

DRAFT

Submission on Senior Staff Employment

15 November 2022

Contents

Part I. Executive Summary	3
Part II. Operation Dasha	3
Part III. LGNSW Member Consultation	4
The “Mosman Motion”	5
Part IV. Employment under the Standard Contract <i>vis a vis</i> the <i>Local Government (State) Award 2020</i>	6
Addressing the Misconceptions	7
Part V. Transition Arrangements	8
Part VI. Conclusion	9

Part I. Executive Summary

Local Government NSW (“LGNSW”) is the peak body for Local Government in NSW and represents the interests of NSW councils, county councils, joint organisations, and regional organisations of councils.

On 19 September 2022 the New South Wales Office of Local Government, Department of Planning and Environment issued a Discussion Paper in Circular No 22-27, seeking the views of the local government sector on changes requested by the parties to the *Local Government (State) Award 2020* (“Award”). Briefly stated, the changes include amending the *Local Government Act 1993* (NSW) (“Act”) to remove the ability for councils to determine positions within their organisation structure to be “senior staff positions” and affording all executive level employees (other than general managers) protection from unfair dismissal.

As advised in a correspondence dated 27 October 2021, LGNSW supports the changes requested by the parties to the Award and requests the Government to remove the ability of councils to determine positions within their organisation structure to be senior staff positions.

On 15 October 2021 the LGNSW Board resolved the following:

“The Board endorses the Industrial Advisory Committee’s recommendation that LGNSW, consistent with concerns raised by ICAC in the Operation Dasha report, requests to amend the Local Government Act 1993 to remove references to senior staff from the Act so that all executive level employees (excluding general managers) are covered by the Local Government (State) Award”.

The OLG Discussion Paper seeks a response from the industry in relation to a number of key considerations. Relevantly, and consistent with the Board’s resolution of 15 October 2021, LGNSW advocates that:

1. All council employees, other than general managers, should be employed under an award such as the *Local Government (State) Award 2020*.
2. Amendments should be made to the Act to remove the requirement that the holders of senior staff positions (other than general managers) be employed under statutory fixed-term contracts.
3. In terms of transitional arrangements, LGNSW advocates that once the relevant legislative changes are made, existing occupants of senior staff positions should have the option of either:
 - i) transitioning immediately to the Award by mutual agreement between the employer and the employee; or
 - ii) remaining under the contract until the contract termination date.

Part II. Operation Dasha

On 22 March 2021 the NSW ICAC released its report into what was known as Operation Dasha. Entitled, “*Investigation into the conduct of councillors of the former Canterbury City Council and others*”, the Report followed an ICAC investigation into whether councillors of the

former Canterbury City Council engaged in corrupt conduct or influence, that included allegations of expressly or impliedly threatening to cause the dismissal of Council's General Manager unless he concluded the employment of Council's Director of City Planning and appointed another person, chosen by the councillors, to that position. The ICAC identified that corrupt influence was exercised over the General Manager through leverage of the "no reason" termination provision (clause 10.3.5) of the then *Standard Contract of Employment for General Managers*.

The interactions between councillors and the General Manager and senior staff at the former Canterbury Council encapsulate the problematic balance of power that is created by the *Standard Contract of Employment: Senior Staff (other than General Managers) of Local Councils in New South Wales* ("Standard Contract"). If not for the Standard Contract and the "no reason" termination provision (clause 10.3.5), the relevant councillors would not have been able to improperly influence the General Manager. For this reason, the ICAC recommended (at Recommendation 2): *"That the DPIE conducts a review into the no "reason" termination provision in the Standard Contract"*.

Part III. LGNSW Member Consultation

The control and governance of LGNSW is prescribed in the LGNSW rules. Rule 17(a) provides that a conference of all ordinary and associate members of the LGNSW shall be the supreme policy making body. Rule 19 provides that LGNSW's Board of Directors is the Committee of Management of the Association and has control and governance of the Association in between conferences, *"such that it may take any action or make any decision during this time as it thinks fit for the furtherance of the objects of the Association..."*.

Rule 21A of the LGNSW rules refers to an Industrial Advisory Committee ("IAC") that is established to assist and make recommendations to the LGNSW Board in relation to industrial relations issues.

