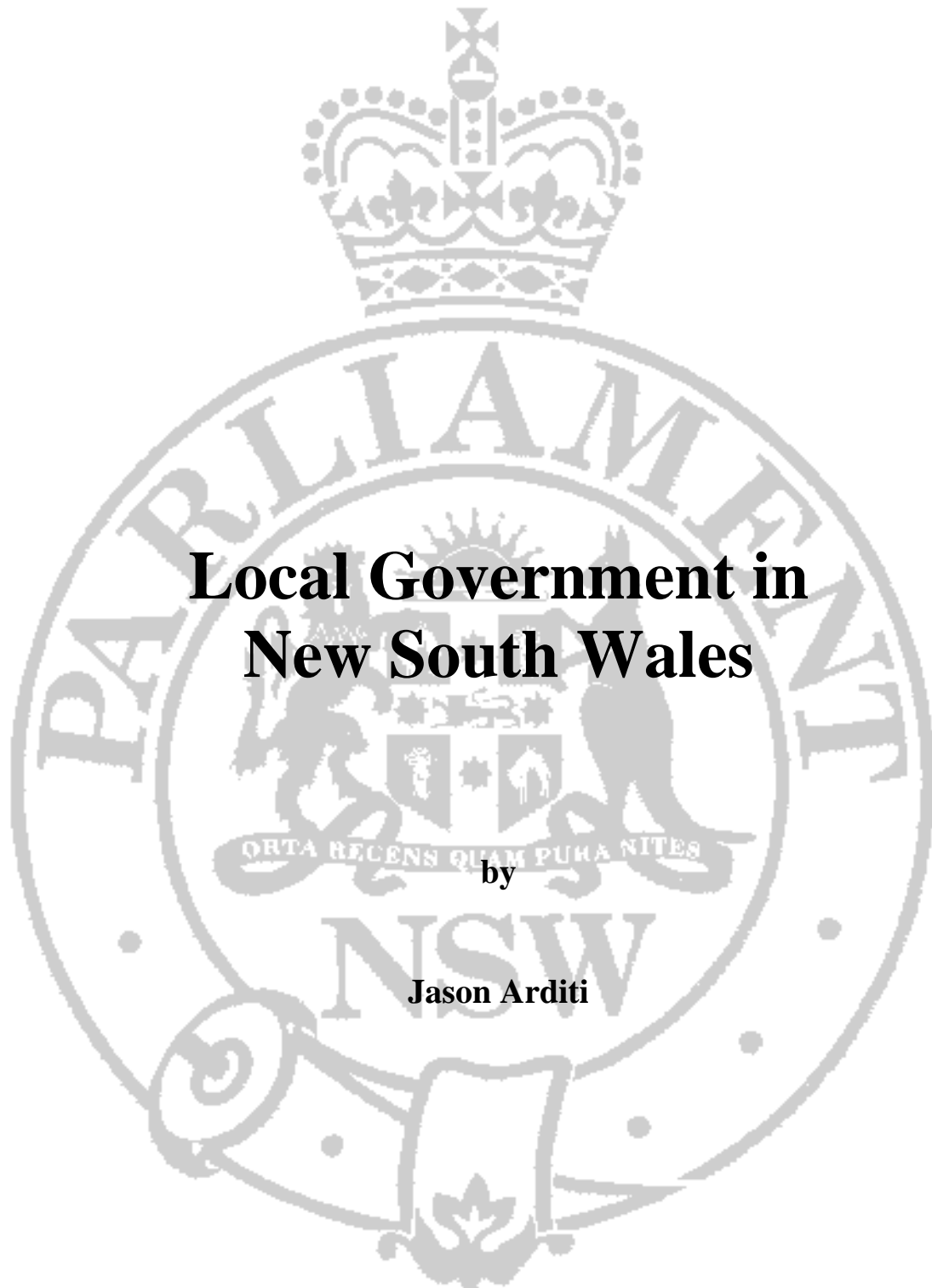


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**Local Government in
New South Wales**

by

Jason Ardit

Briefing Paper No 11/08

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Local Government in New South Wales

by

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EXECUTIVE SUMMARY

This *Briefing Paper* looks at the operation of local government in NSW. The paper examines the history and constitutional foundation of local government, together with the salient features of the *Local Government Act 1993* and the service and regulatory functions set out by the Act.

The paper commences with a brief snapshot of the facts and figures about local government in NSW. [2] The paper then identifies the historical framework in which local government was established and traces its development from penal colony through Federation to today. [3] Consideration is given to the numerous attempts throughout the past 30 years to give local government constitutional recognition, both in the Federal and State Constitutions, together with the reasons for such a move. [4]

The paper then takes a detailed look at the machinery of the *Local Government Act 1993*, including how councils are established and operate [5] – [8] before assessing the myriad of functions and duties councils have, including council obligations with respect to service delivery and regulatory requirements. [9] – [11] A brief survey is then given of some of the offences councils are empowered to create. [12]

The paper examines the various ways councils are able to generate revenue and the type of expenditure councils incur. [13] – [14] Lastly, the paper touches on the regulation of councils and councillors and the various integrity and transparency requirements the *Local Government Act 1993* and other legislative instruments impose on councils. [15]

1. INTRODUCTION

Local government has traditionally been regarded as the third tier of Government in Australia, with the first and second tiers being the Commonwealth and State governments.¹

Although once referred to (and often derided as) being no more than an authority concerned with ‘rates, roads and rubbish’², local government has evolved to be a more active participant in community life. Today, local councils play a vital, if sometimes under-recognised, role in providing basic services. From ensuring the roads driven on are well maintained and well lit, to maintaining services for water and waste to and from our houses, to keeping our public gardens free of noxious weeds and vermin, local councils play a pivotal role in some of the most basic functions of government. Local government is one of the most direct and inclusive forms of democratic participation as councils (and councillors) often have an immediate connection with members of the local community and are often more familiar to their constituents.

On 13 September 2008, 4.5 million people across New South Wales cast their votes for the individuals they wished to be their local government representatives for the next four years.

As has been the trend in recent years, independents and local community groups have done extremely well, as has the largest minor party, the Greens. The results also suggest that the major parties continue to dominate their respective heartlands but do face increasing struggles against popular independents, especially in rural areas.

As the councillors assemble to take their seats for the next four years and commence haggling over what roads to patch up, where the aquatic centre should be and how much in rates they should levy, this paper seeks to give a brief overview of some of the basic features of local government, its role, its powers and some information on its revenue and expenditure. In particular, this paper focuses on the *Local Government Act 1993* as the primary legislative instrument that creates and regulates the local government regime. The paper also touches on some of the past problems and emerging issues confronting local government today. One of local government’s most important functions, planning, has previously been discussed in Briefing Paper 1/08.

¹ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 1.

² David Clark, *Bluett’s Local Government Handbook in New South Wales* 16th ed, Lawbook Co 2008 at p xi.

2. LOCAL GOVERNMENT STATISTICS IN NEW SOUTH WALES

The following provides a brief snapshot of local government in New South Wales:

- There are 152 local government authorities, representing an average of 6.9 million residents.
- The average number of residents per council is 45,000.³
- Geographic sizes of councils vary considerably. The smallest council is Hunters Hill (5.8 square kms). The largest council is Central Darling (53,510 square kms).⁴
- The population sizes of councils also vary considerably. The smallest council is Urana (1,400 residents). The largest council is Blacktown (283,000 residents).
- The density of people per square kilometre likewise varies. The council with the densest population concentration is Waverley (6,624.8 p/km²). The council with the sparsest population spread is Central Darling (0.045 p/km²).
- Councils have between five to 15 councillors, for a total of 1500 councillors across the State.
- Councils employ over 50,000 staff, comprising 1.3% of the State workforce.⁵
- Nationwide, local councils have total revenues of approximately \$20 billion, representing about 2% of GDP.⁶

The current boundaries of local government authorities in New South Wales are shown in the map on the following page.

³ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government*, July 2008 at p 9.

⁴ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government*, July 2008 at p 9.

⁵ Department of Transport and Regional Services, *Local Government National Report 2005-06*, 2007 at p 4.

⁶ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government*, July 2008 at p 25.



Sydney Surrounds



Sydney Urban



Regional Road Groups

- Central Metropolitan Group
- Central West Group
- Hunter Group
- Illawarra Group
- Metropolitan North
- Metropolitan West
- Mid North Coast Group
- New England Group
- North Coast Group
- Orana Group
- South East Metropolitan
- South Eastern Group
- South West Group



3. A HISTORY OF LOCAL GOVERNMENT IN NEW SOUTH WALES

Local councils have undergone various different incarnations. Their roles have changed over time and their powers have waxed and waned.

During the first 50 years of settlement, most services were provided by the State. The infancy of the colony, and the fact that it was primarily a penal outpost, meant that centralised control was the most appropriate and efficient method of Government.⁷

In the early years, this method of governance suited the nascent colony, with its limited population, quite well. However, the growth of the colony, together with the necessity of confining the areas of settlement to a definite area to reduce the costs of administration, meant that the system of government at the time was becoming unsuitable.

The changing circumstances led the then Governor, Sir Ralph Darling, to divide the colony into local areas similar to the model of counties in England in 1829. Although often cited as the first example of local government, these delineated regions were nothing more than defined areas used for title identification and to reduce the burden of centralised administration.⁸ Later Governors would then use the pre-existing local areas already defined to delegate the delivery of social services to those local areas.

In the 1830s, the general condition of the colony's roads and rubbish collection motivated local residents to take a more active role in the affairs of their immediate vicinities. As a result, in 1840 the Government drafted a scheme to introduce municipal institutions, again modelled largely on the English experience. The structure was such that upon receipt of at least 150 petitions out of a population of 1,000, the Magistrates in Petty Sessions would convene a meeting to determine whether there was sufficient support for incorporation of the local area. If community support existed, the Governor would incorporate the region and create a council comprised of a Mayor, Aldermen and Councillors.⁹ There was some initial enthusiasm for the new scheme and in the 1840s 28 District Councils were proclaimed with the first local elections taking place in 1842.

These new Councils were empowered with the authority to levy general rates and charges for the purpose of constructing and maintaining roads, bridges and other infrastructure. Councils were also granted the power to enact by-laws for 'the eradication of nuisances' and to employ officers to enforce local order.¹⁰

⁷ Frederick A Larcombe, *The Development of Local Government in New South Wales*, F.W. Cheshire, 1966 at p 1.

