix 2 would allow the minister to issue a direction to a council, upon the advice of a monitor, to improve its governance processes or policies. A failure to comply with this direction without satisfactory reason may then be used by the minister as grounds for seeking suspension for a serious failure to provide good government.

Standing down a councillor

The possible reforms at Appendix 2 include empowering the minister to stand down an individual councillor. It proposes this may be done in situations where the councillor is the subject of a Councillor Conduct Panel or VCAT application for a finding of serious misconduct or gross misconduct, and the councillor is creating a serious risk to health and safety, is preventing the council from performing its functions or is not acting in accordance with the role of a councillor.

DISMISSING A COUNCIL

The power to suspend a council has in the past only been used as a temporary measure while a Bill to dismiss the council is brought to Parliament.

In the case of Brimbank City Council, an Order in Council suspended all councillors of that council in September 2009. The *Local Government (Brimbank City Council) Act 2009* came into operation in November 2009, dismissing the council and providing for the appointment of a panel of administrators.

In the case of Wangaratta Rural City Council, the power to suspend the council was not exercised prior to the *Local Government (Rural City of Wangaratta) Act 2013* coming into operation in September 2013 dismissing all councillors of that council.

Key issues

Amendments to the Act in 2003 narrowed the grounds on which the minister may suspend a council, removing the grounds of:

- failing in a serious or ongoing respect to perform a function which it is required to perform
- failing to form or maintain a quorum.

The logic behind the 2003 reform appears to be that suspending a council is a last resort, and should only occur when all other avenues under the Act have been unsuccessful and the governance issues are such that the council can no longer function properly.

Given that suspension has always been followed by dismissal by Parliament a question arises as to whether a clearer distinction is needed between suspension and dismissal. It also raises the question of whether, if suspension is retained as an option, the bar should be set lower so the suspension can be used more effectively as a short term measure to get the council back on track.

The reforms at Appendix 2 seek to provide scope for earlier, preventive, ministerial intervention when a council is experiencing governance problems but is not so dysfunctional as to warrant suspension or dismissal. This may have the effect of reducing instances where suspension must ultimately be considered.

Q: Should 'failure to provide good government' be defined in the Act to provide greater clarity about when intervention is warranted?

Q: Should there be other grounds for suspension of a council in addition to the existing grounds, such as strong community support for such intervention?

Recall Election

In recent years, debate has occurred in New South Wales whether a citizen initiated 'recall' election should be permitted for that state's Parliament. A recall election, which operates in various forms in a number of states in the USA as well as British Columbia in Canada, essentially allows the electorate to petition for a fresh election to determine the suitability of one or more elected representatives of a governing body. A Panel appointed by the NSW Government in 2011 regarded as feasible a process for a recall election to occur for the whole Legislative Assembly. This process would involve an application for a petition supported by 500 voters, and the petition signed by at least 35 per cent of voters spread across a number of electorates in order for the new election to proceed. The Panel also stated that a referendum on the introduction of relevant legislation for such a system would be firstly required.

Careful consideration would be required if there may be similar potential for a recall election process to apply to local government in Victoria.

Power to revoke local laws

Ministerial power to revoke local laws is addressed in Chapter 3.



Questions on ministerial powers

1. Should the role of the minister be described in the Act? And if so, how should this be described?
2. What powers should be provided to the minister in the Act:
 - a) in relation to the structure of the sector (i.e. circumstances in which new councils are established or existing councils amalgamated, numbers of councillors etc)?
 - b) to ensure councils comply with the Act?
 - c) to ensure the integrity of governance and standards of behaviour?
3. What penalties should be included in the Act in relation to councils not complying with the exercise of the minister's powers?

Chapter 10: Harmonisation of the Local Government Act



Chapter 10:

Harmonisation of the Local Government Act



In this chapter:

Victorian legislation, other than the Local Government Act 1989, that imposes obligations or confers powers on councils

City of Melbourne, Greater Geelong and Municipal Association of Victoria Acts

Identifying duplication and inconsistency between the Local Government Act and related legislation

Removing redundant legislation, schedules or provisions and harmonising contested provisions in different Acts

Reducing confusion for councils and citizens about responsibilities and rights.

Current arrangements

Councils carry out a broad range of services and functions, from waste collection and road maintenance through to aged care, child care and youth services. The authority to perform many of these activities is formally given under legislation other than the *Local Government Act 1989*.