The matter of removing references to senior staff from the Act was considered by the LGNSW Board on 18 June 2021 and referred to the IAC for further consideration on 28 July 2021. LGNSW arranged for the Board and IAC to be briefed by ICAC on 6 October 2021, where the Board and the IAC were provided with further information on Operation Dasha and had the opportunity to question the ICAC regarding the concerns relating to the Standard Contracts and the "no reason" termination provisions within it. The Board considered the matter again on 15 October 2021 and made the following resolution:

"The Board endorses the Industrial Advisory Committee's recommendation that LGNSW, consistent with concerns raised by ICAC in the Operation Dasha report, requests to amend the Local Government Act 1993 to remove references to senior staff from the Act so that all executive level employees (excluding general managers) are covered by the Local Government (State) Award."

The IAC and Board resolutions were informed by a survey of LGNSW members on the matter in September 2020. The survey asked the following questions:

“Do you support senior staff having access to protection from unfair dismissal like Award based employees?”

In response to this question, 71% of respondents answered “Yes” whilst 29% answered “No”. The response indicates that LGNSW members strongly support affording protection from unfair dismissal to senior staff/executive level employees. The removal of the Standard Contracts would facilitate access to this protection.

“If senior staff were to have access to unfair dismissal protection, which court/tribunal should hear such claims?”

In response to this question 70% of respondents selected the “Industrial Relations Commission of NSW”, 27% selected “No preference”, 2% selected the “Supreme Court of NSW” and 1% selected the “Land and Environment Court of NSW”.

The “Mosman Motion”

Pursuant to Rule 28(c) of the LGNSW rules, a Member of LGNSW may bring any matter falling within the objects of the Association before a Conference of the Association. Motions debated by voting delegates are then determined by a vote. If the motion is carried, the motion becomes a policy position of LGNSW.

At the 2022 LGNSW Special Conference, Mosman Municipal Council submitted the following motion (the “Mosman Motion”):

“That Local Government NSW takes no further action on the proposal to remove senior staff (excluding General Managers) from the Local Government Act 1993 in order to bring senior staff (excluding General Managers) under the Local Government State Award and re-iterate its commitment to allowing members to have individual discretion to determine whether or not to have senior officer positions, as is currently the case.”

The Mosman Motion was debated and then defeated by a majority of the LGNSW members in attendance. The defeat of the ‘Mosman Motion’ confirmed that LGNSW members support the LGNSW Board resolution of 15 October 2021 for the removal of references in the Act to senior staff so that all executive level employees (excluding general managers) are covered by the Award.

Part IV. Employment under the Standard Contract *vis a vis* the *Local Government (State) Award 2020*

The table below compares the legal rights and entitlements of employers and employees engaged under the existing standard contract for senior staff and those existing under the Award.

	Standard Contract	<i>Local Government (State) Award 2020</i>
Employers are able to dismiss employees without providing a valid reason?	✓	×
Employees are able to seek protection from alleged unfair dismissals (s84 IR Act)	×	✓
Employees are able to seek protection from alleged unlawful termination (s772 FW Act) (reverse onus of proof applies)	✓	✓
Employees have protection from alleged unlawful discrimination (<i>Anti-Discrimination Act 1977</i> (NSW), <i>Sex Discrimination Act 1984</i> (Cth), <i>Racial Discrimination Act 1975</i> (Cth), <i>Age Discrimination Act 2004</i> (Cth), <i>Disability Discrimination Act 1992</i> (Cth))	✓	✓
The ability to summarily dismiss employees for serious misconduct?	✓	✓
The ability to dismiss employees for repeated poor performance or conduct	✓ 13 weeks notice required (or payment in lieu thereof)	✓ 2 – 5 weeks notice required (or payment in lieu thereof)
The ability to dismiss employees due to indefinite incapacity	✓	✓
The ability to terminate employees due to redundancy	✓ 38 weeks pay or balance of contract	✓ 5 weeks notice, plus severance from 0 - 34 weeks depending on length of service

The ability to pay market competitive rates of pay?	✓	✓
The ability to offer bonus payments?	×	✓
The ability to require a performance agreement?	✓	✓
The ability to employ staff using a fixed term contract of employment?	✓	✓ (some restrictions apply – can't use contracts as a device to dismiss)
Transfer of sick leave (up to 13 weeks) on change of employment between councils	×	✓
Annual leave, long service leave, sick leave, parental leave, carer's leave, special leave	✓	✓
The cashing out of excess LSL into superannuation	×	✓

Precluding executive level employees from accessing the unfair dismissal jurisdiction and not requiring a valid reason to terminate the employment relationship are the only distinguishing features that set apart employment under the Standard Contract from employment under the Award.

Addressing the Misconceptions

The Discussion Paper identifies four (4) arguments against removing the ability for councils to determine positions as senior staff positions:

- 1. It will remove the current flexibility councils have to determine whether executive level employees are employed under the Award or a statutory contract.*

This argument is technically correct. However, this argument is merely a description of a process and does not identify the reasons why councils will be disadvantaged by losing the ability to designate positions as senior staff positions.