⁸ Frederick A Larcombe, *The Development of Local Government in New South Wales*, F.W. Cheshire, 1966 at p 2.

⁹ Frederick A Larcombe, *The Development of Local Government in New South Wales*, F.W. Cheshire, 1966 at p 13.

¹⁰ Frederick A Larcombe, *The Development of Local Government in New South Wales*, F.W. Cheshire, 1966 at p 13.

For all its promise, the early scheme proved ineffective. A host of reasons, including general apathy, impracticability and public opposition to the levying of rates, led to local government's first incarnation in NSW being deemed a failure.¹¹

Largely as a result of these early failures, the method of local governance was restructured and the creation of local government was again attempted with the passing of the *Municipalities Act* in 1858. This Act allowed any town, city, hamlet or rural district to be constituted as a municipality by a petition of only 50 or more householders. This was contingent on no counter-petition being signed that received a greater number of signatures than the initial petition in the ensuing three months. Councils consisted of either six or nine councillors, elected by ratepayers for a three-year term with one third of councillors retiring every year.¹²

Municipalities under the 1858 Act had slightly expanded functions than under the 1840 scheme as they had responsibility for cemeteries, water supply, sewerage, hospitals, libraries, museums and parks, in addition to their pre-existing duties regarding infrastructure and the control of 'nuisances' and ensuring 'public decency'. The incorporation uptake was limited and in its early years only 20% of the State's population was covered, constituting a mere 1% of the area of the State.

The legislation was also deemed inadequate for the demands of local government. Local authorities were hamstrung by restricted franchise, limited revenue raising abilities and lack of regulatory oversight. Further, the combination of a large area and small population was an important influence in its unpopularity.¹³ Also, by 1858, Responsible Government had been achieved in NSW somewhat addressing public demands for local participation in the affairs of Government.¹⁴

To address the shortcomings in the 1858 legislation, the Carruthers Government then passed the *Local Government (Shires) Act* in 1905. This Act divided the state, exclusive of existing municipalities, into shires for the purpose of local administration. The key feature of this legislation was that incorporation was made compulsory. For the first time, the overwhelming bulk of NSW was covered by a comprehensive scheme of local administration. This Act was quickly followed up by the subsequent *Local Government Act 1906* which consolidated the existing legislation and laid the basic foundations for the way local government operates in NSW today. The *Local Government Act 1906* only included the most basic structure of local government for operational simplicity and left detail of the machinery and administrative nature of the regime to later ordinances and

¹¹ Frederick A Larcombe, *The Development of Local Government in New South Wales*, F.W. Cheshire, 1966 at p 31.

¹² H.E. Maiden, *The History of Local Government in New South Wales*, Angus and Robertson, 1966 at p 25.

¹³ H.E. Maiden, *The History of Local Government in New South Wales*, Angus and Robertson, 1966 at pp 66 – 79.

¹⁴ Frederick A Larcombe, *The Development of Local Government in New South Wales*, F.W. Cheshire, 1966 at p 41.

regulations. This was designed to allow for maximum flexibility in ensuring that the interests of different regions could be regulated separately and appropriately rather than a 'one size fits all' approach.

In 1919, the legislation of 1906 was repealed and new measures were set up in the *Local Government Act 1919*. Although major features of the 1906 Act were retained, the 1919 Act, and subsequent amendments, made important developments to the operation of local government. Specifically, the Act and subsequent amendments extended the electoral franchise, introduced compulsory voting and encouraged amalgamations so that municipalities were fewer in number and larger in area.¹⁵ The Act also removed the requirement to have the Governor approve many measures passed by councils. This Act set the stage for the administration of local government in NSW for the next seven decades.

The 20th century saw numerous amalgamations, boundary adjustment and reforms and the 1919 Act was routinely amended to address changing circumstances. The constant changes resulted in a piece of legislation that was increasingly unwieldy, was confusing and could only be understood and applied with the assistance of a large body of case law. It had been described as being 'a legislative morass, a legal nightmare',¹⁶

In 1973, the Committee of Inquiry into Local Government Areas and Administration – the Barnett Committee – reviewed local government. The Committee found that a number of council areas (at the time, there were 233 in NSW) were too small and the result was duplication of services and poor asset management. Despite the findings of the Barnett Committee, a complete overhaul of local government did not take place.¹⁷

By the end of the 20th century, it was apparent that the *Local Government Act 1919* had outlived its usefulness and was no longer adequate for the demands of 20th century local governance. Councils had evolved from being more than just providers of basic amenities to central players in community life and public expectations about the functions of local government had similarly shifted. This, together with the increasingly hotchpotch legislation that was required to supplement the *Local Government Act 1919*, convinced the Minister for Local Government of the day that the Act was beyond redemption, needed to be abandoned and a complete overhaul of the legislation was the only way forward.

As such, a comprehensive review of the 1919 Act commenced with the release of a white paper in 1990. The white paper sought to lay new foundations for local government in New South Wales. It required that the proposed new legislation be designed to do three things:

- (1) First, to work effectively for small, rural councils as well as for large, urban

¹⁵ H.E. Maiden, *The History of Local Government in New South Wales*, Angus and Robertson, 1966 at pp 136 – 137.

¹⁶ Frederick A Larcombe in David Clark, *Bluett's Local Government Handbook* 16th ed, Lawbook Co 2008 at pxiii.

¹⁷ Department of Local Government, *A New Direction for Local Government*, October 2006 at p 6.

councils and for those in between. The legislation should not be predicated on the performance of the lowest common denominator of councils. It should permit all councils to perform to the best of their abilities.

- (2) Second, to create mechanisms for appropriate balances to be struck between State and local responsibility and accountability. As this balance may change from time to time, the legislation should be capable of accommodating changes in emphasis without complex amendments.
- (3) Third, to allow councils to be free to get on with the business of running their operations with minimal intervention, and with accountability to the local electorate.¹⁸

A discussion paper was released in August 1991 to seek public input on the major changes to local government that were envisaged.¹⁹ After the submissions were received, the Fahey Government tabled legislation in November 1992 and debate on an amended version of the Bill commenced in March 1993. The Bill and related legislation was the subject of approximately 400 amendments but was ultimately passed by both houses and received assent on 8 June 1993. Operation of the Act commenced on 1 July 1993.²⁰ Although the *Local Government Act 1993* has been the subject of numerous amendments, the core features of the regime implemented in 1993 have been largely untouched.

4. THE CONSTITUTIONAL FOUNDATION OF LOCAL GOVERNMENT

By the time of Federation, there was a well established system of local government across the colonies. Although local government in New South Wales was less developed, and more heavily resisted by communities than in other States, there had been a roughly 50 year history of experimenting with local government in New South Wales by the turn of the century.²¹ Despite this, a head of power for local government was omitted from the Commonwealth Constitution during its drafting at the time of Federation.

The Commonwealth Constitution addresses the powers of the Commonwealth and defines its relationships with the States. It is generally accepted that whatever head of power is not expressed as a Commonwealth power, is a residual power left to the States.²² Given that the Commonwealth Constitution is silent on the issue of local government, the role and powers of local government are effectively State creations, deriving their authority from

¹⁸ Functions and powers for Local Government for the 21st century white paper, *NSW Department of Local Government* July 1990 at p 8.

¹⁹ The Hon. G.B. Peacocke M.P. Minister for Local Government, *Reform of Local Government in New South Wales Proposals for Legislation*, Department of Local Government, August 1991.

²⁰ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 7.

²¹ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 3.

²² Cheryl Saunders, *It's your constitution*, Federation Press, 2003 at pp. 130 – 131.

State legislation (and in some cases, State constitutions).²³

The issue of constitutional reform and recognition of local government was prominent during the 1970s and 1980s. In 1973, the first of six Constitutional Conventions addressed local government recognition. The first session of the Convention focused on the position of local government with respect to its financial arrangements with the Commonwealth and the States. The Convention resolved to put the question of local government recognition to a referendum. Subsequently, on 18 May 1974, the Whitlam Government put to a referendum a proposal that would have given the Commonwealth the powers to borrow money for local government bodies and grant financial assistance to any local government body on such terms and conditions as the Parliament deems fit.

The proposal was defeated with only 46.8% of electors voting in favour. Interestingly, the only State to record a majority vote, albeit a narrow one with 50.8% of electors in support, was New South Wales.²⁴

Attempts to give local government constitutional recognition then shifted to the States and amendments to the relevant Constitutions. In 1986 the NSW Government amended the *Constitution Act* 1986 by inserting a new part in relation to local government. Specifically, Part VII provides:

- (1) There shall continue to be a system of local government for the State under which duly elected or duly appointed local government bodies are constituted with responsibilities for acting for the better government of those parts of the State that are from time to time subject to that system of local government.
- (2) The manner in which local government bodies are constituted and the nature and extent of their powers, authorities, duties and functions shall be as determined by or in accordance with laws of the Legislature.
- (3) The reference in subsection (2) to laws of the Legislature shall be read as a reference to laws that have been enacted by the Legislature, whether before or after the commencement of this section, and that are for the time being in force.
- (4) For the purposes of this section, the Western Lands Commissioner, the Lord Howe Island Board, and an administrator with all or any of the functions of a local government body, shall be deemed to be local government bodies.

Despite the constitutional expression afforded to local government, the provision does not

²³ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 3.

²⁴ Final Report of the Constitutional Commission 1988 Volume 1, Australian Government Publishing Service, Canberra 1988 at p 436.

fetter the ability of State governments to dismiss councils nor does it restrict State Government control over the powers and functions of councils.

It should also be noted that the Constitution of New South Wales is not an entrenched document. Unlike the Commonwealth Constitution, it is 'flexible' and 'fluid' and most constitutional provisions can be amended or repealed through ordinary legislation.²⁵ The insertion of a power relating to local government was not intended to put local government beyond the reach of the legislature as the Minister of Local Government at the time observed:

Local Government is entirely a creation of the State Government. It is, like departments and other public authorities, subject to the laws of the legislature and subject to being changed if the Government of the day so desires.²⁶

To this end, the constitutionality of local government is limited to mere constitutional expression rather than constitutional entrenchment.

