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14.1 Local Government Act 1995 Phase 2 Review *(File No. 00/00/0000)*

Author	Manager Governance
Authorising Officer	Director Corporate and Performance
Disclosure of Interest	The Author and Authorising Officer declare that they do not have any conflicts of interest in relation to this item.

OFFICER'S RECOMMENDATION

That Council;

1. Indicate which WALGA's position statements on the Local Government Act 1995 Phase 2 Review, as listed under attachment 1, it supports;

2. Request that the CEO or his delegate forward the list of supported position statements to WALGA and the Department of Local Government, Sport and Cultural Industries (DLGSC); and

3. Encourage individual Elected Members, Town staff and community members to submit responses to the surveys published by the DLGSC on the Local Government Act 1995 Phase 2 Review.

SIMPLE MAJORITY VOTE REQUIRED

NOTE: Due to the number of position statements presented to Council, it is recommended that they be considered via en-bloc voting.

PURPOSE

The purpose of this report is for Council to consider WALGA's advocacy positions in relation to Phase 2 of the Local Government Act 1995 review, and indicate whether it supports or otherwise said positions. Council's decision will then be submitted to both WALGA and the DLGSC.

DETAIL

In 2017 the McGowan Government announced a review of the Local Government Act 1995. This is the first significant reform of local government conducted in more than two decades. The aim is to modernise local governments and better position them to deliver services for the community. The first phase of the review was completed in 2018. This is the second phase of the review, the theme of which is "Delivering for the Community."

The vision is for local governments to be agile, smart and inclusive, which has been broken down into the categories below:

Agile	Smart	Inclusive
Beneficial enterprises	Administrative efficiencies – local laws	Community engagement – Integrated Planning and Reporting
Financial Management	Council Meetings	Complaints management
Rates, fees and charges	Interventions	Elections

The Department and WALGA presented a workshop on the Local Government Act Review in November 2018 for Elected Members, Executive Group and Town Officers The workshop was focused on receiving feedback, and opened the floor for discussion on improvements to the existing Act.

Following this WALGA issued an advocacy position paper, restating its positions supported over the years through its State Council meetings. These positions are what Council members were presented at two briefings on the 23 and 30 January 2019, and are now being requested to formally support or otherwise.

As follows is the list of WALGA's position statements and associated reasoning for the proposed statements. The DLGSC has also provided on its website a series of fact sheets and discussion papers related to most of the below topics, which due to their size have been included as electronic attachments to this report, and can be viewed here https://www.dlgsc.wa.gov.au/localgovernment/strengthening/Pages/LG-Act-Review.aspx (attachment 2).

AGILE

BENEFICIAL ENTERPRISES

WALGA's Position Statement: The Local Government Act 1995 should be amended to enable Local Governments to establish Beneficial Enterprises (formerly known as Council Controlled Organisations).

WALGA has been advocating for Local Governments to have the ability to form Beneficial Enterprises (formerly known as Council Controlled Organisations) for approximately ten (10) years. A Beneficial Enterprises is a standalone arm's length business entity to carry out commercial enterprises and to deliver projects and services for the community. Local Governments would have the ability to create Beneficial Enterprises through the Local Government Act, however the stand alone business entity would be governed by the Corporations Act (ie normal company law).

Beneficial Enterprises provide services and facilities that are not attractive to private investors or where there is market failure. A Beneficial Enterprise cannot carry out a regulatory function of a Local Government.

Examples:

- Urban regeneration; A Land Development may not be attractive to a private developer, however the ability to develop the land may be beneficial for the Local

Government in respect to strategic development/connection of an area. Or may be worth a joint venture with a developer.

- Measures to address economic decline in Regional WA – A small business may not be viable for a private citizen, however maybe considered an essential service for the Local Government. ie Could be the local Pharmacy or local mechanical workshop.

WALGA's Issues Paper on Beneficial Enterprises can be found under attachment 3.

At the confidential briefing on 23 February some Elected Members questioned why a model should not be decided upon as part of the Act's review process. The reason for this is that it would be counter-productive to the Local Government Act review process to attempt to land on any one particular model for the implementation of a beneficial enterprise, Local Governments should be able to match the model to the activity they wishe the enterprise to perform. WALGA advises that the recent example of prescriptive requirements for establishing a Regional Subsidiary highlights the dangers of over-regulation; to date, no Local Governments have in fact established a Regional Subsidiary.

PROCUREMENT

WALGA's Position Statement: Increase in Tender Threshold to align with State Gov. ($250,000)

The current tender threshold requirement for calling tenders is $150,000. The proposal is to increase this to $250,000 in line with State Government.

This is the maximum threshold above which tenders must be called. Nothing precludes a tender being called for a lesser value purchase. The Town's Purchasing Policy and associated internal operating procedures set out the requirements for purchases below the threshold where a tender is not called. The proposal reflects the growth in value of purchases and would enable greater flexibility and responsiveness in procurement.

DISPOSAL OF PROPERTY

WALGA's Position Statement: That Regulation 30(3) be amended to delete any financial threshold limitation (currently $75,000) on a disposition where it is used exclusively to purchase other property in the course of acquiring goods and services, commonly applied to a trade-in activity.

This provision essentially relates to where a disposal is part of a purchase and typically this occurs where plant and equipment are traded in as part of the purchase of new plant and equipment. The current limit has the effect of forcing old plant and equipment above the limit to be disposed of by a separate disposal process even though a better net change over may be achieved by trading it in. The proposal is to retain the exemption but remove the $75,000 limit. The impact of the change would be particularly relevant to those Local Governments who have fleets with large high-value earth moving and waste disposal equipment.

DEBT

WALGA's Position Statement: That section 6.20(2) of the Act requiring one month's notice of intent to borrow be deleted.

Section 6.20(2) requires, where a power to borrow is proposed to be exercised and details of the proposal are not included in the annual budget, that the Local Government must give one month's public notice of the proposal (unless an exemption applies). There is no associated requirement to request or consider written submission prior to exercising the power to borrow, as is usually associated with giving public notice. Section 6.20(2) simply stops the exercise of power to borrow for one month, and it is recommended it be deleted.

There is an argument that the requirements are there to ensure that the community is informed, however if the power to borrow had been included in the budget the community would not have been separately informed, although the budget is a public document.

MEMBERS INTERESTS

WALGA's Position Statement: Create an exemption under Regulation 4 relating to AASB 124 'Related Party Transactions' for EMs to declare interests.

Regulation 4 of the Financial Management Regulations provides a mechanism for an exemption from the Australian Accounting Standards (AAS). Regulation 16 is an example of the use of this mechanism, relieving Local Governments from the requirement to value land under roads.

WALGA has been requested by some of its members that an exemption be allowed from the implementation of AASB 124 'Related Party Transactions' due to the current provisions in the Act on declarations of interest at meetings and in Primary and Annual returns. This is regarded as providing appropriate material declaration and disclosure of interests associated with function of Local Government.

Other WALGA members however believe that AASB 124 is addressing a quite different level of disclosure. It is seeking to establish whether there is any related party issues that may have a material financial impact on the Annual Financial Statements so that the impact can be disclosed in the Annual Financial Report. The Local Government Act disclosure of interests do not capture these requirements, are not required to be quantified to determine the material financial impact and are not required to be disclosed in the Annual Financial Report.

BASIS OF RATES

WALGA's Position Statement: That section 6.28 be reviewed to examine the limitations of the current methods of valuation of land, Gross Rental Value or Unimproved Value, and explore other alternatives including simplifying and providing consistency in the rating of mining activities.

The method of valuation of land to be used as the basis of rating in Western Australia is either: Gross Rental Value for predominantly non-rural purpose; or unimproved value of land for rural purposes. These are the only two methods available under the Section 6.28 of the Local Government Act in Western Australia. A review of the method of valuation of land is currently being undertaken by the Valuer General's Office. Once this review is completed and amendments proposed, the relevant provisions in the Act will be examined, in line with any submissions received.

Eastern State Local Governments can elect to rate on one of the following options:

- Site Value - levy on the unimproved value of land only and disregards the value of buildings, personal property and other improvements;
- Capital Value - value of the land including improvements;
- Annual Value - rental value of a property (same as GRV).

Some WALGA members have argued that there is value in having consistency of methods across Local Governments as it makes comparability easier, there is consistency of understanding of methodology particularly where owners have property in more than one Local Government and would be simpler for valuers.

Alternative land valuation methods came under the scope of the WALGA Systemic Sustainability Study (attachment 4 https://walga.asn.au/getattachment/Policy-Advice-and-Advocacy/WALGA-Advocacy-Position-Statements/2-2-2007-SSS-Report.pdf.aspx?lang=en-AU), particularly Capital Improved Valuations which are in operation in Victoria and South Australia.

DIFFERENTIAL GENERAL RATES

WALGA's Position Statement:
That section 6.33 be reviewed in contemplation of time-based differential rating, to encourage development of vacant land.

This section outlines the characteristics that Local Governments may take into account when imposing differential general rates. It is recommended the issue of time-based differential rating should be examined, to address some Local Governments view that vacant land should be developed in a timely manner, as there is concern that the amount of vacant land remaining in an undeveloped state for an extensive period of time might hold up development opportunities.

RATING EXEMPTIONS

WALGA's Position Statement: Charitable Purposes

1. Amend the Act to clarify that Independent Living Units should only be exempt from rates where they qualify under Commonwealth Aged Care Act 1997;

2. Either:
(a) amend the charitable organisations section of the Local Government Act 1995 to eliminate exemptions for commercial (non-charitable) business activities of charitable organisations; or
(b) establish a compensatory fund for Local Governments, similar to the pensioner discount provisions, if the State Government believes charitable organisations remain exempt from payment of Local Government rates; and

3. Request that a broad review be conducted into the justification and fairness of all rating exemption categories currently prescribed under Section 6.26 of the Local Government Act.

Exemptions under this section of the Act have extended beyond the original intention and now provide rating exemptions for non-charitable purposes, which increase the rate burden to other ratepayers. There may be an argument for exemptions to be granted by State or Federal legislation. Examples include exemptions granted by the Commonwealth *Aged Care Act 1997* and group housing for the physically and intellectually disabled which is supported under a government scheme such as a Commonwealth-State Housing Agreement or Commonwealth-State Disability Agreement.

An example provided is that of a Perth Housing Authority that used to pay rates on its rental properties that were let to the disadvantaged. The Housing Authority rolled out a new model where this housing stock was leased long term to charitable bodies to manage. These bodies were then entitled to claim a rate exemption and no rates were paid on these properties.

WALGA's Position Statement: Rate Equivalency Payments
Legislation should be amended so rate equivalency payments made by LandCorp and other Government Trading Entities are made to the relevant Local Governments instead of the State Government.

Rate Equivalency payments apply mainly to Government agencies who operate in a commercial environment and although otherwise exempt from Local Government rates are required to make a rate equivalent payment to the State Treasury based on competitive neutrality principles. There are only a few agencies that are in this position, the most relevant example is Landcorp. A particular example is the exemption granted to LandCorp by the Land Authority Act 1992. In 1998, the Act was amended to include provisions for LandCorp to pay the Treasurer an amount equal to that which would have otherwise been payable in Local Government rates, based on the principle of 'competitive neutrality'. This matter is of concern to Local Governments with significant LandCorp holdings in their district. The shortfall in rates is effectively paid by other

ratepayers, which means ratepayers have to pay increased rates because LandCorp has a presence in the district.

The example of the Perth Airport listed in the 2012 WALGA submission on the Metropolitan Local Government Review Panel (attachment 5 https://WALGA.asn.au/getattachment/Policy-Advice-and-Advocacy/WALGA-Advocacy-Position-Statements/1-1-Metropolitan-Reform-Submission-2012.pdf.aspx?lang=en-AU) demonstrates that a system of rate equivalency payments is appropriate and can work in practice. In this case, the Commonwealth Government requires the lessee to make a rate equivalency payment to the relevant Local Government and not the Commonwealth. A similar system could be adopted for State Government Trading Entities.

WALGA's Position Statement: Rating Restrictions – State Agreement Acts
Resource projects covered by State Agreement Acts should be liable for Local Government rates.