Q: Are there provisions in relevant legislation relating to road management that should be transferred to or from the Act?

Example:

Councils' responsibilities to adopt planning schemes and issue planning permits are regulated under the *Planning and Environment Act 1987*.

Their powers and duties to regulate pet ownership are set out in the *Domestic Animals Act 1994*.

Many councils are custodians of Crown land as 'committees of management' under the *Crown Land (Reserves) Act 1978*.

As statutory public bodies, councils are also bound by various pieces of legislation that obligate them to act accountably and fairly.

Examples:

- *Freedom of Information Act 1982*
- *Whistleblowers Protection Act 2001*
- *Charter of Human Rights and Responsibilities Act 2006*
- *Information Privacy Act 2000*

Some council responsibilities under the *Local Government Act 1989* are either expressly subject to other legislation (for example local laws made under the Act are void if they are inconsistent with other Acts) or operate alongside other Acts.

Examples:

Councils have specific powers over roads under Schedule 10 to the Act but their overall responsibilities as ‘road authorities’ are set out in the *Road Management Act 2004*.

Councils’ powers over parking are contained variously in Schedule 11 of the Act, the *Road Safety Act 1986* and the *Road Safety Road Rules 2009* made under that Act.

Two councils – the cities of Melbourne and Greater Geelong – have their own Acts (*City of Melbourne Act 2001* and *City of Greater Geelong Act 1993*) which set out certain functions specific to those councils. The City of Melbourne Act confers a number of additional objectives recognising its responsibilities as the state capital, as well as prescribing a range of electoral provisions that are unique to Melbourne, such as a different voter franchise, the direct election of the Lord Mayor/Deputy Lord Mayor leadership team and nomination of group candidates. The City of Greater Geelong Act includes provisions on the direct election of the mayor and position of Deputy mayor and transitional arrangements for creating the council’s planning scheme. Both Melbourne and Greater Geelong councils are otherwise subject to the Local Government Act.

The Municipal Association of Victoria (MAV), the peak advocacy body for Victorian councils, also has its own legislation (the *Municipal Association Act 1907*). That Act formally established the MAV as a body corporate with the ability to make its own rules. Councils may appoint representatives to the MAV. The MAV is required under that Act to manage a public liability and professional indemnity insurance scheme for councils and is also empowered to establish a Municipal Officers’ Guarantee Fund, issue accident insurance policies for councillors and water authorities and arrange other contracts for insurance. The MAV may also establish a ‘Local Investment Service Fund’ for councils and other approved bodies.

Key issues

Ultimately, local government is established and operates under laws of the Victorian Parliament, even though it is a ‘distinct and essential tier’ of government⁸⁶ and is given powers to perform its functions and enable it to achieve its purposes or objectives.⁸⁷

There is a large number of Acts which the state has, over time, decided should impose obligations and provide powers to councils. Virtually all Victorian Government ministers have portfolio responsibility for legislation that impacts councils. It is a common misconception that the Minister for Local Government can intervene in any matter relating to council activities in relation to these other Acts.

Since the Local Government Act’s inception, a range of ‘issue specific’ legislation has been introduced that affects existing provisions of the Act covering similar matters. Of note is the *Road Management Act 2004* which created a new statutory framework to manage Victoria’s road network and coordinate the various uses of roads. Having multiple Acts that cover individual functions does not necessarily lead to them contradicting each other. It can, however, create confusion for councils in understanding their legal obligations and for the community in establishing their rights and responsibilities^{88,89}.

Q: Does the *City of Melbourne Act 2001* need to remain as separate legislation or should its provisions be incorporated into the Local Government Act?

⁸⁶ Section 74A(1) *Constitution Act 1974* and section 1(1) *Local Government Act 1989*

⁸⁷ Section 3F(1) *Local Government Act 1989*

⁸⁸ Councils’ role in tree management is particularly complicated. Their obligations in a particular instance will be impacted in part by where the tree is located – for example on a road, council property and Crown land – and which laws apply in each case, whether it be the *Local Government Act 1989*, the *Crown Land (Reserves) Act 1978*, the *Road Management Act 2004*, the *Country Fire Authority Act 1958* (where an emergency has occurred) and/or the common law duty of care.