At the same time the NSW Constitution was being amended, another Constitutional Commission was established to consider, *inter alia*, anchoring local government in the Commonwealth Constitution. Specifically, the Commission recommended that a new section be inserted into the Commonwealth Constitution on the following terms:

119A. Each State shall provide for the establishment and continuance of local government bodies elected in accordance with its laws and empowered to administer, and to make by-laws for, their respective areas in accordance with the laws of the State.²⁷

The Commission considered that it was timely for local government to be formally recognised as the third sphere of government. In supporting its position, the Commission detailed the extensive history of local government in the early colonies (predating both Federation and even responsible government) and its evolution from being a mere supplier of the most basic services to its centrality in community life.²⁸

The Commission also considered that constitutional clarification was required to ameliorate some of the difficulties associated with constitutional silence on the issue. Similar to the concerns that prompted the referendum in 1974, a question mark remained over whether the Federal Government could directly provide financial assistance to local government,

²⁵ Anne Twomey, *The Constitution of New South Wales*, The Federation Press 2004 at pp 268 – 269.

²⁶ The Hon. Janice Crosio in NSWPD, 25 September 1986 at pp 4025 – 4026.

²⁷ Final Report of the Constitutional Commission 1988 Volume 1, Australian Government Publishing Service, Canberra 1988 at p 435.

²⁸ Final Report of the Constitutional Commission 1988 Volume 1, Australian Government Publishing Service, Canberra 1988 at pp 442 – 443.

and in effect by-pass the States, and whether local government could impose rates on State and Federal Government property. Mainly though, the effects of the proposed constitutional recognition would ensure the democratic election of local governments which could not be dismissed or suspended arbitrarily. The proposed new provision did not envisage any considerable extension or reorganisation of local government duties.²⁹

Objections to the amendment were plentiful and varied. There was uncertainty as to how the High Court would interpret the provision, question marks over whether the provision would require local government to be established where it was unwanted or unworkable and concerns that local government would limit the authority and independence of State governments.

Arguments in favour were that it would mandate a system of elected local officials, compel State and Federal Governments to consult with local government with its associated grassroots connections with the community and open up new opportunities for local – State/Federal cooperation.³⁰

The proposed amendment was put to the nation on 3 September 1988 with three others. The measure was overwhelmingly rejected, with a mere 33.6% of the population voting in favour.³¹ This time, New South Wales also rejected the amendment with just 31.7% of the electors in favour, a slump of more than 19% from the previous referendum 14 years prior.

The result of these failed referenda is that local government is still not formally recognised in the Commonwealth Constitution, and many of the issues first canvassed in the mid 1980s remain issues today. That said, these issues do not appear to have adversely affected the operation of local government to any great degree and, given the lack of any pressing concern that local government authorities are not recognised in the Constitution, moves for such recognition have since been dormant.³²

5. THE LOCAL GOVERNMENT ACT 1993

The *Local Government Act 1993* commenced operation on 1 July 1993. It is the principal Act in relation to local government. It applies to the bulk of New South Wales with the exception being a portion of largely uninhabited area in the north west of the State (called the ‘unincorporated area’). This area is considered too large and sparsely populated to be effectively managed by local government and is therefore administered by the Western

²⁹ *Ibid*, pp 435 – 443.

³⁰ *Ibid*.

³¹ http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm

³² The National General Assembly of Local Government passed principle 2.2 in November 2007. This principle calls for the rights of citizens to the democratic pursuit of community values through elected local government must be protected in the Australian Constitution. A full copy of the national agenda can be found at <http://nga.alga.asn.au/business/nationalAgenda/>

Lands Commissioner instead.³³

In summary, the purpose of the Act is set out in section 7, which is as follows:

- (a) to provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales;
- (b) regulate the relationships between the people and bodies comprising the system of local government in New South Wales;
- (c) to encourage and assist the effective participation of local communities in affairs of local government;
- (d) to give councils:
 - o the ability to provide goods, services and facilities, and to carry out activities appropriate to the current and future needs of local communities and the wider public;
 - o the responsibility for administering some regulator systems under the Act;
 - o a role in the management, improvement and development of the resources of their areas; and
- (e) to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities.

The *Local Government Act 1993* contains a charter that provides councils with guidance as to their obligations. The generalised wording of the charter effectively renders the obligations largely unenforceable, but nonetheless provides an indication of Parliament's expectations from councils. Councils may add other principles provided that they are not inconsistent with the principles in the charter. The charter can be found at section 8(1) of the *Local Government Act 1993* and is as follows:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively;
- to exercise community leadership;
- to exercise its functions in a manner that is consistent with and actively promotes the principles of multiculturalism;
- to promote and to provide and plan for the needs of children;
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable

³³ David Clark, *Bluett's Local Government Handbook in New South Wales* 16th ed, Lawbook Co 2008 at p 2.

development;

- to have regard to the long term and cumulative effects of its decisions;
- to bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible;
- to facilitate the involvement of councilors, members of the public, users of facilities and services and council staff in the development, improvement and co-ordination of local government;
- to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants;
- to keep the local community and the State government (and through it, the wider community) informed about its activities;
- to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected; and
- to be a responsible employer.

6. HOW ARE COUNCILS ESTABLISHED?

Chapter 9 of the *Local Government Act 1993* sets out how local councils are constituted and the process by which the public can participate in the establishment of new councils. In particular, provisions apply as to notifying the public about proposed changes and provide the public with an opportunity to make representations on the changes.³⁴

Determining the borders of councils is the function of the Local Government Boundaries Commission, which is constituted under the *Local Government Act 1993*.³⁵ The current borders of councils are not permanently fixed. A council or an appropriate number of electors (defined as 250, or 10% of total electors, whichever is greater / lesser depending on the circumstances) may initiate a proposal to amalgamate councils or alter boundaries. Typically, before determining borders, the Local Government Boundaries Commission must consider such matters as community of interest, financial consequences, public attitudes toward any proposed changes, geographic cohesion and traditional values that exist in the proposed area.³⁶

³⁴ *Local Government Act 1993* (NSW) s 216

³⁵ *Local Government Act 1993* (NSW) s 260 – 265

³⁶ *Local Government Act 1993* (NSW) ss 217 – 218

The overall trend, however, is not so much the creation of new councils, but towards the amalgamation of existing ones and the Act allows for two or more areas to amalgamate into one or more new areas. The boundaries of existing councils may be similarly altered without necessarily amalgamating two councils.³⁷

The viability of many minor councils has been called into question given their relative size and distance from many services. As such, there is concern that small councils do not have the resources or finances to adequately serve the needs of their electorate. Recently in Queensland, the issue of amalgamation was controversial as the Beattie Government effected an across-the-board reorganisation (and effective merger) of councils in light of concerns about the sustainability of many councils.³⁸ Public attitudes were, at times, openly hostile to the changes and may give an indication of the possible public attitude if a wholesale reorganisation of councils was to take place in NSW.

6.1 The Mayor and Councillors

Each council is constituted as a body corporate and assumes the general attributes of statutory incorporation.³⁹ The governing body of the council are the elected representatives who direct and control the affairs of the council in accordance with the *Local Government Act 1993*.⁴⁰ The number of councillors comprising each governing body ranges between five and 15. Any alteration of the number of councillors must be approved by referendum.

Each council is required to have an elected mayor. The Act sets out the duties of the mayor and it is generally required that he or she:

- exercise in cases of necessity, the policy-making functions of the governing body of the council between meetings of the council;
- exercise such other functions of the council as the council determines;
- preside at meetings of the council;
- carry out the civic and ceremonial functions of the mayoral office.⁴¹

Generally, the mayor is elected from the ranks of the councillors unless it has been decided at a referendum that the mayor is to be elected directly by constituents in a popular vote. Directly elected mayoral elections take place in many of the larger councils, including most notably the City of Sydney. A mayor drawn from the ranks of the councillors ordinarily serves for 1 year whereas a popularly elected mayor serves for 4 years. Councillors,

³⁷ *Local Government Act 1993* (NSW) ss 218A – 218B

³⁸ Brian Dollery, *When big is not better*, Courier-Mail, 25 April 2007.

³⁹ *Local Government Act 1993* (NSW) s 220

⁴⁰ *Local Government Act 1993* (NSW) ss 222 – 223

⁴¹ *Local Government Act 1993* (NSW) s 226

meanwhile, ordinarily serve 4 years.

Specifically, The Act provides for a councillor's individual functions which include participating in the optimum allocation of the council's resources for the benefit of the area, creating and reviewing council policies and objectives in relation to its regulatory functions, and reviewing the delivery of services and revenue policies. Further, as an elected representative, the councillor is required to represent the interests of residents and ratepayers and facilitate communication between the council and the constituents the council represents.⁴²

A council must award a fixed annual fee, paid monthly, for all councillors in accordance with the appropriate determinations set down by the Local Government Remuneration Tribunal. Similarly, the council must award an additional fee for the role of mayor, in accordance with appropriate determinations by the Tribunal.⁴³ There are special circumstances in which a council can refuse to pay the fee, notably when a councillor is absent from a council meeting for more than 3 months. The Tribunal itself is established under section 235 of the *Local Government Act 1993* and must give consideration to the size, and physical terrain of a council area, together with workload and significance of the council, before determining the appropriate fees to be paid. For the 2008/09 financial year, the tribunal has determined that councillors shall be paid between \$6,870 and \$22,680. Mayors shall be paid a fee of between \$7,300 and \$66,100 in addition to the fee they receive as a councillor.⁴⁴

6.2 Councils in Administration

Although democratically elected in periodic elections, constituents are not the only ones who have the power to dismiss a council. One of the more controversial, and not altogether infrequently used, powers under the *Local Government Act 1993* is the ability for councils to be dismissed.

The Minister for Local Government has the power to recommend to the Governor that the civic offices of a council be declared vacant in circumstances where a public inquiry concerning the council has been conducted by a Commissioner appointed under the *Local Government Act 1993*.⁴⁵ The Act does not specifically set out the reasons for which a public inquiry may be held into a council's activities nor does it set out what constitutes sufficient grounds to dismiss a council. To this end, the discretion is left largely to the Minister to make that judgement.

The Minister may also make a recommendation to dismiss a council if the Independent

⁴² *Local Government Act 1993* (NSW) s 232

⁴³ *Local Government Act 1993* (NSW) s 241

⁴⁴ 2008 Annual Review, Local Government Remuneration Tribunal at <http://www.remtribunals.nsw.gov.au>, accessed 25 September 2008.