The reality is that councils will not be disadvantaged by the change, other than the fact that it will no longer be possible to terminate the employment of executive employees without a valid reason or procedural fairness.

- 2. It will diminish accountability by senior staff for their performance (rather than dismissing poor performing executive level employees for “no reason” or by not renewing their contract, councils would be expected to performance manage the employees, afford them procedural and substantive fairness, and have a ‘valid reason’ for their dismissal).*

As the Discussion Paper notes, employees are not immune or sheltered from performance management under the Award. Employers are entitled to expect compliance with lawful and reasonable directions. If compliance with a lawful and reasonable direction/requirement by an executive level employee is not forthcoming and the general manager deems that an employee's performance is unsatisfactory, the general manager is entitled to take action to address the poor performance with the employee. This is the case in a number of existing councils throughout NSW who have elected not to designate any positions as senior staff positions and performance manage their executives (other than the general manager) under the Award.

Further, upon engaging an executive level employee, the general manager and the employee can agree to the same performance targets that would have otherwise been identified pursuant to the senior staff contract. An employee can be held accountable to meeting these expectations and performance targets as essential requirements of the position.

3. *It will reduce the current flexibility that allows general managers to "build" senior management teams.*

Subject to complying with the workplace change provisions of the Award, it is possible for general managers to implement workplace change and to configure or 'build' senior management teams.

4. *It will limit the ability of councils to attract talented executive level employees by offering attractive and competitive remuneration packages (though this could be addressed by offering remuneration and other benefits that are above the award minimums).*

LGNSW reiterates the observations made in the Discussion Paper that the Award is a minimum rates Award. As such councils are not precluded from attracting quality executive level employees by offering competitive remuneration packages. Employment pursuant to the Award provides councils with the opportunity to negotiate and offer total reward packages that not only provide above-Award salaries but also terms and conditions of employment that are flexible, accommodating, and sought-after.

Part V. Transition Arrangements

Acutely aware of the fact that a party to a contract has freely entered those arrangements and have a right to the execution of the terms of the contract, LGNSW advocates that once the relevant legislative changes are made, existing occupants of senior staff positions should have the option of either:

- i) transitioning immediately to the Award by mutual agreement between the employer and the employee; or
- ii) remaining under the contract until the contract termination date.

Further, once the relevant legislative changes are made, all executive level employees (other than general managers) should immediately be afforded protection from alleged unfair

dismissal under the *Industrial Relations Act 1996*. This will provide employers with a strong deterrent from using the existing contracts simply as a device to dismiss employees without a valid and lawful reason.

To achieve the above outcome, the transitional legislation should provide for the following:

- i) No award, agreement, contract determination or order made or taken to be made or continued in force under the *Industrial Relations Act 1996* (other than an order under s89 of the *Industrial Relations Act 1996*) has effect in relation to the employment of senior staff employed pursuant to a standard contract of employment made under 338 of the Act.
- ii) The remuneration threshold at section 83(i)(b) of the *Industrial Relations Act 1996* does not apply to senior staff employed pursuant to a standard contract of employment made under 338 of the Act.

Part VI. Conclusion

There are three key reasons for the removal of senior staff positions (other than general managers) from the Act:

1. Consistent with the March 2021 findings of the NSW Independent Commission Against Corruption (ICAC), the removal of senior staff positions, will limit potential corruption risks associated with the 'no reason' termination provisions in the standard contracts, whereby elected representatives will be curtailed from exerting influence (corrupt or otherwise) on general managers and other executive level employees.
2. The removal of senior staff positions will provide all council employees (other than the general manager) the security and protection of being covered by the Award and access to the 'unfair dismissal' jurisdiction of the Industrial Relations Commission of New South Wales. Part III of this submission identified that LGNSW members overwhelmingly support this key reason.
3. The elimination of the Standard Contract, being an instrument that has historically allowed for the dismissal of senior staff employees for 'no reason', will necessitate an improvement of the industry's employment practices through increased and improved performance management.

Part IV of this submission compared the legal landscape under the standard contract and the Award and identified that the only material 'advantage' of employment under the Standard Contract is the ability for employers to terminate employees without a valid and lawful reason or procedural fairness. Employment under the Award, on the other hand, extends protection from unfair dismissal to executive level employees whilst also enabling other employment flexibilities that may not be entered into under the standard contract.

It is the collective view of LGNSW and local government unions that the proposed change is a positive change that will lead to improved employment practices in the future.