Before the 1980s, State Government conditions of consent for major resources projects in WA included the requirement for purpose-built towns in close proximity to project sites. These conditions were detailed in State Agreement Acts, which are essentially contracts between the State Government and proponents of major resources projects that are ratified by the State Parliament.

The requirement to provide community services and infrastructure meant State Agreement Acts typically included a Local Government rating restriction clause. Many of these towns have since been 'normalised' due to Local Governments, the State Government and utility providers assuming responsibility for services and infrastructure.

In 2011, the State Government introduced a new policy on 'the application of Gross Rental Valuation to mining, petroleum and resource interests' (the GRV mining policy). The Policy was extended in 2015 and remains in place. The primary objectives of the policy were to clarify the circumstances where Local Governments could apply GRV rating to mining land and enable the use of GRV rating on new (i.e., initiated after June 2012) mining, petroleum and resource interests. This included the application of GRV rating to new State Agreement Acts. However, existing State Agreement Acts continue to restrict Local Government rating. Rating exemptions on State Agreement Acts mean that Local Governments are denied an efficient source of revenue. There are also equity issues associated with the existing exemptions since they only apply to a select group of mining companies whose projects are subject to older State Agreement Acts. Removing the rates exemption clauses from the pre-July 2012 State Agreement Acts would provide a fairer outcome for all other ratepayers, including the proponents of new resources projects.

WALGA's Position Statement:
That Section 6.56 be amended to clarify that all debt recovery action costs incurred by a Local Government in pursuing recovery of unpaid rates and services charges be recoverable and not be limited by reference to the 'cost of proceedings'.

FEES AND CHARGES

WALGA's Position Statement:
That a review be undertaken to remove fees and charges from legislation and Councils be empowered to set fees and charges for Local Government services

Fees and charges are, on average, the second largest source of Local Government discretionary revenue. Local Governments are able to impose fees and charges on users of specific, often incidental, services. Examples include dog registration fees, fees for building approvals and swimming pool entrance fees.In some cases, Local Governments will recoup the entire cost of providing a service. In other cases, user charges may be set below cost recovery to encourage a particular activity with identified community benefit, such as sporting ground user fees or swimming pool entry fees.

Currently, fees and charges are determined according to three methods:
- By legislation;
- With an upper limit set by legislation, and
- By the Local Government.

Fees determined by State Government legislation are of particular concern to Local Governments and represent significant revenue leakage because of:
- Lack of indexation;
- Lack of regular review (fees may remain at the same nominal levels for decades), and
- Lack of transparent methodology in setting the fees (fees do not appear to be set with regard to appropriate costs recovery levels).

Examples of fees and charges of this nature include dog registrations fees, town planning fees and building permits. Since Local Governments do not have direct control over the determination of fees set by legislation, this revenue leakage is recovered from rate revenue. This means all ratepayers end up subsidising the activities of some ratepayers.

When fees and charges are restricted by legislation, rather than being set at cost recovery levels, this sends inappropriate signals to users of Local Government services, particularly when the consumption of those services is discretionary. When legislative limits allow consumers to pay below 'true cost' levels for a discretionary service, this will lead to overprovision and a misallocation of resources.

Under the principle of 'general competence' there is no reason why Local Governments should not be empowered to make decisions regarding the setting of fees and charges for specific services. There may be an argument that certain fees and charges should be consistent across the State or the metropolitan area; however it is not clear why dog registration fees, as an example, should be the same in every Local Government area. Local Governments in most other states are able to set animal registration fees.

Car registration fees are not the same in every State and few would argue they ought to be; setting fees, charges and tax rates is a core function of government and Local Governments, as a legitimate sphere of government, should be able to make policy

decisions regarding their services and revenue streams. Councils should be empowered to make policy decisions regarding user-paid services provided by the Local Government.

Additionally, it is recommended that Section 6.16 be amended so that it only relates to statutory application fees and charges and not consumer items, facility entrance fees, ad hoc minor fees and charges etc. The exhaustive listing of relatively minor fee and charge items, together with the technical requirement to give public notice of any change after the adoption of the annual budget, is both inefficient and costly.

AGILE

CONTROL OF CERTAIN UNVESTED FACILITIES

WALGA's Position Statement: That section 3.53 be repealed and that responsibility for facilities located on Crown Land return to the State as the appropriate land manager.

The Local Government Act 1995 includes a provisions, under Section 3.53, that is carried forward from Section 300 of the former Local Government Act 1960. Former Section 300 stated:

"A council has the care, control, and management of public places, streets, ways, bridges, culverts, fords, ferries, jetties, and drains, which are within the district, or, which although not within the district, are by this Act placed under the care, control, and management, of the council, or are to be regarded as being within the district, except where and to the extent that under an Act, another authority has that care, control, and management."

Section 3.53 refers to infrastructure as an 'otherwise unvested facility', and is defined to mean: "a thoroughfare, bridge, jetty, drain, or watercourse belonging to the Crown, the responsibility for controlling or managing which is not vested in any person other than under this section."

Section 3.53 places responsibility for an otherwise unvested facility on the Local Government in whose district the facility is located. Lack of ongoing maintenance and accreting age has resulted in much infrastructure falling into a dilapidated state. This, together with the uncertain provenance of many of these facilities, particularly bridges, is reported as placing an unwarranted and unfunded burden on a number of Local Governments. WALGA recommends section 3.53 of the Act be deleted and that responsibility for facilities located on Crown Land return to the State as the appropriate land manager.

LOCAL GOVERNMENT ADVISORY BOARD

WALGA's Position Statement: WALGA seeks inclusion of a proposal to allow electors of a Local Government affected by any boundary change or amalgamation proposal entitlement to petition the Minister for a binding poll under Schedule 2.1 of the Local Government Act.

Details included in the WALGA December 2014 State Council minutes state as follows:

"WALGA's current policy position is that the poll provisions should apply to:

i. A boundary change or amalgamation proposal that will see one or more Local Governments abolished; and
ii. A boundary change proposal that will 'significantly affect' a Local Government, subject to further research and sector consultation being carried out on any associated criteria and for a report to be presented through the next Zone/State Council Meetings.

• Sector consultation, via an InfoPage, has been conducted with responses invited on two principal options:
i. That any boundary change should be subject to the potential for a poll to be called by electors; or
ii. That any boundary change that 'significantly affects' a Local Government – defined as a percentage variation of (either 10 percent, 25 percent, or 50 percent) in a key factor (population, rateable properties, or revenue) – should be subject to the potential for a poll to be called by electors. • 59 Local Governments (42 percent of members) responded to the request for feedback with the greatest number of respondents (29 Local Governments) favouring Option (i) above."

PROPOSAL TO THE ADVISORY BOARD, NUMBER OF ELECTORS
WALGA's Position Statement: That Schedule 2.1 Clause 2(1)(d) be amended so that the prescribed number of electors required to put forward a proposal for change increase from 250 (or 10% of electors) to 500 (or 10% of electors) whichever is fewer.

The proposed increase in the number of electors was also mentioned at the December 2014 State Council meeting as part of discussions surrounding the metropolitan local government reform.

PROPOSAL TO AMEND NAMES, WARDS AND REPRESENTATION, NUMBER OF ELECTORS
WALGA's Position Statement: That Schedule 2.2 Clause 3(1) be amended so that the prescribed number of electors required to put forward a submission increase from 250 (or 10% of electors) to 500 (or 10% of electors) whichever is fewer.

The proposed increase in the number of electors was also mentioned at the December 2014 State Council meeting as part of discussions surrounding the metropolitan local government reform.

TRANSFERABILITY OF EMPLOYEES BETWEEN STATE and LOCAL GOVERNMENT

WALGA's Position Statement: A General Agreement between State and Local Government should be established to facilitate the transfer of accrued leave entitlements (annual leave, sick leave, superannuation and long service leave) for staff between the two sectors of Government. This will benefit public sector employees and employers by increasing the skills and diversity of the public sector, and lead to improved collaboration between State and Local Government

WALGA has long advocated for accrued employment entitlements (long service leave, sick leave, superannuation and annual leave) to be transferable between State and Local Government employers. The inability for employees to transfer their accrued entitlements between sectors can act as a significant disincentive to labour market mobility between State and Local Government sectors. Anecdotal evidence to WALGA suggests that this restriction is an impediment to staff applying for and accepting positions in the alternate sector. This was particularly the case prior to the Global Financial Crisis when both sectors were experiencing widespread skills shortages.

Increasing labour market mobility by removing this significant institutional barrier will benefit both employees and employers.
For employees, this will facilitate:

- The attainment of broader and more diverse work experience;
- The development of new professional skills, experiences and capabilities;
- Creation of broader professional and personal networks; and,
- Greater appreciation and understanding for the work of other government sectors.

The benefits of an employment entitlement transfer arrangement for the State and Local Government sectors would include:

- Increasing the potential labour pool, thereby improving the capacity to attract the right candidates and reducing the time to fill vacancies;
- Cross-pollination of skills and experiences between sectors, resulting in access to a broader range of skill sets for both sectors;
- Greater workforce diversity; and,
- Greater understanding of both sectors leading to improved collaboration.

A resolution was passed at WALGA's 2006 Annual General Meeting seeking the establishment of a General Agreement between State and Local Government in Western Australia that facilitates the transfer of accrued entitlements (annual leave, sick leave, superannuation and long service leave) for staff transferring their employment between the two sectors. A General Agreement of this nature is in place between the Federal Government and State Governments.

Work on this project has been ongoing since the Association's advocacy began in 2006 with an Agreement to be based on the existing State-Federal Government Agreement. The project is being led by the Department of Local Government, in consultation with WALGA and other Local and State Government stakeholders, but has stalled despite both sectors supporting the establishment of an Agreement.

For the benefit of both spheres of government and employees, and to increase labour market mobility, WALGA and the Local Government sector is seeking the establishment of a General Agreement between State and Local Government to allow for the transfer of employment entitlements between the two sectors.

ONUS OF PROOF IN VEHICLE OFFENCES MAY BE SHIFTED: SECTION 9.13(6)
WALGA's Position Statement: Amend Section 9.13 by introducing the definition of 'responsible person' and enable Local Governments to administer and apply effective provisions associated with vehicle related offences

This proposal from the North Metropolitan Zone emerged due to an increase in cases when progressing the prosecution of vehicle related offences in court (at the request of the vehicle owner) resulted in dismissal of charges by the Magistrate when the owner of the vehicle states that he does not recall who was driving his vehicle at the time of the offence.

The Litter Act 1979 was amended in 2012 to introduce the definition of 'responsible person' (as defined in Road Traffic Act 1974) so that a 'responsible person' is taken to have committed an offence where it cannot be established who the driver of the vehicle was at the time of the alleged offence. This also removes the ability for the responsible person to be absolved of any responsibility for the offence if they fail to identify the driver. It is suggested that a similar amendment be made to Section 9.13 of the Act in order to ensure that there is consistent enforcement in regards to vehicle related offences.

QUEROLOUS, VEXATIOUS OR FRIVOLOUS COMPLAINTS
WALGA Position Statement: That a statutory provision be considered, permitting a Local Government to declare a person a vexatious or frivolous complainant, and that any amendments to the legislation be consider the following points to implement the proposed arrangements:

- Create a head of power to determine whether a community member is vexatious (potentially establish a new body through legislation and give it this power of determination);
- Define vexatious behaviour broadly to include the extent and nature of communication between the alleged vexatious person and the Local Government (using words such as 'unreasonable', 'persistent', 'extensive', 'malicious' and 'abusive');
- Outline the restrictions to statutory rights which can be imposed on a person if he or she is declared by the independent body to be vexatious;
- Establish a process, if necessary, to enable a Local Government to present its case for the alleged vexatious person to defend himself/herself;
- Determine what appeal rights are necessary.

There is an argument that the proposal to potentially establish a new body through legislation, and give it a power of determination as to whether a complaint is trivial or vexatious, places an unnecessary legislative process around an administrative and operational issue. The ability to determine a vexatious or trivial complaint could in fact be one that is at the discretion of the CEO, through established guidelines. Members of the public already have an avenue in terms of reviewing administrative procedures of Local Governments through the WA Ombudsman and the Standards Panel. This approach reflects in part the Town's intent when it recently reviewed policy 1/026 'Customer Feedback, Complaints and Suggestions'.