⁴⁵ *Local Government Act 1993* (NSW) s 740

Commission Against Corruption finds that either the council suffers from ‘systemic corruption’, or in circumstances where the council has not appropriately followed its rate-levying requirements, or where the council has not exercised its functions generally, or where the council has been unable to form a quorum at meetings and is therefore deemed to be a non-functioning council.⁴⁶

In place of dismissed councils, the Governor, again on the advice of the Minister, may appoint an administrator whose job it becomes to take carriage of all matters ordinarily reserved for the council. As an alternative, the Minister may also recommend holding fresh elections.

In 2008, the Minister for Local Government recommended the dismissal of two councils following public inquiries. In February, Port Macquarie-Hastings council was dismissed after it was discovered that finance for the construction of a cultural and entertainment Centre – the Glasshouse - had blown out to 6 or 7 times the initial intended cost of the project.⁴⁷ The inquiry found a lack of prudent financial controls in the construction of the centre.⁴⁸ In July, Shellharbour City Council was dismissed after findings of disorderly meetings and an irretrievable breakdown in the relationship between councillors and staff.⁴⁹ In both cases, administrators were appointed for four-year terms. It should also be noted that in both cases, council elections that were due to be held in mid September 2008 were deferred indefinitely to give the administrator more time to rectify the affairs of the council.

Perhaps the most notable dismissal of a council in recent times was the dismissal of Wollongong City Council in March 2008 after a report by the Independent Commission Against Corruption found evidence of ‘systemic corruption’ and recommended ‘prompt action’ to declare the council vacant after the ICAC investigation into allegations of bribery and corrupt conduct.⁵⁰ Again, council elections intended for mid September were deferred indefinitely.

7. COUNCIL ELECTIONS

The make up of councils are determined by local government elections that take place (usually) every four years. The duration of the past two terms of councils has been four and half years following amendments to the *Local Government Act 1993*.⁵¹ Residents,

⁴⁶ *Local Government Act 1993* (NSW) ss 255 – 259

⁴⁷ Samantha Williams, *Mayor defends council sacked for \$41 million blowout*, The Daily Telegraph 28 February 2008.

⁴⁸ *Council sacked*, Port Macquarie News, 27 February 2008.

⁴⁹ *NSW govt sacks south coast council*, The Sydney Morning Herald, 9 July 2008.

⁵⁰ *Report on investigation into corruption allegations affecting Wollongong City Council*, Independent Commission Against Corruption, March 2008.

⁵¹ See *Local Government Amendment (Elections) Act 2003* and the *Local Government Amendment (Election Date) Act 2008*.

ratepayers and occupiers are eligible to vote although the Act prevents a person voting more than once in one area.⁵² Different councils conduct elections in different ways. For example, some council areas are sub-divided into separate wards, with electors returning a representative/s per ward. Examples include Woollahra Municipal Council and Fairfield City Council. Other councils operate as one ward-at-large where each councillor represents the entire council area. Examples include Hay Shire Council and Murray Shire Council.

Like other elections, voting is compulsory with fines of \$55.00 for those who fail to vote.⁵³ On occasion, however, there is no need for voters to turn up on polling day. For example, in the recent local government elections, all candidates in Botany Bay City Council were elected without contest.⁵⁴

Councils are also able to seek input or guidance from the local community by way of a council poll or referendum. A council poll is a non-binding poll of electors to seek guidance on what approach a council should take on an issue. It is largely an opportunity for the council to test the temperature of community attitude toward a planned project or issue.⁵⁵ A referendum, meanwhile, is a legally binding poll of electors on the manner in which councils are elected (for example whether the mayor should be popularly elected or drawn from the ranks of councils).⁵⁶

In the recent round of council elections, polls were held in eight councils and referenda in 18. In Wingecarribee Shire Council, a poll was put to electors concerning the construction of a leisure centre and in Mid-Western Regional Council, a poll was put to electors on whether or not the council should rename itself, and if so, what the new name should be. Meanwhile, referenda were held in Burwood to determine if the mayor should be popularly elected, rather than elected by councillors, and in Snowy River Shire Council a referendum was put seeking approval to lower the number of councillors from 9 to 7.

8. OPERATION OF COUNCILS

As a general rule, the meeting of a council must be open to public. A council must make publicly available the time and venue of the council meeting, together with an agenda and associated business papers. All members of the community are able to attend council proceedings, although the council may pass a resolution that expels an attendee, subject to the regulations. In certain circumstances, the council may close the meeting to the public if it relates to personal matters, is a commercial issue of a confidential nature or a matter subject to legal professional privilege. The openness of a council meeting extends to the

⁵² *Local Government Act 1993* (NSW) s 266

⁵³ *Local Government Act 1993* (NSW) s 312

⁵⁴ Wendy Frew, *Two wards too few for council critics*, *The Sydney Morning Herald*, 20 August 2008 at p 4.

⁵⁵ *Local Government Act 1993* (NSW) s 14

⁵⁶ *Local Government Act 1993* (NSW) ss 15 – 17

requirement that a council provides reasonable access to any person to inspect correspondence or reports laid on the table during the meeting.

In the spirit of transparency, councils must also provide members of the public with the ability to inspect a wide range of council documents, available free of charge, although reasonable fees for copying documents may be levied. The right to inspect also entails the right to obtain copies of documents, subject to reasonable fees. These documents include annual reports, land registers, local policies and management plans, amongst others. There are of course limitations to the documents that can be reviewed, such as those that concern the personal matters of individuals, the personal hardship of any resident or ratepayer, trade secrets or other confidential information. When a council refuses access to a document, it must provide publicly available reasons why the document is shielded from public view.⁵⁷ These obligations overlap largely with obligations placed on councils under the *Freedom of Information Act 1989* and *Privacy and Personal Information Protection Act 1998*.

8.1 Code of Meeting Practice

An ordinary council meeting must be held at least 10 times each year in a different month. Extraordinary meetings meanwhile must be called within 21 days after two councillors have made a request. A quorum is formed if the majority of the councillors are present.

Unsurprisingly, decisions are made by a majority vote of councillors in a meeting where a quorum is present. Ordinarily, the presiding councillor does not vote unless using their casting vote to break a tie. Councils may choose to alter or rescind resolutions but a strict process is set out which outlines how and when they may do so. A council is obliged to keep full and accurate minutes of the proceedings of its meetings,⁵⁸ although minutes generally record motions moved and are not 'intended to be a kind of local government Hansard'.⁵⁹

9. SERVICE FUNCTIONS OF COUNCILS

The *Local Government Act 1993* recognises three categories of councils' functions. They include the 'service' functions, the 'regulatory' functions and 'ancillary' functions. In addition, councils are required to draft management plans that set out the principle activities they wish to conduct, together with objectives and performance targets.

The broad sweep of service functions required and allowed by councils is primarily conferred by the *Local Government Act 1993*. The list is thorough, but not exhaustive, as councils have additional duties under auxiliary legislation. For example, the provision of library services under the *Library Act 1939* or the issuance of planning certificates required under section 149 of the *Environmental Planning Act 1979*.

⁵⁷ *Local Government Act 1993* (NSW) ss 12 – 13

⁵⁸ *Local Government Act 1993* (NSW) ss 365 – 375

⁵⁹ David Clark, *Bluett's Local Government Handbook in New South Wales* 16th ed, Lawbook Co 2008 at p 130.

Under the previous *Local Government Act 1919*, councils had to locate a specific conferral of power before they could engage in a particular function. If no such power to perform a particular duty existed, then the Courts prevented the council from engaging in that duty as it would be deemed *ultra vires*.⁶⁰ The effect of the very strict reading of the legislation was that councils were precluded from performing activities that deviated even slightly from the head of power. Numerous amendments to address perceived omissions and shortcomings in the Act went some way to expanding the scope for council functions, but also created a hotchpotch of duties which were not cleanly and exhaustively listed beneath any single chapter of the Act.

The *Local Government Act 1993* is based on ‘a different proposition’⁶¹. Rather than limiting the service functions of councils to a set of strictly defined criteria, the Act allows councils to undertake functions either conferred or imposed by the *Local Government Act 1993* or any other auxiliary legislation. In addition, councils are also able to do such things that are ancillary or consequential to the exercise of their functions.⁶² This provision effectively gives local councils a much wider scope to undertake activities they deem appropriate to properly service their community.

The preface to the chapter on service functions of councillors in the *Local Government Act 1993* provides a lengthy and widely varied list of some of the service functions of councils, ranging from cultural and sporting functions to pest reduction and waste removal and tourism and industry development. Importantly though, the introduction expressly states that the list is not exhaustive. In fact, the relevant provision in the *Local Government Act 1993* that provides councils with the authority to provide goods and services, does not elaborate on what those services might entail.⁶³

9.1 General service functions of councils

The table below indicates some of the service functions of councils, although the list is far from exhaustive.

Table 9a: Service features of councils

Service Features	Examples
Community services and facilities	Day care, child care, youth services, families and children, aged and disabled, migrant services, Indigenous services.

⁶⁰ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 232.

⁶¹ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 233.

⁶² *Local Government Act 1993* (NSW) s 23

⁶³ *Local Government Act 1993* (NSW) s 24

Health services	Food inspection and control, immunisations, pest eradication, noxious plants control, health centres.
Housing and community amenities	Housing, town planning including zoning, waste management, street cleaning, garbage collection and disposal, recycling, public sanitation and amenities.
Transport services	Road maintenance, footpaths, bridges, parking areas, bus shelters, street lighting.
Economic development	Tourism, local events organising and promotion.
Recreation and culture	Public libraries, museums, art galleries, community centres and halls, pools and sporting grounds, lakes and gardens.
Industrial affairs	Building control, zoning, abattoirs, quarries.
Public safety	Fire prevention, animal control, emergency services.
Environmental affairs	Conservation, nature reserves, environmental protection.

Source: Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government: Other Industries Issues Paper*, July 2008 at p 34.

Councils have a fair degree of independence in choosing what service functions they wish to provide. Due to local variances, each council provides and maintains a different degree of infrastructure, together with different services.

There are significant discrepancies in the roles of metropolitan and rural councils. Rural councils tend to have a low population base servicing a large geographic area with expanded road networks. In this respect, rural councils often have a low rating base to draw their sources of revenue from. Despite this, rural councils may also be required to perform expanded functions, such as water supply and drainage together with banking, welfare or even health care. The tendency for a scattered population also means that rural councils have to stretch council services across a vast area.⁶⁴ Inversely, metropolitan councils have a relatively high population base and small geographic area. This density allows for a concentration of services and metropolitan councils usually do not have to attend to water supply or health care.

