LOCAL GOVERNMENT NSW

Local Government Reform – Frequently Asked Questions

Can the Government force councils to amalgamate?

Yes. The *Local Government Act 1993* (NSW) (the "**Act**") includes a scheme for amalgamating councils (the "**amalgamation scheme**") and provided the Government follows the prescribed steps in the amalgamation scheme, the Government can force councils to amalgamate without the need for legislative change.

What steps must the Government follow if it decides to force councils to amalgamate?

Refer to Appendix A.

Does the Government have to follow all of the steps in the amalgamation scheme to force councils to amalgamate?

If the Government does not follow all of the steps in the amalgamation scheme the process may be exposed to legal challenge, and the further the Government deviated from the steps, the greater the potential for a successful legal challenge.

Are there any loopholes in the legislation that the Government could potentially use to force councils to amalgamate without having to follow the steps in the amalgamation scheme?

The Act contains various provisions concerning proclamations and the temporary suspension of councils which, at first blush, could be seen as an alternative means for facilitating the forced amalgamation of councils (see sections 213, 438I, 438W, 736 and 738). However, legal advice indicates that these are largely facilitative provisions and cannot be used as a substitute for the specific provisions of the Act concerning council amalgamations (although this is not free from doubt, especially in respect to section 738).

As indicated above, the further the deviation from the amalgamation scheme prescribed by the Act, the greater the potential for a successful legal challenge.

Does IPART's 2015 assessment of councils' *Fit for the Future* proposals or the ILGRP's 2013 review of NSW Local Government constitute an inquiry for the purposes of the amalgamation scheme?

No.

The inquiry that the Government is required to undertake as part of the amalgamation scheme must occur after a proposal period has been formally initiated under s215 or 218E of the Act by either the Minister, a council affected by the proposal or an appropriate minimum number of electors (as defined in the Act).

Further, the Act requires that there be at least 28 days' public notice of the proposal [see ss216 and 218A(3)], and that the inquiry be undertaken by either the Boundaries Commission or Director General [s218F(2) and 263(2A)].

Can the Government dismiss or suspend mayors and councillors, and then appoint administrators to facilitate the forced amalgamation of councils?

Under the Act, the *Governor* has power to *dismiss* mayors and councillors, and the *Minister* has power to *temporarily suspend* mayors and councillors in certain circumstances.

The Act also contains provisions that empower the Governor/Minister to appoint an administrator in certain circumstances, such as where all councillors have been dismissed (s256) or temporarily suspended (s438M).

Legal advice suggests that these powers can only be exercised *bona fide* for the purposes of the administration of the Act. That means that if there was any evidence the powers were being exercised to get around the statutory limitations and protections for councils in the Act, the Government would be vulnerable to a legal challenge.

Any deviation from the Act's amalgamation scheme and the purpose of its provisions leaves the Government open to legal challenge – and the greater the deviation, the higher the likelihood such a challenge would succeed.

What are the circumstances required for the Governor to dismiss councillors?

The *Governor* may, by proclamation, declare all civic offices in relation to a council to be vacant:

- Following a public inquiry, if the Minister recommends that the Governor make such a declaration [s255], **OR**

- Without a public inquiry, if the Minister recommends that the Governor make such a declaration and ICAC, following an ICAC investigation, recommends that consideration be given to the making of such a declaration because of systemic corruption within the council [s255].

What are the circumstances in which the Minister may temporarily suspend a council?

There are two circumstances where the *Minister* may, by order published in the Gazette, temporarily suspend all councillors of a council. These include:

a) To restore the proper or effective functioning of the council, **OR**

b) Where the Minister considers it in the public interest.

These are briefly discussed in more detail below.

a) Temporary suspension to restore the proper and effective functioning of the council

To fulfil the legislative requirements of this option, the Minister must:

- reasonably believe the appointment of an interim administrator is necessary to restore the proper or effective functioning of the council; **AND**
- have considered the suspension criteria at Regulation 413E of the *Local Government (General) Regulations 2005*; **AND**
- have given the council notice in writing of his or her intention to suspend the council [see s438I].

If a council is suspended by the Minister under the "proper or effective functioning" option, he is prohibited from initiating a proposal (and the Governor is prohibited from making a proclamation) to amalgamate the council or to alter the boundaries of the council while the suspension is in force [s438T].

In addition, where the Minister proposes to suspend a council, he or she is required to:

- give the council written notice of the intention to suspend the council; **AND**
- invite the council to make submissions in respect of the proposed suspension, **AND**
- have regard to those council submissions made during the consultation period in deciding whether to suspend the council [s438K].

b) Temporary suspension where the Minister considers it in the public interest

To meet the requirements of this option it is necessary that:

- a public inquiry relating to the council is held or to be held; **AND**
- the Minister considers it **in the public interest** to suspend the council [s438W].

What is in the 'public interest' is incapable of precise definition as there is no single and immutable public interest.

The High Court of Australia has described “public interest” as follows:

> “*the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'.”* [*O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaurdon JJ].

Temporarily suspending councils to get around the requirements of the amalgamation scheme may leave the Government vulnerable to a legal challenge as such action is arguably not in the public interest.

If the Government forces councils to amalgamate and/or dismisses or suspends councillors to facilitate amalgamation, what role (if any) would LGNSW play in any legal challenge?