INCLUSIVE

ELECTORS' GENERAL MEETING
WALGA Position Statement: Section 5.27 of the Local Government Act 1995 should be amended so that Electors' General Meetings are not compulsory.

There is adequate provision in the Local Government Act for the public to participate in Local Government matters and access information by attending meetings, participating in public question time, lodging petitions, and requesting special electors' meetings.

SPECIAL ELECTORS' MEETING
WALGA Position Statement: That Section 5.28(1)(a) be amended:
(a) so that the prescribed number of electors required to request a meeting increase from 100 (or 5% of electors) to 500 (or 5% of electors), whichever is fewer; and
(b) to preclude the calling of Electors' Special Meeting on the same issue within a 12 month period, unless Council determines otherwise.

It is considered that a minimum figure of 5% or 500 electors would demonstrate that the issue is one that is of concern to a significant number of electors.

MINUTES, CONTENTS OF
WALGA Position Statement: Regulation 11 should be amended to require that information presented in a Council or Committee Agenda must also be included in the Minutes to that meeting.

Regulation 11 contains a potential anomaly in that the content requirements relating to Minutes of a Council or Committee meeting do not make reference to the reports and information that formed the basis of the Agenda to that meeting. Despite it being a common practice that Agenda reports and information are included in most Minutes, this is not universally the case, and it is recommended that an amendment be considered as an aid to community understanding of the decision-making process of the Council. The Town currently adopts this practice with the Minutes of all of its Council and Committee meeting.

REVOKING OR CHANGING DECISIONS
WALGA Position Statement: That Regulation 10 be amended to clarify that a revocation or change to a previous decision does not apply to Council decisions that have already been implemented.

Regulation 10 provides a mechanism for the revocation or change to a previous decision of Council. It does not however, contain any provision clarifying that the provisions do not apply to Council decisions that have already been implemented. This regulatory deficiency is currently managed administratively, but warrants an appropriate amendment to assist clarify the rights of a Councillor to seek a revocation or change.

ELECTED MEMBER ATTENDANCE AT COUNCIL MEETINGS BY TECHNOLOGY
WALGA Position Statement: The regulations require amendment to consider allowing attendance at a meeting via technology from any location suitable to a Council.

The current Local Government (Administration) Regulations 1996 allows for attendance by telephone, however only if approved by Council and in a suitable place. A suitable place is then defined as in a townsite as defined in the Land Administration Act 1997. This restricts an Elected Members ability to attend the meeting to a townsite in Western

Australia. This requirement does not cater for remote locations or the ability to attend via teleconference whilst in another state or overseas.

CONDUCT OF POSTAL ELECTIONS: SECTIONS 4.20 AND 4.61
WALGA Position Statement: The Local Government Act 1995 should be amended to allow the Australian Electoral Commission (AEC) and or any other third party provider to conduct postal elections.

Currently, the WAEC has a legislatively enshrined monopoly on the conduct of postal elections that has not been tested by the market. This could include the Australian Electoral Commission, individual local governments or private companies.

VOLUNTARY VOTING: SECTION 4.65
WALGA Position Statement: Voting in Local Government elections should remain voluntary.

Although voting at local government elections in Western Australia is optional, compulsory voting has existed in Australia at the State level since Queensland in 1915 and the Federal Government in 1924 and currently about 25 countries and their jurisdictions have compulsory voting yet only about 10 enforce it. The Australian Electoral Commission notes the following arguments are advanced for/against compulsory voting, although some of the points may be more relevant to State and Federal elections:

Arguments used in favour of compulsory voting

- Voting is a civic duty comparable to other duties citizens perform eg. taxation, compulsory education, jury duty
- Teaches the benefits of political participation
- Parliament reflects more accurately the "will of the electorate"
- Governments must consider the total electorate in policy formulation and management
- Candidates can concentrate their campaigning energies on issues rather than encouraging voters to attend the poll
- The voter isn't actually compelled to vote for anyone because voting is by secret ballot.

Arguments used against compulsory voting:

- It is undemocratic to force people to vote – an infringement of liberty
- The ill informed and those with little interest in politics are forced to the polls
- It may increase the number of "donkey votes"
- It may increase the number of informal votes
- It increases the number of safe, single-member electorates – political parties then concentrate on the more marginal electorates
- Resources must be allocated to determine whether those who failed to vote have "valid and sufficient" reasons.

METHOD OF ELECTION OF MAYOR/PRESIDENT: SECTION 2.11
WALGA Position Statement -Local Governments should determine whether their Mayor or President will be elected by the Council or elected by the community.

Mayors and Shire Presidents can be elected by the community or elected from the pool of councillors by the elected members. If the Mayor or Shire President is elected by the elected members, they can decide to change to have the position elected by the community. If the Mayor or Shire President is elected by the community, only the electors can decide to change back through a successful ballot of the electors. Twenty-five local governments currently use direct election with the remainder elected by a ballot of council members.

The direct election of a Mayor or President strengthens the role of electors in a district and in turn can increase public confidence. Elections for Mayor and President positions have the highest elector participation rates. Direct election can also create greater visibility for the mayor and reinforce the role of the mayor as a community leader that is accountable to electors.

Particularly in other jurisdictions, the popular election of mayors or presidents has been linked to greater politicisation and a source of instability in council. Popularly elected mayors or presidents may seek to direct council citing a mandate from the community. This can lead to considerable friction within a council and may lead to a dysfunctional local government.

ON-LINE VOTING
WALGA Position Statement -That WALGA continue to investigate online voting and other opportunities to increase voter turnout.

WALGA has received requests from three (3) Zones to explore the possibility of introducing on-line voting in Local Government elections. A State Council Item for Noting was prepared in May 2017 advising that WALGA staff will liaise with the WAEC regarding the use of the iVote system and also seek feedback from the Local Government sector on online voting and other opportunities to increase voter turnout. The Minister for Local Government has indicated that online voting is likely to be considered in the context of increasing elector participation.

Electronic voting is an alternative to traditional voting methods where the voter records their vote digitally rather than marking a ballot paper and lodging at a polling booth or via post. Online voting is a specific type of electronic voting where a vote made digitally is recorded remotely. Online voting was trialled in the 2017 Western Australian State Government elections and has been used in the 2011 and 2015 New South Wales State Government elections. The concept has also been investigated by a Commonwealth Parliamentary Inquiry in 2014, a Victorian Parliamentary Inquiry in 2017, and in the Western Australian Parliament's Community Development and Justice Standing Committee report into the 2017 Western Australian State Election. On each occasion both the benefits and risks of online voting have been highlighted.

Online voting is seen as convenient, more efficient and in the long term more cost effective. Despite these benefits, online voting has not been adopted widely principally due to concerns with the integrity of voter registration, the casting and scrutiny of votes and the high costs in establishing and conducting elections online. In New South Wales, the average cost of every vote cast electronically in the 2011 elections was $74. This compares to a cost of $3.59 per elector in elections conducted by the WAEC in

2017. iVote in New South Wales have been popular. In 2015, over 230,000 votes or over 5% were cast in the New South Wales State Government election.

While there is no evidence of instances of deliberate voter manipulation through online voting in Australia, there is a level of risk with all internet applications. These risks would necessitate the continuous application of best practice with respect to security and also need to be balanced against the risks inherent in conventional paper based systems.

METHOD OF VOTING - SCHEDULE 4.1

WALGA Position Statement - Elections should be conducted utilising the first-past-the-post (FPTP) method of voting. (electoral system is one in which voters indicate on a ballot the candidate of their choice, and the candidate who receives the most votes wins.)

The FPTP method is simple, allows an expression of the electorate's wishes and does not encourage tickets and alliances to be formed to allocate preferences.This 2008 State Council resolution influenced amendment to Schedule 4.1 in 2009 that returned Local Government elections to a first past the post system from the preferential proportional Representation. The resolution is reiterated here as an indication of the sector's ongoing preference for this vote counting system.

LEAVE OF ABSENCE WHEN CONTESTING STATE OR FEDERAL ELECTION

WALGA Position Statement: Amend the Act to require an Elected Member to take leave of absence when contesting a State or Federal election.

The options to consider include:

(i) that an Elected Member remove themselves from any decision making role and not attend Council and Committee meetings; or

(ii) that an Elected Member take leave of absence from all aspects of their role as a Councillor and not be able to perform the role as specified in Section 2.10 of the Local Government Act.

Under the Local Government Act 1995, there is no requirement for an Elected Member to either stand down or take leave of absence if they are a candidate for a State or Federal election. If elected to Parliament the Elected Member is immediately ineligible to continue as an Elected Member. Currently it is up to an individual Elected Member to determine if they wish to take a leave of absence. In some cases Elected Members have voluntarily resigned.

There is also an argument that as elected members are elected to represent the electors of the district having a mandatory stand down provision will diminish that representation and could place an additional burden on remaining elected members and the Council.

LEVEL OF SIGNIFICANCE

In accordance with Policy 4/009 'Significant Decision Making', this matter is considered to be of xx significance, as this matter xx.

CONSULTATION

Internal

- Executive Leadership Team
- Elected Members at a Confidential Forum on 23 and 30 January 2019

External Agencies

- DLGC + WALGA session with Elected Members and staff in Chambers on 13 November 2018
- DLGC session with staff (Port Hedland and Karratha) in Chambers on 14 November 2018

Community

- DLGC session with community on 13 November 2018

LEGISLATION AND POLICY CONSIDERATIONS

LG Act 1995 and associated Regulations.

FINANCIAL AND RESOURCES IMPLICATIONS

Nil in relation to the adoption of these position statements.

STRATEGIC AND SUSTAINABILITY IMPLICATIONS

The following sections of the Council's Strategic Community Plan 2018-2028 are applicable in the consideration of this item:

1.b.4 Regular opportunities for the broad community to have input into the Town of Port Hedland plans and programs are provided for transparency, accountability and two-way interaction

1.b.5 Opportunities to get involved and results of engagement are regularly promoted

2.c.1 Business and government agencies and other relevant stakeholders are engaged to:

- Identify strategic employment and economic development priorities
- Assess and address market failures affecting the cost of living
- Assess and address cost of doing business challenges

3.b.5 The protection and valuing of amenities and urban space is enhanced through community engagement

4.a.3 A positive narrative and unique brand is developed and promoted

4.b.1 Sound long-term financial planning is implemented

4.b.2 Transparent and regular financial reporting and communication to the community is undertaken

4.b.3 Transparent and regular governance reporting and communication to the community is undertaken

4.b.4 Constructive forums are provided for discussion and the representation of the diversity of views and needs that impact on the Town's developments, programs and policies

There are no significant identifiable environmental, social or economic impacts relating to this item.

RISK MANAGEMENT CONSIDERATIONS

There is a reputational risk associated with this item, which is dependent on Council's input in relation to its views on each subject of WALGA's position statements. The risk rating is considered to be medium (6) which is determined by a likelihood of unlikely (2) and a consequence of moderate (3).

There is also another reputational risk that if Council are not seen to provide input into the review, that there may be a negative perception by the community. The risk rating is considered to be medium (6) which is determined by a likelihood of unlikely (2) and a consequence of moderate (3).

This risk will be eliminated upon the adoption of the officer's recommendation.

OPTIONS

Option 1 – Support all of WALGA's position statements listed in Attachment 1

Option 2 – Support a selected number of WALGA position statements listed in Attachment 2

Option 3 – Not support any of WALGA's position statements listed in Attachment 1

CONCLUSION

This is the first comprehensive review of the Local Government Act 1995 since it was first drafted, which represents an opportunity to propose changes to the legislation that will align and reflect current local government practices. The Town Council has already considered Part 1 of the review and is now requested to become involved in Part 2 by determining whether it supports WALGA's position statements presented in this paper.