The demographics of the community that the council represents would also go some way to influencing its service functions. For example, a council with a high population of non-English speaking residents may be required to go some way to providing specific language

⁶⁴ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government: Other Industries Issues Paper*, July 2008 at p 34.

services⁶⁵ and councils with a large Indigenous population may operate a community development and reconciliation program.⁶⁶

9.2 Management of Public Land

Councils have duties with respect to the management of public land and are required by the Act to classify public land as either 'community' or 'operational'.⁶⁷ The purpose of classification is to organise land into one of two categories, that which should be retained for general public use (community land) and land that which can be disposed or alienated by lease (operational land). Community land will generally be a park, playground or other area deliberately set aside for public use whereas operational land is often just a temporary asset or investment, not necessarily for public use, but important for the council in performing its functions, such as the use of a works depot. There are certain restrictions on the lease of community land but no such restrictions on operational land.

With respect to community land, councils are required to draft a management plan that sets out the objectives and performance targets in dealing with that land.⁶⁸ The Council must also provide the core objectives for community land.⁶⁹ Although community land cannot be disposed of in any way, there is scope for councils to grant licences or lease the land for certain purposes.

9.3 Miscellaneous service functions

The *Local Government Act 1993* also provides for councils to offer private works services, subject to a fee. The type of works that can be carried out include guttering, fencing, tree maintenance, demolition, drainage, gas and electricity connections.⁷⁰

A separate provision allows for councils to remove graffiti work on a private property and, if the graffiti is visible from a public place, the council may remove the graffiti even without the agreement of the owner or occupier of the premises.⁷¹

⁶⁵ An example of which is Fairfield City Council which provides multilingual information on its website at <http://www.fairfieldcity.nsw.gov.au>

⁶⁶ An example of which is Walgett Shire Council's *Indigenous Community Development and Reconciliation Plan*.

⁶⁷ *Local Government Act 1993* (NSW) ss 25 – 26

⁶⁸ *Local Government Act 1993* (NSW) s 36

⁶⁹ *Local Government Act 1993* (NSW) ss 36E – 36N

⁷⁰ *Local Government Act 1993* (NSW) s 67

⁷¹ *Local Government Act 1993* (NSW) ss 67A – 67C

10. REGULATORY FUNCTIONS OF COUNCILS

The major regulatory functions of councils are set out in Chapter 7 of the Act. Councils engage in regulatory functions to two main kinds, those functions that pertain to approvals and those that pertain to orders.

Various activities taking place on private land are subject to prior approval from the council. The council also has the authority to order a landowner to do, or to refrain from doing, something on their private land. The failure to seek an approval when required and the failure to comply with an order are offences under the Act (see offences below.)

10.1 Approvals

Approvals are often related to development applications for renovations or extensions on private property but can also be related to ordinary business, other commercial activity or the organising of community events.

The *Local Government Act 1993* provides for the methods used in dealing with the approval process as well as the criteria that the council needs to assess an application against. The *Local Government Act 1993* does not, however, provide for all approvals as building applications are separately dealt with under the *Environmental Planning and Assessment Act 1979*.

Section 68 of the *Local Government Act 1993* provides a table of activities that a person may only undertake with the prior approval of council. This table is provided in summary form below:

Table 10a: List of items requiring prior council approval

<i>Structures or places of public entertainment.</i>	Approval must be sought from the council before installing a manufactured home, moveable dwelling or associated structure on land.
<i>Water supply, sewerage and stormwater drainage work:</i>	Summarily, approval needs to be sought before the carrying out of water supply work, including the drawing or selling of water. Any installation, alteration, disconnection or removal of a meter connected to a service pipe also needs prior approval. Similarly, the carrying out sewerage work or stormwater drainage work needs prior council approval, including the connection of a private drain or sewer with a public drain or sewer.
	Individuals must seek approval before transporting waste over or under a public place, place waste in a public space or dispose of it into a sewer of the council, for a fee

<i>Management of waste:</i>	<p>or reward.</p> <p>Similarly, approval must be sought for any installation, construction or alteration of any waste management system.</p>
<i>Community land:</i>	<p>When it comes to community land, approval must be obtained before engaging in any form of trade or business. This includes directing or procuring theatrical, musical or other entertainment for the public, including the playing of music for a fee or award. Further, this provision also captures the operation of a loudspeaker or amplifier for such events or the construction of a temporary enclosure for the purpose of entertainment</p> <p>Certain civic events, such as delivering a public address or holding a religious service, also require prior approval.</p>
<i>Public roads:</i>	<p>Approval must be obtained before one can swing or hoist goods across or over a public road or footway. Similarly, approval is required before one can expose or potentially expose an article to overhang a public road or outside a shop window or doorway abutting the road, or hang an article beneath an awning over the road.</p>
<i>Other activities:</i>	<p>This table effectively contains various miscellaneous actions requiring approval. These include, approvals to operate a public car park, a caravan park or camping ground, operate a manufactured home estate, install a domestic oil or solid fuel heating appliance, other than a portable appliance. Other actions captured include installing or operating an amusement device, using a standing vehicle or any article for the purpose of selling any article in a public place and carrying out an activity prescribed by the regulations or an activity of a class or description prescribed by the regulations</p>

Source: Section 68 of the *Local Government Act 1993*.

Although this appears to give the council wide discretion to approve or reject an application, the Act limits the council's ability to refuse an application made by the Crown or otherwise impose conditions on the activities of the Crown.⁷²

⁷² *Local Government Act 1993* (NSW) ss 69 – 74

An application for approval is to be made by the person seeking to carry out the activity mentioned under the table above and, in the case of an application pertaining to land, an application by the owner or a person who has obtained the consent of the owner.⁷³

Applications must be lodged with the council with an approved fee, together with any such matters the regulations set out and specified by the council as being necessary before determining the application.⁷⁴

The council must assess the application against relevant regulations and consider whether the stated objectives of the applicant are compatible with the public interest, defined to include considerations of environmental protection and ecological sustainability, public health and safety and items of cultural or heritage significance.⁷⁵ In determining the application, councils may give unconditional approval, approval subject to conditions or refuse to grant the approval.

Councils must inform applicants of the result of the application as soon as practicable and provide the date the approval comes into effect. In the case where an approval is subject to conditions or where it has been refused, the council must specify the reasons for the decision as well as providing notice of the applicant's right to have their determination reviewed by another person at the council (subject to a fee), or their right to appeal the determination if it was passed by council.⁷⁶

10.2 Orders

A council has the authority to compel a specific person to do, or refrain from doing, certain things in certain circumstances. In addition, a council has the authority to specify a standard to which a particular thing must be met.

The orders table itself is sub-divided into five other sub-categories.

⁷³ *Local Government Act 1993* (NSW) ss 75 – 78

⁷⁴ *Local Government Act 1993* (NSW) ss 79 – 81

⁷⁵ *Local Government Act 1993* (NSW) s 89

⁷⁶ *Local Government Act 1993* (NSW) ss 99 – 100

Table 10b: Order powers of councils

<i>Orders requiring or prohibiting the doing of things to or on premises:</i>	<p>By way of summary, councils are able to compel a person to remove, demolish or make structural alterations to a building, when the building is erected in a catchment district and likely to cause pollution of the water supply, compel a person to fence in land, fill in or empty holes or watering holes on public health and safety grounds.</p> <p>Councils may also require a property owner or occupier to identify the premises when markings are lacking, to cover articles or matter and to plant trees to prevent what the council may deem as unsightly conditions, and to do or refrain from doing things that is likely to cause environmental damage.</p>
<i>Orders requiring premises be used or not used in specified ways:</i>	<p>This refers to the council's ability to compel premises to be used or not used in particular ways. Namely, to issue an order that compels the cessation of conduct that is a threatening hazard or constitutes a threat to public health and safety, to cease using, leave, evacuate or refrain from entering premises and to refrain from keeping birds or animals that are kept inappropriately, in kind or number, as well as being likely to communicate diseases. Perhaps slightly unexpectedly, this table of orders can also compel an individual not to use a tennis court as specified.</p>
<i>Orders requiring the preservation of healthy conditions:</i>	<p>Councils have the authority to issue orders that require owners or occupiers to preserve their premises in a healthy condition. Orders can be issued to do such things to ensure that the premises are in a clean and sanitary condition, or to refrain from doing such things so that the premises can be retained in a safe and healthy condition. Councils may also issue orders that require the owner or occupier to treat and dispose of waste, as well as connecting the premises to a sewerage system.</p>
<i>Orders requiring the protection or repair of public places:</i>	<p>This includes requiring the removal or prevention of an object being deposited in a place where it may be an encroachment or obstruction to public land or is otherwise a danger, annoyance or inconvenience. Similarly, the council may issue an order to prevent damage and require repair for a public place that has been affected by the excavation or removal of material. The council may also issue an order to alter or repair a work or structure where it is over or under a public place.</p>
<i>Orders requiring compliance with approval:</i>	<p>A council has the general power to issue an order to comply with an approval, in circumstances where the approval is not being complied with.</p>

Source: Section 124 of the *Local Government Act 1993*

The list of orders under the *Local Government Act 1993* does not limit the authority of the

council to issue orders under other legislation in which power is conferred. For example, under the *Companion Animals Act 1998*, councils still have the authority to declare a dog to be ‘dangerous’ under s34(1) of that Act.

Special provisions apply to land that has heritage value. In particular, before making an order in respect of an item of environmental heritage, the council must assess the impact on its heritage significance and provisions are in place for the council to consult with the Heritage Council before any such orders are made.⁷⁷

The Act also contains a more general clause empowering councils to abate public nuisances. This has been defined as the physical removal or suppression of a nuisance. A nuisance itself is defined by the Act as an interference with the enjoyment of public or private rights. A nuisance is ‘public’ if it materially affects the reasonable comfort and convenience of a sufficient class of people to constitute the public or a section of the public.⁷⁸

10.3 The Process of Issuing Orders

Before issuing an order, a council is required to comply with certain provisions to ensure that the rules of procedural fairness are met. In summary, the council must provide persons affected by an order with notice of the order as well as informing them or their agent of details so that they can make representations to the council as to why the order should not be given. Representations may be made to the council as a whole, individual councillors or a specified committee. After hearing and considering the representations made concerning the order, the council, committee or councillor may choose to affirm, vary or scrap the order. A new period of notice is then not required. Reasons for the order, together with a reasonable period of time to comply with it, must also be provided. The Minister for Local Government also has the authority to issue an order and to the extent to which a council’s orders conflict with that of the Minister’s, the former is void.⁷⁹

10.4 The Land and Environment Court

The Council must also advise of appeal rights before the Land and Environment Court against the order or specified parts of the order together with the period in which the appeal must be lodged.

