

LOCAL GOVERNMENT

Councillor's Duties: Codes of Conduct and Complaint Management

The Department of Local Government and Planning, Policy and Legislation Division are currently considering submissions received during the recent consultation period and finalising the draft *Local Government Amendment Bill* so that it may be introduced to Parliament in May 2005.

This Bill will amend the *Local Government Act 1993* ('LGA') to make it compulsory for Local Governments to have an enforceable Code of Conduct for Councillors and a Complaints Management Process in place by 1 February 2006.

Following is an outline of Councillors' duties, mechanisms currently in place for controlling and dealing with misconduct and inappropriate behaviour by Councillors, and the proposed changes to be introduced.

Councillors' duties

In its current form, the LGA includes a number of statutory duties which apply to Councillors. These include:

- a duty to serve the overall public interest of the area and, if the Councillor is a Councillor for a division, the public interest of the division: s229(2)(a);
- a duty to give preference to the public interest if conflict arises between the public interest and the private interest of the Councillor or another person: s229(2)(b);
- a duty to ensure there is no conflict, or possible conflict, between the councillor's private interest and the honest performance of the councillor's role of serving the public interest: s229(3);
- a duty to notify the Chief Executive Officer of any interest that should be recorded in the registers of interest: s247(3);
- unless Mayor, a duty not to assume any part of the Mayor's role without the Mayor's prior

approval: s230(1);

- a duty not to direct or attempt to direct, an employee of the local government about the way in which the employee's duties are to be performed: s230(2);

- a duty not to make improper use of information acquired as a Councillor to gain, directly or indirectly, a financial advantage for the person or someone else, or to harm the local government: s250(1);

- a duty not to release information that the person knows, or should reasonably know, is information that is confidential to the local government and the local government wishes to keep confidential: s250(2); and

- a duty to disclose a material personal interest in relation to an issue raised in a Council or Committee meeting and a duty to not take part in a meeting or a vote related to an issue of material personal interest: s244.

There are also additional duties that apply to Mayors, Deputy Mayors and Acting Mayors pursuant to sections 231, 234 and 236.

Current Mechanisms

At the moment, breaches of Councillors' duties (including misconduct and inappropriate behaviour) can be dealt with by the Ombudsman under the *Ombudsman Act 2001* where the breach relates to administration, or for more serious matters, the Crime and Misconduct Commission pursuant to the *Crime and Misconduct Act 2001*.

While many individual Local Governments have introduced voluntary Codes of Conduct for Councillors to outline acceptable conduct standards and address less serious incidents, these are largely unenforceable.

Proposed Changes

According to the draft Bill, a new Part 3A (*Code of Conduct for Councillors*) will be inserted into Chapter 4 (Local Government Councillors) and a new Part 5 (*General Complaints Process*) will be

inserted into Chapter 6 (General operation of Local Governments), to become effective on 1 February 2006. These amendments will not necessarily change the current mechanism per se but will: complement the role of the Ombudsman in the investigation of administrative complaints; deal with matters not pursued by the Crime and Misconduct Commission as 'official misconduct'; and make independent Local Governments' Codes of Conduct compulsory and enforceable.

Codes of Conduct ('CoC')

Each Council will be required to have adopted a CoC by 1 February 2006 and to review their CoC within 6 months after each Council election thereafter. Breaches of the CoC and existing statutory duties (listed above) will be classified into four categories: *meeting breaches*, *minor breaches*, *statutory breaches* and *repeat breaches*. For each type of breach, Council will determine, by resolution, that a breach has occurred and the penalty to be imposed. Penalties which may be imposed on breaching Councillors include written reprimands and/or suspension from meetings. However, *statutory breaches* and *repeat breaches* will first be referred to a *Conduct Review Panel* which will report recommendations to the Council. The *Conduct Review Panel* will be created from a pool of panel members appointed by Council. The Bill is expected to provide that a panel member may only serve a maximum term of 4 years, must meet qualification requirements and must not be current Councillor or Council employee. The Department is encouraging regional Council's to cooperate to establish a regional pool of panel members.