ATTACHMENTS

1. List of WALGA position statements
2. Electronic link to DLGSC facts sheets and discussion papers on LG Act Review Phase 2 https://www.dlgsc.wa.gov.au/localgovernment/strengthening/Pages/LG-Act-Review.aspx
3. WALGA's September 2018 Issues Paper on Beneficial Enterprises (also known as Council Controlled Organisations)

4. Link to WALGA Systemic Sustainability Study with reference to land valuation methods commencing on page 46 (https://walga.asn.au/getattachment/Policy-Advice-and-Advocacy/WALGA-Advocacy-Position-Statements/2-2-2007-SSS-Report.pdf.aspx?lang=en-AU)
5. Link to 2012 WALGA submission on the Metropolitan Local Government Review Panel (https://WALGA.asn.au/getattachment/Policy-Advice-and-Advocacy/WALGA-Advocacy-Position-Statements/1-1-Metropolitan-Reform-Submission-2012.pdf.aspx?lang=en-AU)

WALGA ADVOCACY POSITIONS
LOCAL GOVERNMENT ACT REVIEW

BENEFICIAL ENTERPRISES

1. Position Statement

The Local Government Act 1995 should be amended to enable Local Governments to establish Beneficial Enterprises (formerly known as Council Controlled Organisations).

FINANCIAL MANAGEMENT

2. Tender Threshold Position Statement

WALGA supports an increase in the tender threshold to align with the State Government tender threshold of $250 000, with a timeframe of one financial year for individual vendors.

3. Procurement Position Statement

That Regulation 30(3) be amended to delete any financial threshold limitation (currently $75,000) on a disposition where it is used exclusively to purchase other property in the course of acquiring goods and services, commonly applied to a trade-in

4. Power to Borrow: Section 6.20

That Section 6.20(2) of the Local Government Act, requiring one month's public notice of the intent to borrow, be deleted.

5. Basis of Rates: Section 6.28

That Section 6.28 be reviewed to examine the limitations of the current methods of valuation of land, Gross Rental Value or Unimproved Value, and explore other alternatives including simplifying and providing consistency in the rating of mining activities.

6. Differential General Rates: Section 6.33

That Section 6.33 of the Local Government Act be reviewed in contemplation of time-based differential rating, to encourage development of vacant land.

7. Member Interests - Exemption from AASB 124

Elected Member obligations to declare interest are sufficiently inclusive that WALGA seeks an amendment to create an exemption under Regulation 4 of the Local Government (Financial Management) Regulations relating to AASB 124 'Related Party Transactions' of the Australian Accounting Standards (AAS).

<u>RATES, FEES AND CHARGES</u>

Imposition of Fees and Charges: Section 6.16

8. Position Statement

That a review be undertaken to remove fees and charges from legislation and Councils be empowered to set fees and charges for Local Government services.

9. Rating Exemptions – Charitable Purposes: Section 6.26(2)(g)

1. Amend the Local Government Act to clarify that Independent Living Units should only be exempt from rates where they qualify under the Commonwealth Aged Care Act 1997;

2. Either:
   (a) amend the charitable organisations section of the Local Government Act 1995 to eliminate exemptions for commercial (non-charitable) business activities of charitable organisations; or
   (b) establish a compensatory fund for Local Governments, similar to the pensioner discount provisions, if the State Government believes charitable organisations remain exempt from payment of Local Government rates; and

3. Request that a broad review be conducted into the justification and fairness of all rating exemption categories currently prescribed under Section 6.26 of the Local Government Act.

Rating Exemptions – Rate Equivalency Payments

10. Position Statement

Legislation should be amended so rate equivalency payments made by LandCorp and other Government Trading Entities are made to the relevant Local Governments instead of the State Government.

Rates or Service Charges Recoverable in Court: Section 6.56

11. Position Statement

That Section 6.56 be amended to clarify that all debt recovery action costs incurred by a Local Government in pursuing recovery of unpaid rates and services charges be recoverable and not be limited by reference to the 'cost of proceedings'.

Rating Restrictions – State Agreement Acts

12. Position Statement

Resource projects covered by State Agreement Acts should be liable for Local Government rates.

ADMINISTRATIVE EFFICIENCIES

13. Control of Certain Unvested Facilities: Section 3.53

WALGA seeks consideration that Section 3.53 be repealed and that responsibility for facilities located on Crown Land return to the State as the appropriate land manager.

14. Local Government Grants Commission and Local Government Advisory Board

WALGA seeks inclusion of a proposal to allow electors of a Local Government affected by any boundary change or amalgamation proposal entitlement to petition the Minister for a binding poll under Schedule 2.1 of the Local Government Act

15. Schedule 2.1 – Proposal to the Advisory Board, Number of Electors

That Schedule 2.1 Clause 2(1)(d) be amended so that the prescribed number of electors required to put forward a proposal for change increase from 250 (or 10% of electors) to 500 (or 10% of electors) whichever is fewer.

16. Schedule 2.2 – Proposal to amend names, wards and representation, Number of Electors

That Schedule 2.2 Clause 3(1) be amended so that the prescribed number of electors required to put forward a submission increase from 250 (or 10% of electors) to 500 (or 10% of electors) whichever is fewer.

17. Transferability of employees between State & Local Government (Questions 82-84)

A General Agreement between State and Local Government should be established to facilitate the transfer of accrued leave entitlements (annual leave, sick leave, superannuation and long service leave) for staff between the two sectors of Government. This will benefit public sector employees and employers by increasing the skills and diversity of the public sector, and lead to improved collaboration between State and Local Government.

18. Proof in Vehicle Offences may be shifted: Section 9.13(6)

That Section 9.13 of the Local Government Act be amended by introducing the definition of 'responsible person' to enable Local Governments to administer and apply effective provisions associated with vehicle related offences.

COMPLAINTS MANAGEMENT

19. Querulous, Vexatious and Frivolous Complainants

Amend the *Local Government Act 1995*, to:

- Enable Local Government discretion to refuse to further respond to a complainant wherethe CEO is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith, or has been determined to have been previously properly investigated andconcluded, similar to the terms of section 18 of the *Parliamentary Commissioner Act 1971*.
- Provide for a complainant, who receives a Local Government discretion to refuse to deal with that complainant, to refer the Local Government's decision for third party review.
- Enable Local Government discretion to declare a member of the public a vexatious or frivolous complainant for reasons, including:
  - Abuse of process;
  - Harassing or intimidating an individual or an employee of the Local Government in relation to the complaint;
  - Unreasonably interfering with the operations of the Local Government in relation to complaint.

COUNCIL MEETINGS

Electors' General Meeting: Section 5.27

20. Position Statement

Section 5.27 of the Local Government Act 1995 should be amended so that Electors' General Meetings are not compulsory.

21. Special Electors' Meeting: Section 5.28

That Section 5.28(1)(a) be amended:
(a) so that the prescribed number of electors required to request a meeting increase from 100 (or 5% of electors) to 500 (or 5% of electors), whichever is fewer; and
(b) to preclude the calling of Electors' Special Meeting on the same issue within a 12 month period, unless Council determines otherwise.

22. Minutes, contents of: Regulation 11

Regulation 11 should be amended to require that information presented in a Council or Committee Agenda must also be included in the Minutes to that meeting.

23. Revoking or Changing Decisions: Regulation 10

That Regulation 10 be amended to clarify that a revocation or change to a previous decision does not apply to Council decisions that have already been implemented.

24. Elected Member attendance at Council meetings by technology

The current Local Government (Administration) Regulations 1996 allows for attendance by telephone, however only if approved by Council and in a suitable place. A suitable place is then defined as in a townsite as defined in the Land Administration Act 1997. This restricts an Elected Members ability to attend the meeting to a townsite in Western Australia.

This requirement does not cater for remote locations or the ability to attend via teleconference whilst in another state or overseas. The regulations require amendment to consider allowing attendance at a meeting via technology from any location suitable to a Council.

ELECTIONS

Conduct of Postal Elections: Sections 4.20 and 4.61

25. Position Statement

The Local Government Act 1995 should be amended to allow the Australian Electoral Commission (AEC) and or any other third party provider to conduct postal elections.

Voluntary Voting: Section 4.65

26. Position Statement

Voting in Local Government elections should remain voluntary.

Method of Election of Mayor/President: Section 2.11

27. Position Statement

Local Governments should determine whether their Mayor or President will be elected by the Council or elected by the community.

28. On-Line Voting

That WALGA continue to investigate online voting and other opportunities to increase voter turnout.

Method of Voting - Schedule 4.1

29. Position Statement

Elections should be conducted utilising the first-past-the-post (FPTP) method of voting.

30. Leave of Absence when Contesting State or Federal Election

Amend the Act to require an Elected Member to take leave of absence when contesting a State or Federal election, applying from the issue of Writs. The options to consider include:

(i) that an Elected Member remove themselves from any decision making role and not attend Council and Committee meetings; or

(ii) that an Elected Member take leave of absence from all aspects of their role as a Councillor and not be able to perform the role as specified in Section 2.10 of the Local Government Act.

Western Australian Local Government Association

Council Controlled Organisations as a Means of Improving Local Government Efficiency

A Position Paper

September 2018

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EXECUTIVE SUMMARY

There has long been a broad recognition of the need for reform of the local government sector in WA. However, the approach of the former State Government to local government reform was to focus on structural reform: it did not address the broader issue of how local governments can act in a more commercially efficient manner to develop alternative revenue streams or to enter into commercial partnerships with the private sector to achieve their objectives more efficiently. The inclusion in 2016 of a statutory capacity to form regional subsidiaries was a valuable step towards improved efficiency by facilitating the delivery of shared services, but did not address the issue commercial efficiency in some areas of increasing importance to local government.

In 2010 WALGA adopted as policy the concept of establishing subsidiary corporate structures (then called Local Government Enterprises) as vehicles for greater efficiency and improved partnering practices for local government involvement in a range of commercial activities that are distinct from the commonly understood "core functions" of local government. Examples of such activities include affordable housing projects, urban regeneration, measures to address economic decline in regional centres, public-private partnerships to develop local government assets and measures to enhance the income-generating asset base of local governments.

Local governments in WA are involved in a range of commercial activities while being constrained from conducting those activities in a commercially efficient manner. Common examples of such activities include airports, waste management facilities, aged care and land development. In some smaller communities, local government has had to become involved in providing basic retail services where no equivalent private business exists. It is also arguable that some of the so-called "core" functions of local government (such as road construction) are also "commercial" to the extent that these functions could equally well be provided by private contractors. However, current legislation prevents local governments from conducting these operations with the level of commercial efficiency that exists for private enterprise.

The involvement of local government in property dealings or other commercial enterprises raises a number of issues including real or perceived conflict of interest between the regulatory and ownership roles of local government, the capacity and competence of local government to undertake such enterprises and the exposure of ratepayers to financial risk. WALGA believes that the most efficient way to avoid potential or actual conflicts of interest, to minimise financial risk and to engage the necessary commercial and corporate expertise is through the creation of an arms' length vehicle such as a wholly-owned subsidiary company to hold and manage the commercial interests of a local government. The essence of such an entity is that it be legally obliged to operate at arms' length from the local government and to act independently of all other factors (including political pressure) within the regulatory parameters applicable to any other corporate entity.

Western Australia is unique among Australasian jurisdictions in imposing a blanket prohibition on the use of corporate governance structures by local government. In both Queensland and New Zealand, for example, it is common practice for local authorities to place their commercial activities in wholly-owned corporate subsidiaries under the control of external Boards. Some of these companies control assets valued at hundreds of millions of dollars that are run on a commercial basis but are ultimately owned and controlled by local government.

This paper argues that there are certain overarching objectives that are essential to any reform of governance for commercial activities by local government. These include the need to maximise commercial efficiency, improve the quality of decision-making in the utilisation of local government assets, prudently broaden sources of local government income, retain local government control of its assets, and enhance community consultation in matters affecting the disposition of local government assets. It proposes that local government should be empowered – with the consent of its community through detailed consultation processes – to establish corporate entities known as *Council Controlled Organisations* (CCOs), governed by directors appointed for their relevant expertise, to manage and develop assets using normal commercial arrangements. WALGA believes that that the use of such structures will improve commercial efficiency and reduce risk to ratepayers, while enabling local government to achieve strategic outcomes that are extremely difficult to achieve under current statutory restrictions.