In order to appear in court or to take part in legal proceedings, a person or organisation must have standing. The general rule in Australia is that for a person to have standing, their private rights and interests are (or will be) affected by the matter, or they have a "special interest" in the subject matter.

Whether LGNSW has standing will depend on the nature and circumstances of any legal challenge.

LGNSW has ‘*Legal Assistance Policy Guidelines*’ which set out the circumstances and process in which contributions may be sought from all councils to assist with a council's or its legal costs. Where LGNSW agrees to support a request for such assistance, contributions will be sought from councils. Contributions are entirely voluntary and no council is under any obligation to make a contribution in any instance. LGNSW’s *Legal Assistance Policy Guidelines* are available on the LGNSW website: www.lgnsw.org.au

APPENDIX A – Amalgamation Scheme (forced amalgamations)

The *Local Government Act 1993* (NSW) (the "Act") contemplates two processes in which councils may be forced to amalgamate.

Firstly, the Governor may, by proclamation, dissolve the whole or part of any council area [s212] and then constitute any part of New South Wales as a new area [s204].

Secondly, the Governor may, by proclamation, amalgamate two or more areas into one or more areas, with the effect that the former areas are dissolved and the new area or areas are constituted [s218A].

The above two processes in which councils may be forced to amalgamate involve similar steps [see section 218A(3)], as follows:

STEP 1: A proposal to amalgamate two or more councils (a "**proposal**") must be formally initiated under s215 or s218E of the Act. A proposal may be initiated by:

- the Minister;
- a council affected by the proposal; or
- an appropriate minimum number of electors (as defined).

STEP 2: The Minister must give at least 28 days' public notice of the proposal (the "**public notice period**") [s216]. During the public notice period, representations concerning the proposal may be made to the Minister by a council or elector affected by the proposal [s217].

STEP 3: The Minister **must consider all representations** made by a council or elector affected by the proposal that are made within the public notice period [s217(2)].

STEP 4: If the Minister decides to proceed with the proposal, the Minister must **refer the proposal to either the Boundaries Commission or the Director General** for **examination and report** [s218F].

> Note: Section 218F(2) provides that sections 263, 264 and 265 apply to the examination of a proposal by the Director-General in the same way as they apply to the examination of a proposal by the Boundaries Commission.

STEP 5: The Boundaries Commission or Director General must consider the attitudes of the residents and ratepayers and must hold an **inquiry** [s263(2A)].

Section 263 of the Act prescribes various requirements that must be complied with as part of the inquiry into the proposal. These include:

- the giving of **reasonable public notice** of the holding of the inquiry [263(2B)].

- When considering the proposal, consideration is required to be given to various criteria, including:

- the financial advantages or disadvantages (including the economies or diseconomies of scale) of any relevant proposal to the residents and ratepayers of the areas concerned;
- the community of interest and geographic cohesion in the existing areas and in any proposed new area;
- the existing historical and traditional values in the existing areas and the impact of change on them;
- the attitude of the residents and ratepayers of the areas concerned;
- the requirements of the area concerned in relation to elected representation for residents and ratepayers at the local level, the desirable and appropriate relationship between elected representatives and ratepayers and residents and such other matters as it considers relevant in relation to the past and future patterns of elected representation for that area;
- the impact of any relevant proposal on the ability of the councils of the areas concerned to provide adequate, equitable and appropriate services and facilities;
- the impact of any relevant proposal on the employment of the staff by the councils of the areas concerned;
- the impact of any relevant proposal on rural communities in the areas concerned,
- in the case of a proposal for the amalgamation of two or more areas, the desirability (or otherwise) of dividing the resulting area or areas into wards;
- in the case of a proposal for the amalgamation of two or more areas, the need to ensure that the opinions of each of the diverse communities of the resulting area or areas are effectively represented;
- such other factors as it considers relevant to the provision of efficient and effective local government in the existing and proposed new areas.

- Members of the public must be allowed to attend the inquiry [263(5)].

The Boundaries Commission (or Director General) has an obligation to afford procedural fairness in the exercise of its statutory functions (see *South Sydney City Council v Minister for Local Government and Another* [2002] NSWLEC 74 at [48]-[52]).

STEP 6 When considering the proposal, the Boundaries Commission or Director General **must give proper, genuine and realistic consideration** and not merely pay lip service to relevant matters (see *South Sydney City Council v Minister for Local Government and Another* [2002] NSWLEC 74 at [63]).

STEP 7 If the proposal was referred to the Director General and not the Boundaries Commission, the **Director General must furnish their report to the Boundaries Commission for review and comment**, and the Boundaries Commission must review the report and send its comments to the Minister.

STEP 8 The **Boundaries Commission furnish their report and/or comments to the Minister**.

STEP 9 Following the examination and report by the Boundaries Commission or Director General, and furnishing of the report to the Minister, the Minister may:

- recommend to the Governor that the proposal be implemented:

  (a) with such modifications as arise out of the Boundaries Commission's report, and

  (b) with such other modifications as the Minister determines,

  but may not do so if of the opinion that the modifications constitute a new proposal.

- decline to recommend to the Governor that the proposal be implemented.

STEP 10 The Governor, by proclamation, implements the proposal.

Note: Section 738(1) of the Act provides:

"*A proclamation or notification of the Governor purporting to be made under this Act and being within the powers conferred on the Governor is not invalid because of any non-compliance with any matter required by this Act as a preliminary to the making of the proclamation or notification*."