The Land and Environment Court is a specialist court of limited jurisdiction established by the *Land and Environment Court Act 1979*. Section 20(2) of that Act prescribes that the Court has the civil jurisdiction to hear and dispose of proceedings to enforce any right, obligation or duty conferred or imposed by planning or environmental law as well as the right to review, or command, the exercise of a function conferred or imposed by a planning

⁷⁷ *Environment Planning and Assessment Act 1979* (NSW) s 124; *Local Government Act 1993* (NSW) s 124

⁷⁸ *Local Government Act 1993* (NSW) s 125

⁷⁹ *Local Government Act 1993* (NSW) ss 129 – 157

or environmental law. Section 16 to 21B of the *Land and Environment Court Act 1979* provides seven classes of the Court's jurisdiction and class 2 enables the court to consider merits review appeals in relation to approvals and orders under the *Local Government Act 1993*.

The *Local Government Act 1993* confers onto applicants the right to appeal to the Land and Environment Court if they are dissatisfied with the determination of the council with respect to their application for an approval. Applicants must appeal within 12 months, or 3 months if the appeal concerns an approval that was revoked or modified by the council.⁸⁰

With respect to orders, the Court has the authority to revoke, modify or otherwise substitute the order. The Court may also award compensation to a person who has incurred expenses as a result of a council's order. Additionally, the Land and Environment Court can award compensation for the consequences of a council's refusal or delay to grant an application in circumstances where the Court was unduly influenced by unmeritorious submissions or has otherwise acted vexatiously. Councils may similarly award compensation for individuals affected by frivolous and vexatious litigants.⁸¹

11. ANCILLARY FUNCTIONS OF COUNCILS

Chapter 8 of the *Local Government Act 1993* confers on councils a whole suite of powers deemed to be either necessary or desirable to have in order to properly and effectively carry out their other functions. Namely, this chapter authorises councils to compulsorily acquire land and enter onto private land in certain circumstances.

11.1 Compulsory acquisition of land

Land to be acquired must be by a just agreement between the parties or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*. However, restrictions are placed on councils depending on what its intention is with respect to the land. For example, if it is for the purpose of resale, council cannot acquire the land without the prior approval of the owner.⁸²

11.2 Powers of entry

For the purpose of enabling a council to exercise its functions, (for example, for the purposes of sewerage work) a council employee or any other authorised person may enter premises. However, councils do not have unfettered access to premises at any time of their choosing, entry may only take place at a reasonable hour of daytime or at any hour during which business is in progress or is usually carried on at the premises.⁸³

⁸⁰ *Local Government Act 1993* (NSW) ss 672 – 679

⁸¹ *Ibid*

⁸² *Local Government Act 1993* (NSW) ss 186 – 190

⁸³ *Local Government Act 1993* (NSW) ss 191 – 201

Without limiting the generality of the power afforded to councils to enter premises, councils may enter premises for the construction and maintenance of storm water supply work, sewerage and stormwater drainage works. The council may also enter premises for the purposes of inspections and investigations that come under its remit. Reasonable force may be employed to gain entry into premises. However, care must be taken to do as little damage as possible. Compensation is payable by the council for damage done to the property as a result of the entry, but not for an inspection which uncovered a contravention of the *Local Government Act 1993*.⁸⁴

In addition to the functions conferred by the *Local Government Act 1993*, local councils have ancillary functions under auxiliary legislation. Two notable examples are provided below.

11.3 Impounding

Local government also has some obligations under the *Impounding Act 1993*. This Act came into force at the same time as the *Local Government Act 1993* as is part of the same suite of legislative reforms that revamped the operation of local government.

The Act provides that impounding authorities – which include local councils – have the power to impound certain animals, motor vehicles and other abandoned and unattended articles and makes provisions for their release or disposal.

The *Impounding Act 1993* also sets out requirements for how impounded animals or vehicles are to be handled, the steps required to notify their owners and for the disposal of the impounded items.⁸⁵

11.4 Roads

The other Act that came in conjunction with the *Local Government Act 1993* is the *Roads Act 1993*. The objectives of the *Roads Act 1993* is to provide for the rights of residents to use and have access to roads, provide for their care and maintenance and regulate the classification and period closure of roads. Many of the functions under the *Roads Act 1993* are conferred on the Roads and Transport Authority and the duties and functions placed on local governments are usually subject to RTA powers.⁸⁶

12. OFFENCES

Chapter 16 of the *Local Government Act 1993* contains a non-exhaustive list of offences.

⁸⁴ Ibid

⁸⁵ For more information see David Clark, *Bluett's Local Government Handbook in New South Wales* 16th ed, Lawbook Co 2008 at pp 285 – 299.

⁸⁶ For more information see David Clark, *Bluett's Local Government Handbook in New South Wales* 16th ed, Lawbook Co 2008 at pp 301 – 334.

The offences provisions of the Act aligns neatly with the historical role of local government to also be responsible for dealing with public nuisances and ensuring public order.

The offences contained under the *Local Government Act 1993* are not just limited to breaches of a regulatory process, but also provide a raft of offences relating to nuisances in public and to public property. These offences include disturbing plants and animals, breaking glass and other matter, acting contrary to erected notices and various bathing offences, including a prohibition on nude bathing. The penalties for these offences range between 10 and 20 penalty units.

Additionally, the Act contains offences relating to water, sewerage and stormwater drainage. Specifically, it is an offence to do works on piping when not authorised to do so, to damage property related to the provision of water and drainage services, to tamper with meters and fittings or discharge prohibited matter in the drainage system or otherwise pollute the water supply. There are also offences pertaining to the misuse and waste of water.⁸⁷

Street drinking is also tightly regulated under the *Local Government Act 1993*. The Act gives the council scope to establish ‘Alcohol Free Zones’, subject to public consultation, and is designed to reign in the rates of public drunkenness and associated anti-social behaviour.⁸⁸ Fines are applicable for drinking in the designated ‘Alcohol Free Zones’ and the police have powers to confiscate alcohol in certain circumstances.

The council has authority to designate roadsides as car parking free zones.⁸⁹ Councils are able to erect signs setting out the conditions of car parking free zones, including the time in which the area is a car parking free zone, the maximum period of time a car can be parked and if the car is to be set aside for vehicles whose drivers have disabilities.

13. REVENUE

Naturally, without a ready supply of revenue, local government authorities would be unable able to carry out their statutory functions. As with most functions of councils, the *Local Government Act 1993* provides that local councils in NSW are able to derive revenue from various different sources, including:

- **Ordinary rates:** Councils are required to determine and levy an ordinary rate for each year. The amount of the ordinary rate can differ depending on the land to which it applies;
- **Special rates:** Councils have the discretion to impose additional levies for works or services provided by the council or for special purposes;

⁸⁷ *Local Government Act 1993* (NSW) s 637

⁸⁸ *Local Government Act 1993* (NSW) s 644

⁸⁹ *Local Government Act 1993* (NSW) ss 650 – 651

- **Fees** for goods and services provided by the council (such as the provision of water, sewerage or drainage services). Charges that have not been paid are recoverable through civil proceedings;
- **Grants** and **Subsidies** from the NSW and Commonwealth Governments;
- **Interest** derived from financial assets;
- **Fines** derived from some of the offences listed above, as well as **Contributions** and **Donations**;

In the 2006/07 financial year, 83.6% of local government revenue in NSW was generated from rates and the sale of goods and services. A meagre 8.6% of revenue was derived from grants and subsidies.⁹⁰ To this end, these figures demonstrate that councils are largely financially self-reliant (although concerns about the ongoing sustainability of some councils are present). Of the revenue derived from rates and sales, the split was relatively even between rates and sales.

However, the figures vary markedly from council to council. As a general rule, rural and remote councils receive a far greater proportion of their revenue from Government grants than their urban and metropolitan counterparts. Unsurprisingly, this has much to do with the low base of revenue potential required to provide infrastructure and services to a large area.

Each year a council must prepare a draft management plan with respect to its revenue policy for the proceeding year.⁹¹ Each draft management plan itself must include statements about the councils estimated revenue and expenditure, the ordinary and special rates it proposes to levy, pricing policy for services rendered by the council and information on any other intended fees and charges.

13.1 Rates

Rates based on property are essentially a form of local taxation on property and are designed to recoup immediate losses from the community for services that the council provides.⁹² On average, rates on property only form about a third of all property taxes. However, they also account for less than three percent of total taxation (by comparison, the Federal Government amasses 80% of taxation revenue).⁹³ Although in real terms, local government taxation revenue has been increasing steadily, its proportion of overall taxation

⁹⁰ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government*, July 2008 at p 25.

⁹¹ *Local Government Act 1993* (NSW) s 402B

⁹² Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 132.

⁹³ Productivity Commission, *Study into local government's own-source revenue*, Australian Local Government Association Submission, July 2007 at p 5.

revenue has been decreasing.⁹⁴

Councils are able to nominate the structure of rates they wish to impose from a set of two options.⁹⁵ The first option is for councils to impose a rate on an *ad valorem* amount (that is, an amount entirely in proportion to the value of the land). The second option is to impose a rate that has a fixed base amount to which an *ad valorem* is added. In these circumstances, however, the base amount of a rate is limited to 50% of the total rate. The *ad valorem* amount is the amount in the dollar determined for a specified year by the council on the land value of rateable land.⁹⁶

Before determining an ordinary rate, councils must categorise all rateable land into one of the following categories: farmland, business, residential or mining. Special provisions apply for mixed development and vacant land. Councils decide which category individual properties fall into depending on its characteristics and use. The idea behind differentiating the categories of rateable land is to set different rates on the land, with land used for commercial or business purposes generally having a higher rate burden than residential and rural land.⁹⁷

The Government is able to set a limit on the total amount of annual income that councils are able to raise from rates and charges.⁹⁸ Specifically, the Minister for Local Government can specify the percentage by which councils' income for a particular year may be varied. This is popularly referred to as rate pegging. Rate pegging is on the overall general income and not on individual properties. To this end, it is possible that some particular rate rises may exceed the rate peg limit although the overall general income cannot. Also, the general income does not include certain rates and charges. For example, it excludes water supply and drainage services. Rate pegging does not apply to other user charges, grants, fines, interest and other sources of revenue. The annual rate peg percentage is usually announced in March each year, to take effect the following July.