WALGA supports and welcomes the recently established capacity for local government to form regional subsidiaries, which is primarily directed at enabling the more efficient delivery of shared services by multiple local governments. The present proposal seeks to build on that reform and advocates the application of normal corporate governance and operational principles to CCOs established by one or more local governments to address complex commercial challenges in a commercially efficient manner.

1.0 INTRODUCTION AND BACKGROUND

1.1 Background to the Paper

There has long been a broad recognition of the need for reform of the local government sector in WA. However, the approach of the former State Government to local government reform was to focus on structural reform: measures to date have included attempts to encourage local government amalgamations through the provision of transition funding incentives which met with little response, an unsuccessful attempt to reduce the number of metropolitan local governments and the introduction in 2016 of the concept of regional subsidiaries with limited scope of permissible activities. There has not to date been any attempt to address the issues of capacity building to enable local governments can act in a more commercially efficient manner to develop alternative revenue streams or to enter into commercial partnerships with the private sector to achieve their objectives more efficiently.

In 2010 WALGA adopted as policy the concept of establishing subsidiary corporate structures (then called *Local Government Enterprises*) as vehicles for greater efficiency and improved partnering practices for local government involvement in a range of commercial activities that are distinct from the commonly understood "core functions" of local government. Examples of such activities include affordable housing projects, urban regeneration, measures to address economic decline in regional centres, public-private partnerships to develop local government assets and measures to enhance the income-generating asset base of local governments. The case for this policy was comprehensively explored in a discussion paper *Local Government Enterprises as a Means of Improving Local Government Efficiency* (Conway Davy Pty Ltd, May 2010) which drew heavily on the model of Council Controlled Organisations (CCOs) used in New Zealand. That paper in turn followed on from previous work commissioned by the former Department for Infrastructure and Planning (DPI) in 2007 to address statutory constraints to local government involvement in urban regeneration, which was adopted by WALGA as part of its response to the 2008 Systemic Sustainability Study of Local Government.

In 2011 WALGA updated its thinking on a preferred implementation model for this reform, and adopted the CCO terminology which is now used in this paper. The submission of WALGA and others on this topic was acknowledged in the final report of the Metropolitan Local Government Review Panel which noted that *"The Panel believes [giving local governments power to establish and manage CCOs] is a reasonable and logical consideration in the context of local government reform*". (Report section 5.4.4, July 2012).

More recently, the State Government has embarked on a comprehensive review of the *Local Government Act 1995*. Stage 2 of that review is currently in the consultation phase and includes consideration of the case for the creation of *Beneficial Enterprises* (a terminology borrowed from the Queensland Act). This paper forms a background to, but does not formally constitute, WALGA's submission to that process.

1.2 The Case for Change

WALGA believes that the case for the changes proposed in this paper is fundamentally founded in the desire of all levels of government and their communities to achieve better social outcomes in the most efficient possible manner. In some cases this requires direct action to achieve outcomes that the private sector has been unable or unwilling to deliver; in other cases a partnering approach with the private sector is more appropriate; in some instances the desired outcome is purely to achieve a fair financial return on community-owned assets in order to finance community programmes.

All of these approaches are long-established principles of government operations at the State level. WALGA believes that statutory amendments should be enacted to enable local governments to mirror that approach at a local community scale.

Affordable housing

The State Planning Strategy 2050 provides a strategic context for planning and development across WA. It recognises affordable living as being a component of the state's social wellbeing and economic growth. The strategy acknowledges that housing affordability in the Greater Perth region is challenged by both a mismatch between changing demographic structures and the diversity of housing choices, and by affordable land being located on the outskirts of the metropolitan area where travel costs outweigh any initial capital savings. The primary housing objective of the strategy is to create affordable living by creating a more consolidated urban footprint with higher dwelling densities developed around transport corridors.

Two of the main constraints to the development of affordable housing are the cost of land in areas close to urban centres and transport corridors, and the difficulties of balancing an acceptable investment return for private enterprises with the desire to keep selling (or renting) prices as low as possible for first home buyers or those with limited financial means. Local government can play a major role in both respects by contributing its land as equity in joint ventures while being willing to accept a lower rate of financial return on its investment than a private firm is forced to achieve in order to satisfy its lenders. As a result, projects that would not otherwise meet rates of return required by lenders can be structured to provide differential returns according the social policy objectives of a local government and the financial objectives of the private partner.

The reforms proposed in this paper would provide a basis for this to be achieved through the use of differential shareholding structures that are relatively routine in the private sector, in a way that shields ratepayers from the risk of commercial failure associated with any development venture.

Urban regeneration

A review undertaken by the former Department of Planning and Infrastructure in 2007 and endorsed by WALGA identified urban development as an area of particular importance that was constrained by the statutory provisions set out in the *Local Government Act 1995* ("LGA"). There is a broad recognition that planning instruments alone are insufficient to deliver sustainable development outcomes: maintaining a balance between flexibility and certainty inevitably limits the capacity of planning authorities to regulate the form of development they wish to see produced, while the development outcomes that are best able to deliver environmental and social sustainability are often not those that meet the profit objectives of the private sector. As a consequence, profit-driven property development tends to overlook (or be unable to deliver) longer-term environmental, social and cultural outcomes.

Urban development – especially the regeneration of established older urban areas - is by its nature a highly fragmented process involving the interaction of many individual investment and development decisions by a large number of individual property owners over a prolonged period. Many such owners lack the financial resources, or the motivation, to redevelop their properties to higher or newer forms, especially in the early stages of the redevelopment cycle: there may be little or no established market for such developments in low-intensity suburban locations, and even if property owners

could be persuaded of the merits of such projects they would struggle to attract the necessary financial and other resources to undertake them.

The State has responded to this challenge in some areas by the establishment of localised Redevelopment Authorities (now merged into the Metropolitan Redevelopment Authority) with wide powers to plan and implement urban redevelopment where the scale (generally suburb-wide in nature) is sufficient to warrant its intervention. In other areas, Landcorp has played an important role in redeveloping property at a more localised scale. However, there is no established mechanism for the public sector to facilitate redevelopment and regeneration at the level of individual properties or small clusters of properties.

WALGA believes that there is a legitimate role for local government to facilitate the achievement of such outcomes where it is beyond the capacity or appetite of the private market to do so and the scale is below the threshold for the involvement of the State agencies. Local government also needs to be better equipped to undertake public-private partnerships for the development of its assets, and may seek to undertake value-enhancing projects purely for investment or revenue-generating purposes. In addition to the inherent regulatory-ownership conflict this raises, the nature of such projects is such that direct local government ownership and management is not always conducive to commercial efficiency.

Existing commercial activities

The current statutory framework is philosophically predicated on the idea that local governments do not or should not, in general, become involved in “commercial” enterprises. However, that view overlooks the fact that local governments already operate a wide range of business ventures while being constrained from conducting those activities in a commercially efficient manner. Common examples of such activities include airports, waste management facilities, aged care and land development. In some smaller communities, local government has had to become involved in providing basic retail services where no equivalent private business exists.

It is also arguable that some of the so-called “core” functions of local government are actually commercial, to the extent that these functions - for example, waste collection and road construction - could equally well be provided by private contractors and hence involve local government in competing within a wider marketplace.

However, current legislation prevents local governments from conducting these operations with the level of commercial efficiency that exists for private enterprise. As a consequence, ratepayers are not only denied the higher level of financial return that would flow from a commercially efficient approach but in many cases also are forced to suffer inferior performance.

Regional economic development

Similar issues have been identified where local government sees merit in providing commercial services with the intention of arresting or reversing economic decline in regional towns. In many such cases, private owners are unable to obtain an adequate commercial return from an enterprise or are unable to service the associated debts, resulting in the closure of local businesses with consequential loss of amenity and increased costs for the community. In such circumstances a local government may see opportunities to achieve broader social outcomes that justify accepting reduced financial returns, and thus step into the service gap itself.

Alternatively, a local government may identify local economic development initiatives that require equity support during the early stages of business operations, and may wish to provide that support through direct investment until the venture reaches a stable level of operation. As an alternative to direct financial support (for example through self-supporting loans) equity participation provides a means for the local government and its ratepayers to derive a fair financial return for its assistance, albeit that this return may be some time in eventuating.

As a specific relevant instance, it has been found in some regional towns that there is market failure in relation to the development of new housing - the financial returns available in relation to development and construction costs have been insufficient to attract private investment in rental housing, which has had a constraining effect on economic growth through the lack of suitable accommodation for the employees that are required by local businesses. However, residential housing construction does not readily fit within normal local government procurement provisions and where local government has sought to enter the market the experience has invariably been there is a cost premium associated with compliance with those provisions. Having the ability to operate in a more commercially nimble manner can demonstrably reduce the cost of construction.

Operating a business at any level is fundamentally incompatible with the governance arrangements of local government, and WALGA therefore supports the development of governance arrangements to assist local government in achieving these objectives in a commercially efficient manner while preserving the essential transparency and accountability of local government.

2.0 ISSUES AND OBJECTIVES

2.1 Local Government Involvement in Commercial Activities

The involvement of local government in commercial enterprises raises issues of competence, risk, capacity and regulatory separation. Accordingly, there is a need to consider how an appropriate balance can be achieved between the need to act in a commercially efficient manner and legitimate concerns for accountability and transparency in any public sector activities. WALGA considers that local government involvement in such matters should be based on the general principle that where a local government seeks to undertake direct involvement in commercial enterprises, this should be through structures that provide the necessary separation between the regulatory and ownership functions of the local government.

The most efficient structure to avoid potential or actual conflicts of interest is through the creation of a separate but wholly-owned entity to hold and manage the commercial interests of a local government (as well to enter into participation ventures with other parties). The essence of such an entity is that its governing body (in a company context, the Board) is legally obliged to operate at arms' length from the local government, within the performance parameters laid down in its constitution, and to act independently of all other factors (including political pressure) within the regulatory parameters applicable to any other corporate entity as enshrined in Corporations law.

It has been argued that the current statutory restrictions on such structures are necessary to ensure transparency and accountability in local government property and commercial dealings, with the objective of removing opportunities for corruption. However, it is arguable that the existing legislation has done no better in this regard than has been achieved in other jurisdictions that do not have such limitations. There is also no evidence in other jurisdictions that the separation of local government ownership and control through corporate subsidiaries has led to corrupt practice – if anything the reverse is arguably true. Placing the commercial activities of local government at arms' length from political influence - under the control of independent Boards made up of expert directors and the regulatory provisions of normal company law – will likely produce outcomes that are less susceptible to corruption than the existing statutory arrangements.

A major factor for local governments to consider when contemplating commercial enterprises is the risk of commercial failure, and the recognition that the elected members and staff are unlikely to have the necessary commercial or corporate experience to manage that risk. While most Councils will always (and appropriately) be highly risk-averse, there is little in the current statutory framework to constrain local governments from placing the assets of the local government at considerable risk provided the consultation procedures of section 3.59 are followed. There is likely to be less prospect of commercial failure and substantially less risk to the ratepayers if such enterprises are placed under an incorporated structure, where the board of the entity becomes legally accountable for the assets and any financial risk associated with their use.

It is also argued that the risks associated with borrowing for commercial activities can be mitigated through simple measures to limit the capacity of local governments to underwrite the debts of their corporate subsidiaries, in diametric contrast to the approach currently in place for regional subsidiaries.

Benefits of establishing an incorporate subsidiary entity include:

(a) the ability to employ professional directors and management with experience specific to the commercial objectives of the entity;

(b) removal of detailed investment decisions from day-to-day political processes while retaining political oversight of the overarching objectives and strategy;

(c) the ability to take an overall view of commercial strategy and outcomes rather than having each individual transaction within a complex chain of inter-related decisions being subject to the individual notification and approval requirements of the Local Government Act;

(d) the ability to quarantine ratepayers from legal liability and financial risk arising from commercial or investment activities;

(e) the ability to set clear financial and non-financial performance objectives for the entity to achieve; and

(f) greater flexibility to enter into joint venture and partnering relationships with the private sector on conventional commercial terms.