⁸⁹ Councils’ powers to discontinue roads can be similarly complicated where they intersect with a person’s competing rights under the *Transfer of Land Act 1958*, *Limitation of Actions Act 1958* and the common law rule of adverse possession.

Where practical, laws that deal with specific areas of responsibility should be contained under the one piece of legislation, for both ease of access and understanding and so future amendments are considered holistically. In this context, there is good reason to relocate out of the Local Government Act provisions that are now more substantially covered in other legislation. For example, councils' powers over roads and traffic under schedule 10 and 11 of the Act may therefore be better suited to inclusion in the Road Management Act and Road Safety Act.

Q: Does the *City of Greater Geelong Act 1993* need to remain as separate legislation or should its provisions be incorporated into the Local Government Act?

As an extension of this, there is a strong argument that the Local Government Act should in principle be concerned only with:

- constitutional and electoral matters - how councils are established, how their electoral structures are determined, how councillors are elected
- governance matters – forward planning, council and councillor conduct, disciplinary arrangements
- necessary powers to enable councils to operate as an organisation - including revenue raising, the execution of their core responsibilities and creation of local laws.

Following this argument, legislation required to cover specific council services would no longer be included in the Local Government Act.

Other Acts

As part of the review, consideration will be given to all other legislation⁹⁰ for which the Minister for Local Government has responsibility, including the *City of Greater Geelong Act 1993* and the *City of Melbourne Act 2001*, with a view to simplifying, streamlining and making consistent, that legislation in the new Act. This will involve targeted consultation with the relevant stakeholders impacted by or with an interest in that other legislation.

Further, following the Victorian Auditor-General Office's release of its report 'Effectiveness of Support of Local Government' in 2015⁹¹, the government has committed to review the Municipal Association Act 1907. This will occur in conjunction with the Act review, and a consultation process with the MAV and key stakeholders will be conducted as part of this process.

There are some provisions in the Local Government Act which impact on other Acts, but to what extent is unclear. For example, a council may by instrument delegate to its staff its statutory powers, duties and functions under any Act⁹² and appoint authorised officers for the purposes of administering and enforcing any Act⁹³. Many other Acts have the same powers of delegation and appointment, which leads to confusion about which Act should be used.

90 *City of Greater Geelong Act 1993, City of Melbourne Act 2001, Libraries act 1988, Local Government Act 1989, Local Government (Brimbank City Council) Act 2009, Municipal Association Act 1907, Municipalities Assistance Act 1973, Prahran Mechanics' Institute Act 1899, Victoria Grants Commission Act 1976*

91 Victorian Ombudsman: *Councils and complaints – A report on current practice and issues*, February 2015

92 (section 98(1))

93 (section 224(1))



Questions on harmonisation of the Local Government Act

1. What aspects of the Act should be amended to better harmonise with related legislation?
2. How can council responsibilities in relation to other legislation be made clearer?
3. Are there provisions in the *Local Government Act 1989* that could be improved to clarify their interaction with other legislation? How could they be improved?
4. Is there other Victorian legislation that inappropriately impacts on provisions under the current Act that could be improved or clarified? How could they be improved?
5. Does the Act contain any matters that should be transferred to other Victorian legislation? If so, why

How to get involved



How to get involved



The government invites all Victorians to get involved in the review by making a submission.

Submissions

You are welcome to make a submission to the review discussion paper. You can respond to all of the questions in the discussion paper or only to those that interest you. If your issue is not addressed through the questions raised here, but is within the terms of reference, you can write about it in the way that best suits you.

All submissions will be made public unless confidentiality is requested and granted by the Local Government Act Review Advisory Committee or if the committee determines the material should remain confidential. Submissions that are defamatory or offensive will not be published.

There will be a further opportunity to make a submission to a directions paper, which will be developed in 2016 on the basis of responses to this discussion paper.

- You can make your submission online at www.yourcouncilyourcommunity.vic.gov.au
OR
 - You may download a submission form for completion from www.yourcouncilyourcommunity.vic.gov.au
 - Mail your hard copy submission to the Local Government Act Review Secretariat, C/o Local Government Victoria, PO Box 500, Melbourne VIC 3002
- OR
- Email your soft copy submission to local.government@delwp.vic.gov.au

Submissions to the discussion paper close on Friday 18 December 2015 at 5pm.