NSW has had a long experience with rate pegging with the regulation of council rates being introduced in 1977. The policy rationale is to ensure that councils maintain fiscal discipline, avoid spendthrift measures and generally encourage savings through productivity improvements. Councils, in turn, have grounds to suggest that rate pegging hampers their ability to provide quality local services and infrastructure, and it lessens their overall financial viability.

For the 2008/09 financial year, the rate peg percentage has been set at 3.2%.⁹⁹ In the past

⁹⁴ Ibid.

⁹⁵ *Local Government Act 1993* (NSW) s 497

⁹⁶ *Local Government Act 1993* (NSW) s 498

⁹⁷ Linda Pearson, *Local Government Law in New South Wales*, Federation Press, 1994 at p 135.

⁹⁸ *Local Government Act 1993* (NSW) s 505 – 513

⁹⁹ NSW Department of Local Government, *Circular to Councils: Variation of General Income 2008/09*, April 2008.

six years, the rate cap has been marginally higher than CPI, allowing for price movements in the market plus other projected annual increases in costs that a typical council is likely to face.

Councils that believe they will be adversely affected by the rate cap can apply to the Minister for Local Government for a special variation.¹⁰⁰ A special variation is an application that a council must submit if they wish to increase their general income by more than the rate peg limit.¹⁰¹ The Minister is able to increase the council's general income above the rate cap for a period not exceeding seven years.¹⁰² The Minister for Local Government will then need to consider the reasons for the request before making a determination.

Councils do not often apply for special variations. In the 2007/08 financial year, just 28 of the 152 councils in NSW made an application, with 25 being approved in full and three in part.¹⁰³ In making an application, councils need to set out the reasons for seeking the variation. In some circumstances, the reason identified may be for a specific capital works project being undertaken in which extra revenue is required, such as for a new civic centre or sports complex. In others, general upkeep and maintenance are the reasons cited.¹⁰⁴

By way of comparison, the other States and the Northern Territory generally provide more autonomy to councils in setting their own rates. For example, in Western Australia, the relevant Act does not confer powers on the relevant Minister to fetter the council's ability regarding rates. Recently, the Minister for Local Government in NSW requested the pricing watchdog, the Independent Pricing and Regulatory Tribunal, to review whether the Government should divest itself of its powers to peg rates.¹⁰⁵

13.2 Grants

Another source of revenue, albeit a relatively minor one, is through the allocation of grants from State and Commonwealth Governments. The approach to the allocation of grants is though an integrated State-Commonwealth regime where revenue sources are derived from both State and Commonwealth Governments

The Act provides for the establishment of a Local Government Grants Commission, comprising of a Commissioner appointed by the Minister and the Department of Local

¹⁰⁰ *Local Government Act 1993* (NSW) s508

¹⁰¹ *Local Government Act 1993* (NSW) s506

¹⁰² *Local Government Act 1993* (NSW) s508A

¹⁰³ NSW Department of Local Government, *Annual Report 2006/07*, pp 126 – 127.

¹⁰⁴ NSW Department of Local Government, *Annual Report 2006/07*, pp 126 – 127.

¹⁰⁵ ABC, *NSW mulls council rates shake-up*, 3 June 2008 at <http://www.abc.net.au>, accessed 18 September 2008.

Government.¹⁰⁶

The primary function of the Local Government Grants Commission is to make recommendations to the Minister for Local Government as to the appropriate allocation of finances to local government for general purpose and road grants from the total amount proposed to be transferred to the state under the *Local Government (Financial Assistance) Act 1995* (Cth). The Grants Commission is required to conduct enquiries as it sees necessary before making recommendations to the Minister.

The mechanisms of the scheme are then as follows. The Minister provides a statement to the Federal Treasurer stipulating the details of the intended payments. Money is transferred from the Federal Treasury into the Local Government Financial Assistance Fund, which is then distributed to local councils as set out by the Minister in quarterly instalments.

The object of the *Local Government (Financial Assistance) Act 1995* (Cth) is to improve the financial capacity of local government bodies, their ability to provide equitable services, and provide certainty of funding and efficiency for local government bodies.

Section 6 of the *Local Government (Financial Assistance) Act 1995* (Cth) provide for the drafting of National Principles governing the allocation of funds by State Governments. The process of grant distribution is not entirely at the discretion of the State as it is tempered by two principles. First, a minimum grant of 30% of available funds is made to each council on a per capita basis. Allocation is also tempered by the requirement to distribute funds on a full horizontal equalisation basis, as far as practicable.¹⁰⁷

In 2006/07, approximately \$540,000,000 worth of grants was allocated to NSW local government bodies.¹⁰⁸ In that year, Central Darling Shire received the highest grant per capita at \$756.57. Unsurprisingly, the 54 councils receiving the highest grants per capita were in rural areas. By contrast, the bottom 20 councils, receiving just \$16.69 in grants per capita, were all urban councils. The State average was \$55.63.

Additionally, the *Local Government Act 1993* also enables the Minister for Local Government to make grants to local councils from money appropriated by Parliament for that purpose.¹⁰⁹

Finally, the Commonwealth Government had previously run *Regional Partnerships*, an initiative designed to foster the development of self-reliant communities and regions. The programme was designed to assist in the finance of specific projects by local governments in largely rural areas. The program was not without controversy and had been the subject

¹⁰⁶ *Local Government Act 1993* (NSW) s 613

¹⁰⁷ *Local Government (Financial Assistance) Act 1995* (Cth) s 6

¹⁰⁸ *Local Government (Financial Assistance) Act 1995* (Cth) s 3(2)

¹⁰⁹ *Local Government Act 1993* (NSW) s620

of allegations that it was used inappropriately to ‘pork barrel’ in marginal seats.¹¹⁰ The program ceased accepting new applications as of 31 July 2008.

13.3 Loans

Councils are permitted, by way of overdraft, loan or any other means approved by the Minister borrow for any purpose under the *Local Government Act 1993*.¹¹¹ Councils may give security for a loan in a manner prescribed by the regulations. However, the Minister may impose limitations or restrictions on council borrowing.

13.4 Investments

A council is free to invest money that is not, for the time being, required by the council for any other purpose. There are, however, restrictions on the investment ability of councils. Investments can only be made in a method specified by the Minister of Local Government which, in turn, must have been previously approved by the Treasurer.¹¹²

13.5 Charges

A council must make and levy each year a charge for the provision of domestic waste management services.¹¹³ In addition, a council *may* make a series of charges with respect to a host of other services it provides including, water supply services, sewerage services and drainage services.¹¹⁴

14. EXPENDITURE

As discussed, the local government sector has increasingly diversified, moving away from its traditional property and roads based orientation to one where the provision of human services is at the forefront.

A change by the community in its expectations of councils (and corresponding change of priorities by councils) is demonstrated by equivalent changes in council expenditure in the decade 1998 – 2007. Council spending on general public services has increased by about 50%, from around 16% in 1998 to 25% today. Likewise, there has been a contraction in spending on transport and communications, down from approximately 36% to 20% in the same period.¹¹⁵ A report commissioned by the Commonwealth Grants Commission in June

¹¹⁰ Annabel Stafford and Jewel Topsfield, *Rort claims: PM looking down the barrel*, *The Age*, 16 November 2007.

¹¹¹ *Local Government Act 1993* (NSW) s621

¹¹² *Local Government Act 1993* (NSW) s625

¹¹³ *Local Government Act 1993* (NSW) s 496

¹¹⁴ *Local Government Act 1993* (NSW) s 501

¹¹⁵ See Productivity Commission, *Study into local government's own-source revenue*, Australian Local Government Association Submission, July 2007 at pp 9 – 10.

2001 found that in the past forty years, ‘the composition of services being provided by local government had changed markedly with local government increasingly providing human services at the expense of property-based services’.¹¹⁶

In 2006/07, total expenditure by NSW local government exceeded \$6.8 billion, with average spending of \$1,000 per capita. The breakdown of that expenditure into different purposes can be found below.

To ensure the fiscal responsibility of councils, the *Local Government Act 1993* provides that councils must appoint an auditor to review council finances and ensure appropriate expenditure.¹¹⁷ In addition, each council must make publicly available an annual report that includes the auditor’s financial reports.¹¹⁸

Table 14a: Local Government Expenditure in NSW by Purpose, 2006/07 (\$m)

Purpose	Value
General public services	1,683
% of total	24.3
Public order and safety	223
% of total	3.2
Education, health and welfare	411
% of total	5.9
Housing and community amenities	1,489
% of total	21.5
Recreation and culture	899
% of total	13.0
Transport and communication	1,353
% of total	19.6
Other	860
% of total	12.4
Total	6,919

Source: Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government: Other Industries Issues Paper*, July 2008 at p 34. **General public services** pertains to legislative and executive affairs, financial and general economic affairs.

Other pertains to energy, forestry and fishing, agriculture, mining and manufacturing etc.

As is to be expected, there is a slight variation in the spending on metropolitan councils compared with those on the fringes of cities, provincial areas and rural areas. For example, rural councils spent a greater proportion of revenue on administration costs than those on the fringe areas of cities, reflecting the greater areas they need to service.¹¹⁹ Similarly,

¹¹⁶ ‘Review of the Operation of the Local Government (Financial Assistance) Act 1995’ in Productivity Commission, *Study into local government’s own-source revenue*, Australian Local Government Association Submission, July 2007 at p 9.

¹¹⁷ *Local Government Act 1993* (NSW) ss 442 – 427

¹¹⁸ *Local Government Act 1993* (NSW) s 428

¹¹⁹ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government: Other*

those fringe areas have relatively higher spending on housing and community amenities than, for example, the City of Sydney, reflecting the demographic nature and constituent requirements of councils in the so-called 'mortgage belt'.¹²⁰

15. REGULATION OF COUNCILS

Periodic elections, and perhaps an aggressive media, are not the only mechanisms that temper the conduct of councils. There is a suite of provisions in the *Local Government Act* as well as other important Acts that serve to ensure and enforce the appropriate conduct of councils.

15.1 Honesty and disclosure of interests

An entire chapter of the *Local Government Act 1993* is dedicated to placing obligations on councillors to act in a certain manner when exercising their functions. This chapter sets out the legislative expectations of a councillor's conduct to ensure that every councillor, staff member and council delegate acts honestly and exercises a reasonable degree of care and diligence in carrying out functions under the Act.¹²¹ The legislation provides that the regulations may prescribe a model code of conduct and councils must subsequently adopt a code of conduct that incorporates, and complies with, the provisions of the model code.