This is a normal and proper approach in the private sector, as well as for local government in some other Australasian jurisdictions. In both Queensland and New Zealand, for example, it is common practice for local authorities to place their commercial activities in wholly-owned corporate subsidiaries under the control of external boards. Some of these companies control assets valued at hundreds of millions of dollars that are run on a commercial basis but are ultimately owned and controlled by local government. In South Australia, Councils are directed to organise their affairs so as to separate their regulatory and other roles.

2.2 Statutory Constraints

The current statutory framework for local government in Western Australia, as set out in the *Local Government Act 1995* (LGA) and associated regulations, contains a number of provisions that constrain local government from operating on normal commercial terms. These provisions create significant hurdles to the commercially efficient use of local government assets or the conduct of trading activities on normal commercial terms.

In general, the LGA is framed to deal with the traditional “core functions” of local government and to ensure that those functions are delivered in a manner that is within the capacity and resources of local governments. It would seem, however, that there was insufficient consideration in the legislation to the possibility of local government activity expanding beyond these traditional functions, the involvement of local government in economic or urban development initiatives, or the accumulation of investment assets to help fund local government functions. It is also apparent that the framers of the Act were unaware of the scale of local government ownership of freehold property, including property held for purely investment purposes, and the practical challenges associated with efficient management of such a property portfolio or the potential role of local government in facilitating economic development.

Furthermore, the very concept of the role of government in general – including local government – has developed in the 22 years since the Act came into force, with a broader range of expectations as to both the capacity of public bodies to contribute to sustainable and socially worthwhile outcomes and the need for public-private partnering to achieve these objectives.

There are four specific provisions in the *Local Government Act 1995* constraining local government from acting in a commercially efficient manner, especially but not solely in relation to property-related activities:

Section 3.58 requires that a local government can only dispose of property by public auction, public tender, or otherwise by giving Statewide public notice of the proposed disposition and inviting public submissions that must be considered before the disposition is made. This is a significant disincentive to private bodies seeking to undertake potentially risky development projects (such as those involved in urban regeneration), as they normally seek to prove up the commercial feasibility of a project before paying for the land, and are reluctant to expose commercially sensitive information to their competitors.

Section 3.59 requires that before a local government undertakes a major land transaction or a major trading undertaking it must prepare and advertise a business plan that details include details of the expected effect on the provision of facilities and services by the local government, and on other persons providing facilities and services in the district, its expected financial effect on the local government and on the ability of the local government to manage the transaction. The business plan must be advertised for 6 weeks, and if as a result of any matters raised in public submissions the local government decides to vary its proposal in any significant way, it must repeat the entire process. While such a process is not considered unreasonable in principle, its application to transactions that may be commercially simple despite their size is a matter that could be reviewed.

Section 3.60 provides that a local government *cannot form or take part in forming, or acquire an interest giving it the control of, an incorporated Company or any other body corporate except a regional local government or a regional subsidiary unless it is permitted to do so by regulation*. Regulation 32 of the Local Government (Finance and General) Regulations 1996 provides that a local government may participate in an incorporated association or a body corporate established under the Strata Title Act 1998, but there is no general provision permitting the establishment of trading or investment entities. For the reasons set out in this paper, this prohibition is a significant constraint to the efficient delivery of some functions of local government.

Section 6.21 prohibits local governments from giving security over assets in relation to any borrowings by a local government, providing at s 6.21(2) that the only such security that may be given is the general fund (in essence, the annual rates revenue). A local government that owns commercial or investment property cannot borrow against the value of that property to improve it, inevitably leading to a decline in economic value. This provision also severely constrains the scale of investment that can be undertaken and unnecessarily broadens the risk to ratepayers.

The prudent use of debt is an appropriate means of spreading the cost of an asset and matching that cost to its revenue-generating capacity. Allowing local government to give security solely over defined assets (such as investment property or a self-contained business) is also a prudent measure to protect ratepayers from open-ended commercial risk.

2.3 Regional subsidiaries

In 2016 the Government enacted amendments to the LGA to provide for the creation of regional subsidiaries. The amendments introduced new sections 3.69 to 3.72 to the LGA, providing that:

> *Two or more local governments making arrangements under which they are to provide a service or carry on an activity jointly may, with the Minister's approval and in accordance with the regulations, form a subsidiary body (called a regional subsidiary) to provide that service or carry on that activity* (s 3.69(1))

Local governments wishing to establish a regional subsidiary are required to prepare a draft charter detailing key elements of the proposed body's establishment, purpose, governance and operation and forward this to the Minister for approval (s 3.70).

The purpose of the regional subsidiaries provision was to create entities that could operate on a regional basis with greater flexibility than the existing regional council model, and one welcome provision in particular provides that the governing body of a regional subsidiary may consist of members who are not council members or employees, potentially creating a basis for appointment of a "fit for purpose" Board with relevant experience in the area of proposed activity.

WALGA welcomes and supports the introduction of regional subsidiaries as a vehicles for the more efficient delivery of shared services. However, the usefulness of the regional subsidiary model for addressing the challenges referred to in this paper is severely constrained by provisions in the *Local Government (Regional Subsidiaries) Regulations 2017* which:

- prohibit a regional subsidiary from entering into any land transaction or trading undertaking (defined in s 3.59 of the LGA as any activity carried on by a local government with a view to producing profit); and

- prohibit a regional subsidiary from borrowing money other than from one of the participating local governments.

Most of the issues addressed in this paper are local in nature and fall within the ambit of a single local government, and hence also fall outside the ambit of the regional subsidiaries model as a result. While the origins of the regional subsidiaries proposal stemmed from the use of similar provisions in force in South Australia, and mirror that State's practice to some degree, it is noteworthy that the South Australian legislation also provides for a single local government to form a subsidiary with the approval of the Minister to carry out (non-regulatory) functions purely within a single local government area.

WALGA advocates revision of the above regulations in order to make the regional subsidiaries model more effective as a vehicle for the sharing of core services, but does not believe that it is an effective response to the challenges described in section 1.2 of this paper.

2.4 Objectives of Reform

In making the case for reform, WALGA has identified a number of overarching objectives that it believes to be essential and against which proposed reforms should be tested. These are:

i) that the statutory framework should maximise the commercial efficiency of local government in utilising its assets for the benefit of the community, and should improve the quality of decision-making regarding the utilisation of local government assets.

ii) that ownership and control of local government assets should remain with local government, whether directly or indirectly.

iii) that local governments should be encouraged to prudently broaden their sources of income in the interests of long-term financial sustainability.

iv) that a local government taking commercial risk should do so only to the extent that its “core” assets and functions are not placed at risk.

v) that the statutory framework should support and enhance principles of community consultation in matters affecting local government assets.

vi) that governance arrangements should comply with recognised “best practice”.

vii) that commercial ventures by local governments should not operate in a manner that unfairly competes with the private sector.

viii) that local governments should be encouraged and facilitated to partner with the private sector where appropriate to maximise efficiency in the pursuit of their objectives.

WALGA believes that the ideal model for achieving these objectives is the introduction of incorporated subsidiary entities, called for the purposes of this paper *Council Controlled Organisations* (CCOs).

The possibility of a commercial enterprise being undertaken jointly by a local government and a private sector party (or multiples of each) raises the issue of a threshold test for determining that a corporate entity established for that purpose falls under the general definition of a CCO and hence becomes subject to the relevant provisions of an amended LGA. It is suggested that an appropriate test would be that control of the entity, as that term is defined in section 50AA of the *Corporations Act (Cth*), rests with one or more local governments. A minority or non-controlling shareholding by local government(s) should remain covered by the normal investment provisions of the LGA.

2.5 Accountability and Risk

Ensuring transparency and accountability in local government property and commercial dealings, with the objective of removing opportunities for corruption, is a key issue for any governance model. Apart from the unquestionable proposition that good governance requires the separation of regulatory and commercial activities, it should be acknowledged that leaving valuable assets at the disposal of elected

Councillors may create opportunities for those assets to be used in ways that are designed to assist the political interests of Councillors rather than always those of the ratepayers at large (the true owners of the assets). This potential problem is inherent in the accountability model of elected local government, by contrast with the general law of accountability for directors and trustees.

In principle, elected members are accountable through the electoral process, but during the intervening period a Council is largely free to make commercial decisions according to the political policies of the majority of Councillors. Whether or not a particular decision regarding community assets is legitimate will always be a contestable issue and Councillors are entitled to argue that as long as they are re-elected they have a mandate from the voters for their actions. By contrast, directors and trustees are accountable at law on a continuous basis for ensuring that every decision they make is in the best interests of their shareholders or beneficiaries, and heavy legal sanctions apply to any breach of these duties.

It is therefore argued that placing the commercial activities of local government at arms' length from political influence - under the control of independent Boards made up of expert directors and the regulatory provisions of normal company or trust law – may produce outcomes that are less susceptible to corruption than the existing arrangements.

Another significant factor for local governments to consider when contemplating commercial enterprises of any sort is that of the risk of commercial failure, accompanied by recognition that the elected members and staff are unlikely to have the necessary commercial or corporate experience to manage that risk while seeking commercial efficiency. While most Councils will always (and appropriately) be highly risk-averse, there is in fact little in the current statutory framework to constrain local governments from placing the assets of the local government at considerable risk provided the consultation procedures of section 3.59 are followed. Perhaps paradoxically, therefore, there is almost certainly less prospect of commercial failure and substantially less risk to the ratepayers if such enterprises are placed under the control of CCOs. By quarantining the assets employed within a corporate structure, the board of the entity becomes legally accountable for them and any financial risk associated with their use. Prudential controls by (for example) lending agencies act as a further constraint on reckless assumption of risk.

While greater commercial efficiency, and thus improved financial returns, should result from the use of the CCO model, it will be relevant to consider that the CCO will not enjoy the local government exemption from paying tax on any profits gained from commercial activities. The removal of this anomalous tax treatment in instances where a local government is undertaking a function that is traditionally the preserve of the private sector would represent sound public policy.

2.6 Key Issues

2.6.1 Defining core assets and services

There is an arguable case that the current legislation is broadly appropriate to the protection of the services and assets generally regarded as traditional "core" functions of local government. This raises the question of how decisions should be made as to what is a "core" function.

WALGA does not support any approach for the "core" functions of local government to be defined in a generic sense by regulation, as this will inevitably perpetuate a "one size fits all" approach that would not be uniformly appropriate. There is wide variance in the range of services provided by different local governments and there is no uniform approach in relation to the assets used to deliver agreed "core" functions – for example, one local government may wish to own a purpose-built library, another may wish to house its library in rented premises, while another may wish to share library services with a neighbouring local government (or provide no such service at all).

Similarly, WALGA believes that any attempt to narrowly define what constitutes a "commercial" or "trading" function is equally likely to create difficulties in establishing an appropriate definition. It is arguable that virtually every local government operates functions that could be considered as business enterprises to the extent that they are functions also provided by the private sector (common examples include road construction, waste collection, landfill management and aged housing). Neither can these readily be defined by situations where there is no private alternative locally available, as it is arguable that the existence of any service need creates an opportunity for the establishment of a business to meet that need.

2.6.2 Basis of authority

A key issue in relation to any variation to current local government practice is where the authority should lie for any decision by a local government to establish a CCO. Consistency with the current provisions governing regional subsidiaries would suggest that this authority should rest with the Minister for Local Government. This approach does however raise potential issues concerning the legal liability of the Minister – for example in commercial litigation - in the event that the information on which the approval was given turned out to be incomplete or incorrect.

Requiring the approval of the Minister would require the establishment of a regulatory framework on which the approval decision was to be based. In this respect, the provisions currently in the LGA and Regulations regarding the establishment and approval of regional subsidiaries provide an effective model that could also apply to CCOs

WALGA is of the view that, with appropriate safeguards and consultation mechanisms, there is an arguable case for leaving the decision entirely in the hands of the Council after consultation with the community (as is the case under New Zealand legislation). Statutory provisions could be enacted in similar terms to the regional subsidiaries regulations regarding the consultation process, with oversight and monitoring by the Auditor General.