Contact the Local Government Act Review Secretariat

Visit www.yourcouncilyourcommunity.vic.gov.au

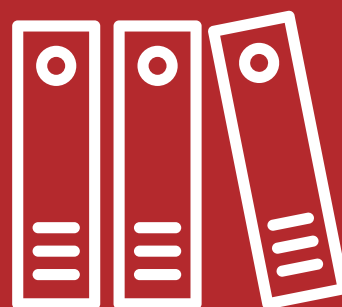
Email local.government@delwp.vic.gov.au

Call (03) 9948 8518

Ongoing consultation

In addition to opportunities to make submissions and be involved in discussions at the Act review website, Local Government Victoria will actively engage with the sector and the community in a variety of ways. This will include a range of forums for direct consultation with stakeholders.

Bibliography



Bibliography

Deloitte Access Economics 2013, *Review of local government rating exemption provisions*

Department of Transport Planning and Local Infrastructure Victoria 2013, *Local Government Electoral Review Discussion Paper*

Department of Transport Planning and Local Infrastructure Victoria 2014, *Local Government Electoral Review Stage 1 Report*

Department of Transport Planning and Local Infrastructure Victoria 2014, *Local Government Electoral Review Stage 2 Report*

Institute of Chartered Accountants in Australia 2014, *Victorian City Council Model Budget 2014-2015*

Local Government Division, Department of Infrastructure 2000, *Risky Business: Improving Councils' Management of Entrepreneurial Risk*, Discussion Paper

Local Government Victoria 2014, *Better Practice Guide: Revenue and Rating Strategy*

Milbur Consulting Pty Ltd 2003, *Rates and Charges Impact Statement for Victorian Councils – Issues and Options Paper*

Office of Local Government 1993, *Rates - Proposals to improve Victoria's Municipal Rating System*

Tan, SF and Artist, S 2013, *Strategic Planning in Australian Local Government: A comparative analysis of state frameworks*, Australian Centre of Excellence for Local Government, University of Technology, Sydney.

Victorian Auditor General's Office 2014, *Local Government: The Result of the 2013-14 Audits*.

Victorian Councillor Allowances Review Panel 2000, *Review of the Remuneration of mayors and Councillors*

Victorian Electoral Commission 2013, *The Conduct of the 2012 Local Government Elections*

Victorian Government 2008, *Recognition and Support – The Victorian Government's Policy Statement on Local Government mayoral and Councillor Allowances and Resources*

World Wide Web

Australian Electoral Commission 2015, Voting within Australia – Frequently Asked Questions, viewed 3 July 2015, <http://www.aec.gov.au/FAQs/Voting_Australia.htm>.

NSW Parliamentary Library Research Service February 2010 E-Brief 3/2010 Page 1 of 11, Recall Elections, [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/RecallElections/\\$File/Recall+Elections+E+Brief.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/RecallElections/$File/Recall+Elections+E+Brief.pdf)

Legislation

Constitution Act 1974

Local Government (Miscellaneous Amendment) Act 1993

Local Government Act 1993 (New South Wales)

Local Government Act 2009 (Queensland)

Local Government Act 1989 (Victoria)

Local Government Act 1993 (Tasmania)

Valuation of Land Act 1960 (Victoria)

Victorian Civil and Administrative Tribunal Act 1998 (Victoria)

Regulations

Local Government (Performance and Reporting) Regulations 2014

Legal Authorities

Hansard Victorian Legislative Assembly second reading speech, Local Government Bill (No. 2), 29 October 1987

Hansard Victorian Legislative Assembly second reading speech, Local Government (General Amendment) Bill 1993, 29 April 1993

Hansard Victorian Legislative Assembly second reading speech, Local Government (Further Amendment) Bill, 1997

Ho v Greater Dandenong City Council (2012) 188 LEGERA 424

Stuart v Price [2011 VMC]

Bycon Pty Ltd v Moira Shire Council [1998] VSC 25

Winky Pop Ltd v Hobsons Bay City Council [2007] VSC 468

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223

Appendices



Appendix 1:

Review of the Local Government Act 1989 Terms of Reference

Purpose

1. The purpose of the review is to revise the current legislation governing local government in Victoria to create a more contemporary, accessible, plain English Act, that meets current and future needs of the community and local government sector.