The Independent Commission Against Corruption has the authority to investigate councillors suspected of engaging in 'serious corrupt conduct' with the ability to recommend the suspension or dismissal of those councillors. The Minister responsible also has the authority to suspend or dismiss a councillor for such 'serious corrupt conduct'.¹²²

There are also provisions for less serious conduct, such as 'misbehaviour', defined by the Act as a councillor acting contrary to the Act or Code of Conduct, or acting in a manner that warrants the description of any other 'act of disorder'. The penalties for 'misbehaviour' can include being subjected to a censure motion by Council or even suspension where it concerns a sufficiently serious incident or where censures have been repeatedly passed. Suspended councillors may appeal before the Pecuniary Interest and Disciplinary Commission, which in turn may choose to confirm, amend or quash the order.¹²³

As part of the package of attempting to ensure appropriate decision-making, councillors are required to avoid placing themselves in a position where private interests conflict with

Industries Issues Paper, July 2008 at p 34.

¹²⁰ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government: Other Industries Issues Paper*, July 2008 at p 34.

¹²¹ *Local Government Act 1993* (NSW) s 439

¹²² *Local Government Act 1993* (NSW) ss 440A – 440E

¹²³ *Local Government Act 1993* (NSW) ss 440F – 440Q

public duty, as well as avoiding the perception of any such conflict. Such a conflict may arise if a councillor has a stake in a company that has dealings with the council or a development application concerning land the councillor has an interest in. To address these concerns, the *Local Government Act 1993* provides for important disclosure requirements. The first is that a councillor (or any interested party) must prepare yearly written returns of financial interest. The second is that a councillor must declare that they have a pecuniary interest, defined as an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person, in a matter that is being considered by the council or committee and must disclose the nature of the interest. Councillors that have pecuniary interests are required to absent themselves from any council discussion about the matter and must abstain from voting on it. These provisions are important mechanisms to ensure, not only that a conflict of interest does not take place, but that the appearance of such a conflict is similarly absent.¹²⁴

The failure of an interested party to declare a pecuniary interest may trigger a complaint to the Director-General who in turn may investigate the complaint or refer the matter to another authority (such as ICAC). A report by the Director-General or other relevant authority must be provided to the Pecuniary Interest and Disciplinary Tribunal which may then decide to either initiate proceedings into the complaint or refrain from conducting proceedings.

The Pecuniary Interest and Disciplinary Tribunal is established by the *Local Government Act 1993*¹²⁵ and presently consists of one part time Member, currently Mr Adrian Galasso QC. In the 2006/07 financial year, the Tribunal received three notices of investigation into the failure to disclose pecuniary interest by four separate councillors. There were no proceedings in that same year.¹²⁶ It is interesting to note that the tribunal may consider its own procedure when conducting proceedings and is not bound by the ordinary rules of evidence.¹²⁷

15.2 Freedom of information and privacy

In addition to requirements under the *Local Government Act 1993*, members of the public are able to request access to information under the *Freedom of Information Act 1989* (FoI Act), subject to certain conditions and fees.

The policy rationale that underpins the freedom of information regime is that members of the public should have rights to obtain access to information held by the departments and agencies in the interests of transparent governance and subsequent accountability to the community. In particular, individuals have a right to know what information local government retains on them and the ability to alter records held about them if the

¹²⁴ *Local Government Act 1993* (NSW) ss 441 – 459

¹²⁵ *Local Government Act 1993* (NSW) s 437

¹²⁶ Annual Report, *Local Government Pecuniary Interest and Disciplinary Tribunal*, 2007.

¹²⁷ *Local Government Act 1993* (NSW) s 471(2)(a)

information is inaccurate or outdated. Freedom of Information determinations can be appealed to the Administrative Decisions Tribunal and complaints can be considered by the Ombudsman.

Overlapping with freedom of information requirements, councils also have certain statutory obligations under the *Privacy and Personal Information Protection Act 1998* (PPIP Act) when it pertains to the handling of personal information. Councils are required to adhere to the twelve information protection principles under the PPIP Act. These principles regulate the way in which local government agencies collect, store, use and disclose of personal information, placing certain restrictions and obligations on local government authorities to handle personal information in an appropriate manner. Complaints against councils about breaches of the PPIP Act are the responsibility of Privacy NSW.¹²⁸

15.3 Lobbying

An issue that is not entirely new, but nonetheless gaining increasing currency, is the question of lobbying. Whilst lobbying is a 'legitimate activity' that is an important part of the democratic process¹²⁹, the nature of this activity can often throw up perceptions of undue influence behind closed doors. Whilst the issue of lobbying takes in all levels of government, recent scandals have cast light on the degree to which local government authorities are susceptible to unscrupulous lobbying, often by developers in relation to building activity or zoning considerations.

ICAC has often been required to investigate allegations of corrupt conduct by councillors or council workers in situations where they solicit or receive a bribe from interested parties for favourably discussing or voting in council meetings. Allegations of this nature are serious, significantly offend the integrity of the democratic process and erode public confidence in local government institutions.

To address some of the consequences of unrestrained influence, there has been some movement at State and Federal level towards instituting a register of lobbyists. For example, as of 1 July 2008 the Australian Government Lobbyists Register has been in operation.¹³⁰ The register, which requires details about lobbyists and the clients they represent to be logged on a database before the lobbyists can have access to Ministers and Government representatives, is designed to maximise transparency in Government dealings with lobbyists and lift the veil on what might otherwise be secretive behaviour. The register is to work in tandem with a lobbying code of conduct.

Although there has been discussion about a similar scheme at the state government level in NSW, there has been less discussion about instituting a register of lobbyists at the local

¹²⁸ See Jason Arditi, *Privacy: The Current Situation*, NSW Parliamentary Library Research Service, July 2008.

¹²⁹ See Gareth Griffith, *The Regulation of Lobbying*, NSW Parliamentary Library Research Service, June 2008.

¹³⁰ <http://lobbyists.pmc.gov.au/lobbyistsregister/>

government level. With recent discussion in the media about the effect and extent of lobbying, especially in light of disclosures about Wollongong Council, the question of regulating lobbying of local government authorities remains a highly topical issue.

15.4 Electoral finance and donations

Like lobbying, electoral finance is a controversial issue. Donations to and fundraising by political parties are a common and accepted part of the democratic process. However, election fundraising raises concerns about possible improper relationships between political parties and interested parties.

The primary piece of legislation that regulates electoral finance is the *Election Funding and Disclosures Act 1981* and recent amendments to the Act have tightened the rules. The Act provides for, and limits, the way in which electoral finance can be spent, limiting expenditure for campaign and electoral requirements.

Elected members of local councils must lodge with the Election Funding Authority a declaration of political donations received and electoral expenditure incurred following each biannual period ending 30 June and 31 December. Specifically, elected members must disclose single donations of \$1,000 or more or of multiple donations from the same source that during one financial year are, in aggregate, \$1,000 or more.¹³¹

The Act does not cap the amount of funding that can be received by any one source but does prohibit certain types of funds, such as from an unknown source or entities that are neither individuals nor organisations with an ABN. Certain types of funding are prohibited, such as indirect campaign contributions by way of office accommodation, computers or vehicles when the value of such gift exceeds \$1,000 in any one financial year.¹³²

Comprehensive records of all donations must be kept, and during the disclosure period the councillor must disclose in a declaration the date of the donation, the name of the donor, the residential address, the amount or value, the ABN (in case of an entity) and an indication as to whether the donation is a cash gift or donation in kind.

Similar mandatory reporting is required when elected council members disclose the electoral expenditure incurred. Reporting requirements include information about the description of electoral expense, amount of expense, name of supplier and other salient details.¹³³

¹³¹ Election Funding Authority, *Funding and Disclosure Guide: Elected Members and Official Agents*, 2008 at p 21.

¹³² Election Funding Authority, *Funding and Disclosure Guide: Elected Members and Official Agents*, 2008 at p 22.

¹³³ Election Funding Authority, *Funding and Disclosure Guide: Elected Members and Official Agents*, 2008 at pp 30 – 34.

16 ONGOING ISSUES

As mentioned previously, there are some question marks surrounding the ongoing viability, both in terms of financial sustainability and operational efficiency, of many individual local councils. These questions, and possible options for reform, are currently being considered in a range of reviews that assesses the long-term future of local government. In 2006, an Independent Inquiry commissioned by the Local Government and Shires Association of NSW asked *Are Councils Sustainable?*¹³⁴ The report found that there were a number of ‘pressing problems’ requiring ‘urgent attention’ and proposed 49 separate recommendations to reform the way local government operates.¹³⁵

In addition, there have been various other reviews that examine the revenue generating abilities of councils and whether the current financial arrangements meet the demands of councils. In 2003, the Hawker Report examined the problem of cost shifting onto local government with a view to ensuring that local councils are appropriately financed.¹³⁶ More recently, in the current Independent Pricing and Regulatory Tribunal (IPART) review of local government, the terms of reference require IPART to consider the ‘the current and future financial position of local government and the scope for efficiencies’.¹³⁷

With the plethora of reviews into local government that have either recently concluded or are currently underway, it is perhaps only a matter of time before some reform of the way local government operates occurs.

17 CONCLUSION

The expansion of the roles and powers of local government is on-going, adding further layers to the many responsibilities of local authorities. These duties will no doubt continue to expand over time in response to community demand, as has been demonstrated by the experience of over 150 years of local government in NSW. How councils fare with these changes, and whether the *Local Government Act 1993* will continue to withstand the test, will be important issues in coming years.

¹³⁴ See Percy Allan, Lisa Darlison and Diana Gibbs, *Are Councils Sustainable? Final Report: Findings and Recommendations*, Local Government and Shires Association of NSW.

¹³⁵ Percy Allan, Lisa Darlison and Diana Gibbs, *Are Councils Sustainable? Final Report: Findings and Recommendations*, Local Government and Shires Association of NSW at pp 7 – 34.

¹³⁶ Rates and Taxes: A Fair Share of Responsible Local Government, House of Representatives, *Standing Committee on Economics, Finance and Public Administration*, October 2003.

¹³⁷ Independent Pricing and Regulatory Tribunal, *Revenue Framework for Local Government*, July 2008 at p 2.

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