Although WALGA favours maximum devolution of authority, it accepts that a regime of Ministerial approval is a likely precondition of statutory reform in this regard and would support an approach similar to that applicable to the establishment of a regional subsidiary.

2.6.3 Governance

In keeping with principles of governance best practice and maximising the commercial efficiency of decision-making, it is essential that:

- the governance of any CCO is vested in people appointed solely for their relevant experience and expertise;

- the basis of any such appointments is transparent;

- appropriate reporting mechanisms are established that balance the need for commercial efficiency with accountability to both the shareholding local government(s) and the community;

- performance measures for any CCO be transparent and the achievement of these measures be monitored and reported.

The issue is whether staff or elected Councillors of a local government should be appointed to the governing board of a CCO owned by that local government (whether or not they have experience and expertise specific to the nature of the entity) is a matter for debate. It is arguable that the appropriate arms-length relationship cannot be maintained if staff and/or Councillors sit on the board of a subsidiary CCO, although it might also be argued that some such representation would improve the alignment of interests between the two bodies. This issue is best addressed through the adoption of a policy by each local government on the appointment of directors as part of the annual consultative process and separately from the actual formation of an entity.

2.6.4 Business planning

The formation of any CCO should be preceded by the development of a comprehensive business plan that explains the rationale for its creation, the commercial objectives to be achieved and the key financial and risk parameters under which it will operate. Because a CCO would be undertaking commercial functions, this should be more detailed in scope than that currently proposed for a regional subsidiary.

Apart from providing a transparent explanation of the anticipated scale, funding and viability of the proposed entity, this process will also provide a valuable "hurdle" that will ensure that any local government contemplating the establishment of an CCO fully understands the medium-term prospects of the entity, including in particular its equity and capital needs and its future capacity to pay dividends to the shareholding local government. Requiring that the business plan includes pro-forma accounts of the CCO for (say) the first 5 years of operation, as well as a statement of the benefits of adopting such a model by comparison with the status quo, would give the Council and the community the opportunity to fully assess the likely costs and benefits of adopting the CCO model.

A key tool in the governance of any CCO will be its Statement of Intent, which should spell out (among other things) how the entity will engage with community expectations. The Statement of Intent should be a public document and the entity should be required to report against its provisions at least annually.

2.6.5 Competitive advantage

It is inherent in the CCO concept that it should be a stand-alone entity (other than for its ownership) at arms' length from its shareholding local government(s). It is also fundamental to the CCO concept that they should operate in a manner that does not unfairly disadvantage private sector firms operating in the same market. In order to achieve the appropriate degree of separation, a number of provisions should be

enacted in relation to borrowings by a CCO and the giving of security for debt. These include:

- Allowing a CCO to borrow on normal commercial terms and give security for borrowings over any of its assets

- Providing that if a CCO borrows from a shareholding local government, it must be at a rate (inclusive of transaction costs) that is no less than the borrowing costs of the local government

- Prohibiting a shareholding local government from guaranteeing the debts or obligations of a CCO

The last of these is a feature of the equivalent New Zealand legislation that acts as a natural constraint on the capacity of a CCO for excessive or risky borrowing, quarantines the local government's ratepayers from commercial risk and prevents a CCO from using the balance sheet of its parent local government to compete unfairly against private firms that lack comparable support. It is also inherent in the notion of limited liability under which a CCO should operate.

Provisions similar to sections 43 and 44 of the Queensland Act could also be incorporated to enshrine the competitive neutrality principle in any functions of a CCO, including requirements for full cost pricing of goods or services.

2.6.6 Oversight

While the directors of a CCO must carry the primary legal responsibility for its operations, there is a good case for an additional level of oversight of the operations of a CCO. WALGA supports the case for the Auditor General to be the mandated auditor of any CCO with broad powers to monitor compliance with prudent commercial norms as well as financial probity.

2.7 Other Australasian Jurisdictions

2.7.1 New South Wales

Section 358 of the *Local Government Act 1993* provides that a Council "must not form or participate in the formation of a corporation or other entity, or acquire a controlling interest in a corporation or other entity, except with the consent of the Minister". Subsection (3) of that section provides that the Minister's consent may be given where the Council can demonstrate that the formation of, or the acquisition of the controlling interest in, the corporation or entity is in the public interest.

This leaves wide discretion with the Minister to approve such arrangements, and to impose conditions on approval, if the Minister is persuaded of the public interest value in such an arrangement.

The NSW Act contains detailed provisions (at Sections 400B to 400N) relating to the establishment of Public Private Partnerships (PPPs), and the NSW Department has issues detailed guidelines for the establishment of such entities. The use of corporate structures for participation in PPPs is clearly contemplated, but not specifically referred to in the Act. In practice, these are dealt with by Ministerial consent under Section 358.

Section 55A of the NSW Act provides that (except in the case of entities established under the PPP provisions) a Council must comply with the procurement provisions set out in the Act "even though the contract … involves something being done to or by an entity that the council has formed or participated in forming".

One widely cited example of the use of a corporate entity in NSW is the so-called "Hunter model" under which a separate corporate entity has been established to provide a range of services and functions to or on behalf of the Councils of the Hunter region as well as marketing these services to the private sector.

2.7.2 Victoria

Section 193 of the Local Government Act 1989 provides that a Council may, for the purpose of performing any function or exercising any power under the Act –

(a) participate in the formation and operation of a corporation, trust, partnership or other body; and

(b) subscribe for or otherwise acquire and dispose of shares in or debentures or other securities of, a corporation; and

(c) become a member of a company limited by guarantee; and

(d) subscribe for or otherwise acquire and dispose of units in a trust; and

(e) acquire and dispose of an interest in a partnership or other body; and

(f) enter into partnership or into any arrangement for sharing of profits, union of interest, co-operation, joint venture, reciprocal concession or otherwise, with any person or corporation carrying on or engaged in, or about to carry on or engage in, any business or transaction capable of being conducted so as to directly or indirectly benefit the Council.

Subsection (5C) provides that where the value of the "at risk" investment exceeds the greater of $100,000 or 1% of the Council's rates revenue, the Council must before proceeding commission a risk assessment by an appropriately qualified (external) person; where the value exceeds $500,000 or 5% the approval of the Minister is required (together with that of the Treasurer if the amount exceeds $5 million). The Minister may place conditions on or issue guidelines for such ventures, and may order a poll of voters to be held before the venture proceeds.

Subsection (11) provides that if a Council participates in the formation of a corporation, trust, partnership or other body in which it will have a controlling interest, the accounts and records of the corporation, trust, partnership or body are subject to audit and inspection as if they were accounts and records of the Council.

The Victorian Act also contains restrictions on the sale or lease of land by a Council in broadly similar terms to those of the Western Australian Act.

2.7.3 Queensland

Section 40 of the Queensland *Local Government Act 2009* enables Councils to conduct a "beneficial enterprise" and in doing so to participate in any partnership, unlisted company (limited either by shares or by guarantee) or any other association provided that they may not enter into any such association that involves unlimited liability. A beneficial enterprise is defined as "an enterprise that a local government considers is directed to benefiting, and can reasonably be expected to benefit, the

whole or part of its local government area". As noted above, the Act also requires and defines the application of competitive neutrality to any local government business activity including those conducted by beneficial enterprises.

Section 46 of the Act places the onus on a local government to undertake a "public benefit assessment" of any new significant business activity, in order to determine whether the benefit to the public (in terms of service quality and cost) of applying the competitive neutrality principle outweighs the cost of doing so.

This approach, which devolves to a local government the responsibility for determining whether and how to approach such an enterprise, is supported by WALGA for adoption in Western Australia.

2.7.4 South Australia

Under section 36(1) of the *Local Government Act 1999*, a Council "has the legal capacity of a natural person" and "has the power to do anything necessary, expedient or incidental to performing its functions or duties to achieve its objectives". Section 36(3) directs Councils that they should, in the arrangement of their affairs, take reasonable steps to separate their regulatory activities from their other activities. In the South Australian context, this generally involves commercial business activities being separated in a subsidiary established under section 42 or a regional subsidiary established under section 43. A single Council subsidiary may not be formed to carry out regulatory functions, but this restriction does not apply to a regional subsidiary.

A council may in the performance of its functions engage in any commercial activity or enterprise and may, in connection with a commercial project, establish a business or participate in a joint venture, trust, partnership or other similar body (section 46), with the exception that it may not acquire shares in a company (section 47) and such activities are carried out either through separate business units or subsidiaries.

Section 201 of the Act gives Councils a general and largely unfettered capacity to deal in land that is vested in Council either in fee simple or as a lessee.

The Local Government Association of South Australia is currently evaluating the case for removing the prohibition on acquiring shares in a company, with a view to potentially seeking the revocation of section 47.

2.7.5 Tasmania

Section 29 of the *Local Government Act 1993* authorises Councils to establish a "controlling authority" to carry out any scheme, work or undertaking on behalf of the council, manage or administer any property or to carry out any other functions on behalf of the council. The establishment of a controlling authority requires only that local public notice be given as to the purpose, membership and Rules of the proposed authority. The scope and content of the Rules of an authority are set out in section 38 There is no other requirement for (for example) Ministerial approval.

2.7.6 New Zealand

The *Local Government Act 2002* invests local government with the "power of general competence", giving Councils unfettered powers to enter into commercial transactions of any kind, provided that in certain cases involving the disposal of assets deemed to be of special significance, or the transfer of functions to a corporate entity, the Act requires that a specified consultative process be followed. Subject to that consultative process, Councils may establish CCO's for any purpose, either commercial, non-commercial or even regulatory in nature.

The operations of a CCO are the responsibility of its Board, and are governed by general corporations law with certain additional limitations imposed by the Local Government Act. These limitations include measures such as provisions that:

- a Council may not guarantee the liabilities of a CCO
- a Council may not advance money to a CCO at more favourable terms than would apply to the Council itself
- a CCO must appoint the Auditor-General as its auditor
- a Council must have a policy covering the appointment of directors, who must be appointed solely on the basis of their relevant experience and expertise
- a CCO must develop and operate under an annual Statement of Intent that is subject to the approval of the shareholding Council and is a publicly available document
- the proceedings and decisions of a CCO are subject to the same freedom of information and public accountability measures as apply to a Council.

It is a requirement of the Act that every Council must adopt policies defining the strategic significance of its assets: any disposal of such assets or a change in the mode of service delivery attracts specific consultative obligations. There is no limitation on the creation of subsidiary companies, although each of these is subject to the consultative processes for their establishment, including provision of detailed information regarding the nature of the company and its key financial parameters.

2.8 Public-private partnerships

There is broad recognition of the value of developing effective partnering relationships between public authorities and the private sector, in order to utilise the financial resources and expertise of the private sector in delivering cost-effective solutions in a range of areas. As noted above, some jurisdictions have developed detailed protocols for managing this process in the local government sector.

Property development is one area in which a partnering approach is particularly relevant. However, the nature of the development process is such that it often requires the parties to take a staged approach to risk management, project financing and the evaluation of development options. In most cases, this is simply not possible to achieve in the context of the requirements of sections 3.58 and 3.59 of the LGA. A further complication is that, if a joint venture is established, it cannot then dispose of developed property (whether by sale or lease) using normal market practices - for example, units or sections cannot be listed for sale in the normal manner – without contravening section 3.58.

The use of a CCO structure would facilitate the establishment of commercial partnerships that have the flexibility to suit a variety of equity arrangements according to the specific circumstances of the proposed partnership.

3.0 PRACTICAL APPLICATIONS OF A CCO MODEL

3.1 Affordable Housing

A major barrier to the development of affordable housing in the Perth metropolitan area is the cost of land in areas closer to the inner city and the main transport corridors. Local government can play a major role in this regard by contributing its land as equity in joint ventures with the private sector, and accepting an equity return from a completed development upon sale instead of requiring payment for the land up front (which imposes cashflow constraints and holding costs upon a project). In order to enable the land to be used as equity for project funding, it needs to be transferred to ownership of the developing entity; for a local government to retain some control over the asset pending project completion it ideally needs the capacity to readily enter into incorporated joint ventures.