Scope

2. The review will consider all aspects of the current *Local Government Act 1989* with a view to more accurately and consistently reflecting policy intent and improving clarity, including provisions setting out:
 - objectives, roles, functions, and powers of councils;
 - roles and responsibilities of councillors, mayors, chief executive officers, and council staff;
 - directions about governance and administrative processes required to be followed by councils directed to ensuring all decision-making, actions and reporting is open and transparent, free from bias and improper considerations, and provides for community input;
 - the system of electoral representation that provides fair and equitable representation;
 - electoral arrangements that deliver a democratic, transparent and secure system of elections for local government resulting in high levels of participation;
 - processes for the maintenance of efficient planning and reporting, and financial arrangements by councils that provide effective accountability to their communities;
 - offences under the Act;
 - the circumstances in, and the extent to which, the Victorian Government, through the Minister for Local Government, can guide, direct or intervene in council governance.
 - The review will include consideration of all legislation for which the Minister for Local Government has administrative responsibility with a view to simplifying and integrating these Acts in the new Act where possible; but will not include consideration of legislation which imposes responsibilities on councils which is not the responsibility of the Minister for Local Government (e.g. *The Planning and Environment Act 1987*), except insofar as this latter legislation interacts with the *Local Government Act 1989* with a view to clarifying that interaction.
 - The review will not include consideration of any changes to existing external boundaries of Victorian municipalities.

Principles

3. The review will have regard to:
 - The recognition in the Victorian Constitution of local government as a distinct and democratic tier of government in Victoria charged with responsibility for delivering peace, order and good government for local communities.
 - The necessity for the legislation to strike an appropriate balance between autonomy for councils in their operations and decision-making processes and the interests of the Victorian community and Government.
 - The need to encourage greater community engagement.
 - The need to reduce, wherever practicable, the imposition of unnecessary administrative requirements on the sector.

Process

4. The review will involve extensive engagement with the local government sector and the broader Victorian community, through the release of papers and receipt of submissions, to ensure their views are incorporated into recommendations to the Minister for Local Government in respect to the new Act.
5. Key consultation stages are:
 - i. Identification of and consultation on issues under the current Act
 - ii. Development of and consultation on proposed directions for the new Act
 - iii. Release of the Exposure Draft Bill.

Appendix 2:

Governance and councillor conduct reforms

Consultation with the sector, and recent examples of troubling behaviour by councillors, indicate the current councillor conduct framework is not working effectively. As a result a number of reforms are currently being considered by the Minister for Local Government.

These reforms may be implemented prior to the completion of the Local Government Act review.

Reforms under consideration include:

- descriptions of the role of councillors in the Local Government Act 1989 – to make sure councillors understand their role
- making signing the councillor code of conduct a qualification for being a councillor
- having effective enforcement mechanisms in councillor codes of conduct – including mandatory internal resolution procedures
- having a gate-keeper to ensure only applications supported by evidence result in councillor conduct panels being established
- providing more powers to councillor conduct panels – especially to hear serious misconduct matters and to suspend councillors for up to six months (currently these have to go to VCAT)
- giving the Minister for Local Government the power to appoint municipal monitors, separate from the inspectors of municipal administration, to monitor councils at the request of the minister
- giving the Minister for Local Government the power, on the advice of a municipal monitor, to intervene and stand down an individual councillor in exceptional circumstances prior to a panel hearing, exceptional circumstances being, if behaviour is a threat to health and safety, prevents council from functioning, or is inconsistent with the role of councillor
- giving the Minister for Local Government a new power to direct improvement in governance on the advice of a municipal monitor
- providing a new role for the chief municipal inspector in investigating serious and gross misconduct and making applications for councillor conduct panels
- prohibiting the use of ward funds (from which councillors can make distributions in their individual discretion) by councils
- making it an offence for councillors to disclose or release confidential information, and improperly direct council staff.

A number of electoral reforms are also being considered by the government, ahead of the 2016 Victorian council general elections, including:

- making the Victorian Electoral Commission the statutory provider for all council elections
- removing the requirement for an exhibition voters' roll
- preventing a person who is banned from being a company director, from being a candidate an election or continuing as a councillor
- enabling a returning officer to remove a candidate found to be disqualified from the ballot paper
- requiring councils to have an election period (or 'caretaker') policy and clarifying limitations on publication of council documents during the election period.