A Councillor found to be in breach of the CoC will not have a right to appeal the determination of Council and Council's will be required to report breaches of the CoC in their Annual Report. The Ombudsman will have the power to investigate a Council's enforcement of its CoC.

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FISHERIES ACT 1994 APPROVALS ROLLED INTO IPA (IDAS) FROM 1 MARCH 2005

On 1 March 2005 the *Primary Industries and Other Legislation Amendment Act 2003* commenced, amending the *Integrated Planning Act 1997* to include approvals for particular marine and aquacultural developments into the Integrated

Decision Assessment System ('IDAS'). This integration was achieved by further expanding the definition of "operational works" to include the constructing or raising of waterway barrier works, works performed in a declared fish habitat area and the removing, destroying or damaging of a marine plant and amending Schedule 8 accordingly.

There are two significant differences in the way that these developments (where the chief executive (fisheries) is the assessment manager or a concurrence agency and the chief executive (environment) is a concurrence agency and the development is of a type listed at section 5.8A.2(1)(b)), will be dealt with under IDAS, compared with other developments:

1. Submitters now have additional appeal rights allowing them to appeal to the Planning and Environment Court against a response from a prescribed concurrence agency in certain circumstances, including in some instances, when the development is only code assessable (refer to section 4.1.28A); and
2. a varied Notification Stage which requires: information request responses to be provided to assessment manager and each prescribed concurrence agency; a minimum notification period of 30 days; a 'notice of compliance to be provided to assessment manager and each prescribed concurrence agency; that each prescribed concurrence agency consent to an assessment managers decision to assess and decide an application despite non-compliance with the notification requirements; that the assessment manager provide each prescribed concurrence agency with a copy of any submissions received from Submitters; and, where the chief executive (environment) or chief executive (fisheries) are a concurrence agency for the development, they must not provide their referral response until after the notification period ends.

Compulsory Acquisition and GST

In October 2004, the Supreme Court of New South Wales considered 'whether land acquired by compulsory acquisition was subject to Goods and Services Tax' in the matter of *CSR Ltd v Hornsby Shire Council* [2004] NSWSC 946.

While this case was decided based on the New South Wales' *Land Acquisition (Just Terms Compensation) Act 1991* and not Queensland

legislation, the basic taxation concepts derived from the Commonwealth A New Tax System (*Goods and Services Tax Act 2000*) are still relevant to Local Governments in Queensland.

In this case the Council sought a private tax ruling from the ATO which stated that the compulsory acquisition of CSR's land was not subject to GST. However, when the Valuer-General made the written notice of compensation payable to CSR, it stated that the compensation figure (the valuation) was GST inclusive.

The Council withheld one eleventh of the compensation determined on the basis that CSR refused to provide the Council with a tax invoice and that, as a result, the Council could claim input tax credit for the equivalent of the amount withheld.

CSR subsequently commenced proceedings against the Council to recover the amount withheld, as well as interest for failing to pay compensation within the 28 days required. The Council submitted that CSR would be 'unjustly enriched' by its failure to issue Council with a tax invoice. The Court in this case held that:

- CSR could not be unjustly enriched as against Council, because if GST was payable, it was payable to the Commissioner of Taxation, not the Council;
- the compulsory acquisition was not a taxable supply;
- because there was no taxable supply, there was no obligation on CSR to provide Council with a tax invoice.

In the reasons for judgment, Justice Gzell also stated: "In view of this finding, it is unnecessary for me to determine whether there was a separate GST component in the determination of market value. In my view there was not. As the Valuer-General said, the market place has adjusted to the imposition of GST and imbedded it in the market value of land."

PLEASE NOTE that this is only general information and that the decision in this case was based on the particular circumstances. There are some circumstances where GST may apply to compulsory acquisitions and the Queensland legislation providing for compulsory acquisition of land is different from that applied in New South Wales. For instance, the Acquisition of Land Act 1967 does provide that where compensation money is being advanced to a claimant, that "any taxes, rates or other moneys charged upon the land taken in favour of the Crown or any local government shall be a charge upon the compensation payable under this Act to a

claimant who is legally liable for payment thereof, and the [Crown or local government] may deduct from such compensation and pay to the Crown or local government concerned any such amount."

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