A second significant issue is the difficulty of balancing an acceptable investment return for private enterprise with the desire to keep selling (or renting) prices as low as possible for first home buyers or those with limited financial means. This often means that a project will generate a lower rate of financial return than a private firm requires in order to satisfy its lenders. However, in order to meet its social objectives a local government will often be willing to accept a lower rate of return, equivalent to its cost of capital with a small margin (that is, without explicitly seeking a profit margin on the overall cost of development). If local governments were free to participate in the formation of companies, it would be easy to then structure a development entity with a two-tier share structure so that the local government holds shares with a lower rate of return than the private partner, which may then achieve the required rate of return on its investment.

There is also an acknowledged market failure for housing in many regional areas throughout the state, where the issue is more one of the cost of construction relative to market value. A similar two-tier approach would enable local governments to facilitate private sector investment while also removing some of the compliance costs associated with local government procurement practices.

3.2 Sustainable Urban Development

State planning strategy seeks to ensure that the Perth region can accommodate future growth in a way that enables it to be economically successful, enjoyable to live in, and minimises the adverse effects of growth on the environment. This strategy is based on the proposition that a long-term solution to the region's transport and infrastructure issues requires a shift towards a more compact and sustainable urban form.

In order to achieve the objective of urban consolidation within existing suburban centres, a more proactive approach is required than has historically been the case. In many cases, the market does not support the preferred planning outcomes to the degree necessary for such developments to occur through conventional planning processes alone. In order for development of the preferred typology to occur in such cases, there is a need for local authorities to act as a catalyst; for example by acquiring strategically located property so as to ensure that it is developed to an appropriate level of intensity, or by participating with private owners to facilitate development of a compact and sustainable urban form.

Furthermore, in order to properly integrate transport and land use policies at a local level, local governments need to be proactive in identifying sites for future transport-related facilities and development, and establishing measures to control and facilitate appropriate forms of development. Measures are also required to ensure that high quality urban design is a feature of any such development.

As the private property sector is overwhelmingly driven by considerations of financial efficiency, this can result in outcomes that (however successful as individual projects) do not address the wider needs of the community and do not produce coherent and integrated urban areas. The duty of local government to provide for the social, economic, environmental and cultural well-being of its community includes ensuring that the development of property in their communities contributes to these well-beings. It will often be the case that the only way for local government to ensure that urban centres develop in accordance with these principles is to take a strategic ownership stake, thus putting it in a stronger position to incorporate non-financial objectives into any project (as a landowner, not solely as a planning authority).

Local government should therefore be encouraged and empowered to selectively acquire or retain such interests in property as may be required to achieve sustainable urban development outcomes. This will include property to support the development of the necessary service, social and community infrastructure and property seen as strategically vital to achievement of urban consolidation, good urban design and/or integration of transport infrastructure and land use. Local government should also be encouraged to explore the creation of effective partnerships to achieve these objectives.

Measures that might be taken by local government to achieve urban regeneration objectives at the local level could include:

- directly undertaking selected development projects, especially those of a form that is not attractive to the private sector (e.g. higher density or mixed use in suburban localities without a prior established pattern of such development), in order to establish or influence the market for the preferred typology;

- joint ventures with private owners to mitigate the development risk as a means of allowing projects to proceed that otherwise might not be within the capacity of a private owner;

- underwriting of specific aspects of development projects where the private sector is unable or unwilling to carry the risks involved (for example, entering into an option to acquire some of the developed property over and above what the owner would normally develop); and

- aggregation of sites to enable development to occur on a suitable scale to achieve the desired density or land use outcomes, thus reducing risk and holding costs to potential developers and allowing the local government to control the form of development through covenants on the property.

However, the involvement of local government in property ownership and/or development beyond its traditional social reasons raises a number of issues regarding public perception and the relationship with the community. These include:

- actual or perceived conflicts of interest between local government's role as a planning authority and as a property owner or developer;

- potential conflicts between political or social priorities of local government and its more commercial activities;

- conflict between the need for commercial confidentiality to achieve better returns and the responsibility for transparency and accountability to the residents and ratepayers;

- the appropriateness of any public authority undertaking commercial activities traditionally the realm of the private sector;

- the management of financial risk when public or community assets are involved;

- decision-making processes which revolve around consultation and consensus that are not conducive to making commercial investment decisions.

The proposed CCO structure is an ideal response to these issues by ensuring that a CCO operates in the same way as any other company and is subject to the same regulatory controls.

3.3 Local Economic Development

Sustainable urban development also requires a focus on balancing demand factors. One of the key drivers of a sustainable and compact urban form is the ability of local residents to earn their living within their local area. Generating the right type and balance of local economic development is therefore essential to the achievement of this objective. Ways in which local government can contribute to this include:

- acquiring sites considered suitable for employment-generating activities, and making these available to purchasers or users on favourable terms

- using innovative approaches to property ownership to take the property cost component out of the equation for prospective investors

- acquiring and aggregating property so as to overcome fragmentation and to offer developers sites that are suitable for commercial development

- contributing ancillary functions to shore up commercial developments that might be ahead of the market

The use of a CCO structure is preferable to direct local government participation in any such activities, to minimise overt political influence in such decisions, to ensure separation of regulatory and commercial decision-making, to minimise commercial risk to ratepayers and to ensure that such decisions are based on rigorous analysis of the financial risks and returns.

3.4 Income Generation and Investment

There is a wide acknowledgement of the need for local government to diversify and expand its sources of income beyond rates. Many Perth local authorities own property that can contribute to this outcome. Investment property is a traditional form of (largely) capital-protected investment, and a prudent portfolio approach to the accumulation of investment assets by a local authority would require at least some of its assets to be held in the form of investment property. Income from these properties can then be used to supplement rates revenue, sustain services or fund specific community development projects.

A related issue is that posed by urban growth. In order to be proactive and strategically "ahead of the game" in managing the challenges of that growth, local government needs to invest heavily in terms of human and financial resources. The costs of doing this pose a significant problem, in that whilst over time the growth of population will generate increased revenues in these areas, these revenues lag behind the forward planning phase and can take several years to show up to any significant degree. Furthermore, those increased revenues are needed to provide the services demanded by the expanded community, leaving a permanent funding shortfall from the early stages of growth.

While a system of developer contributions can help defray the cost of infrastructure and facilities needed to service this growth, this does not provide a complete solution, and no mechanism exists to fund the recurrent and operating expenditure incurred in planning for and managing the effects of growth.

It is worth noting that Local Governments collect money from developers to buy land or construct infrastructure. Sometimes initial contributions can be made many years prior to the actual purchase of the land and the construction of the infrastructure due to a range of reasons, but most significantly, a lack of willingness from particular owners to develop and contribute and a shortage of contributions to allow for land purchase and infrastructure construction. The Association argues that if a Local Government is collecting developer contributions for the purchase of land, that money should be invested in land, so that if the land asset to be purchased inflates, the Local Governments investment will inflate at approximately the same rate. The investment needs to be linked to rising or falling land values.

The financial benefits of growth tend to be enjoyed disproportionately by entrepreneurs who identify development opportunities rather than by the communities that provide the underpinning infrastructure and social fabric that make their development successful. Local government, on behalf of the community, can legitimately capture some of that benefit as a social dividend through a programme of selectively acquisition of property with value growth prospects. Such acquisitions may also serve a strategic purpose in terms of urban design or economic development considerations, allowing local government to achieve multiple objectives of acting as a catalyst for private sector development or investment while controlling the form, scale and timing of development while at the same time capitalising on increasing property values and thus delivering a return to its ratepayers.

3.5 Economic Decline in Regional Centres

A major concern for local government in regional towns is the issue of falling population and hollowing out of local services leading to economic decline as services and theassociated revenues are transferred to larger centres. There is widespread acknowledgement of the difficulties in some regional and rural areas in attracting or retaining essential commercial infrastructure. The decline of rural banking, medical and transport services has been well documented, but there are many less obvious elements to a sustainable community that are under continuing threat. These are often traditionally private sector enterprises that can no longer operate viably in shrinking catchments – such as a pharmacy or a service station.

Local government may see a case for involvement in the delivery of commercial services (either directly or through an equity stake) in order to avoid triggering a "tipping point" of social decline. While private owners may be unable to obtain an adequate commercial return from an enterprise or to service the associated debts, local government may be able and willing – with community support – to trade off lower financial returns for broader social outcomes. It should be open to local government to acquire, underwrite or invest in such facilities where this is seen as contributing to the well-being of the local community, and there is no reasonably available alternative.

Where a local authority chooses to acquire and operate such a business for the benefit of its local community, its chances of success will depend on the efficiency with which it is managed and operated, requiring as close as possible the replication of sound private sector commercial practice. This must include an efficient corporate governance model and the ability (and obligation) to operate like any privately-owned enterprise, including the ability to buy and sell assets, and raise finance

3.6 Regional airports

Many airports in regional centres are owned and operated by local governments which lack the resources to maximise the potential of these both operationally and as investment assets. Various alternative models have been suggested to overcome the need for greater investment in operational systems, capital upgrades and ancillary development, including the establishment of multi-site regional airport entities and/or taking on private sector partners (such as the owners or operators of other larger airports that could bring operational and marketing resources and investment finance to such an arrangement).

Airports have been shown to be both major business opportunities as well as drivers of economic development, and maximising their development potential should be a major consideration for regional development policy. This can be achieved while keeping a significant ownership stake in local hands by creating business models that lend themselves to private and/or collaborative investment. WALGA believes that the CCO model is ideally suited to this objective.

3.7 Waste management

Most waste management functions in the Metropolitan area are currently operated by Regional Councils established under the LGA. While the Regional Council model provides for a greater degree of flexibility in certain respects, its governance arrangements still act as a constraint on commercial efficiency.

Waste management is an activity that readily lends itself to an integrated commercial structure and is also commonly undertaken in other jurisdictions under joint venturearrangements with commercial waste management companies. A CCO model is considered ideal for such joint venture arrangements.

In considering its policy position on waste management, WALGA notes that the composition of Regional Councils varies, dependent on the specific Regional Council establishment agreement, and that elected members appointed to the Regional Councils possess varying degrees of knowledge regarding waste management which may not include the in-depth technical and business understanding necessary to oversee these multimillion dollar businesses. WALGA believes that a viable alternative approach is to consider the establishment of CCOs to allow these entities to act in a commercial role, based on the concept of a skills-based Board.

4.0 STATUTORY AMENDMENTS

As noted above, other Australasian jurisdictions have a spectrum of statutory arrangements for local government commercial functions, ranging from permitting with Ministerial consent to requiring the use of arms-length entities. WALGA supports and advocates for the adoption of an approach broadly similar to the New Zealand CCO model, which is widely employed to carry out a broad range of functions where (in the opinion of the shareholding local authorities) the efficiency of delivering such functions would be enhanced by the creation of professionally governed entities established for the specific purpose and where the appropriate consultation and oversight measures are in place.

In some respects, the 2016 amendments to the LGA and related regulations applicable to regional subsidiaries provide a useful starting point for a suite of amendments governing Council Controlled Organisations. A non-exclusive list of the measures requiring either amendments to the Act or new regulations would include:

(a) a provision in section 3.60 that a local government may establish or participate in a CCO;

(b) a proviso that a local government may not establish a CCO for the purposes of dealing with any regulatory function;

(c) requirements for the development of a Statement of Intent and a Business Plan for any proposed CCO, of a form similar to the provisions now applicable to regional subsidiaries;

(d) details of the consultation and Ministerial approval process similar to those now applicable to regional subsidiaries;

(e) requirements for the adoption of a clear and transparent policy and process regarding the appointment of directors and/or trustees;

(f) a prohibition on the giving of guarantees or security for the performance of a CCO, or the granting of shareholder finance on preferential terms;

(g) detailed performance monitoring and reporting requirements for CCOs;

(h) provisions to cover circumstances such as CCOs owned by more than one local government, or where the purchase of shares by a local government would give rise to CCO status in a company not otherwise applicable;

(i) investment in a CCO, if all other requirements are met, being deemed an approved investment under section 6.14;

(j) provisions applicable to joint enterprises that are partially owned by other interests, so that the CCO provisions come into effect only when there is control (as defined in the Corporations Act) by one or more local governments.