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Company Secretary
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4000

Via email: EGC@parliament.qld.gov.au

Dear Sir/Madam

ELECTORAL AND OTHER LEGISLATION (ACCOUNTABILITY, INTEGRITY AND OTHER MATTERS AMENDMENT BILL 2019: LOGAN CITY COUNCIL SUBMISSION

I refer to your call for submissions on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* (**the Bill**). Logan City Council (**Council**) is pleased to provide a submission to the Committee in respect of the Bill.

Council generally welcomes the reforms contained with the Bill and acknowledges the need to make improvements to processes to ensure local governments provide good outcomes for the community.

In respect of the new process for managing councillor conflicts of interest and new obligations in relation to disclosures on the registers of interest, the Bill inserts into the *City of Brisbane Act 2010* (**COBA**) and the *Local Government Act 2009* (**Act**) largely the same provisions as those which were introduced in May 2019 by the *Local Government Electoral (Implementing Stage 2 of Belcarra) and Other Legislation Amendment Bill 2019* (**Stage 2 Bill**) (but ultimately omitted during consideration in detail).

In its submission to the Economics and Governance Committee on the Stage 2 Bill dated 20 May 2019, Council indicated its support for these proposed changes. Council maintains this position. However, Council has significant concerns in relation to the practical application of the new councillor advisors regime (new Chapter 6, Part 5, Division 2A), and does not support implementation of the regime without an appropriate institutional framework to deal with various industrial relations issues which may arise in respect of councillor advisors, such as the institutional framework currently in place for ministerial appointments.

Without limiting this view, the comments and proposed amendments set out by Council in this letter are suggestions for improvements to the Bill, taking into account the likely impact of the Bill on Council.

Councillor advisors and local government employees

1. Council understands that the legislative intent is to create a regime for councillor advisors that mirrors (to some extent) the regime for ministerial advisors at the State level.

2. The difficulty for local governments is that, unlike the State regime where specific legislation and industrial frameworks addresses many of the industrial issues for ministerial staff, the proposed regime for councillor advisors does not.

3. The Bill expressly excludes councillor advisors from the application of certain parts of the Local Government Act framework that would ordinarily apply to employees of the local government (such

as the disciplinary regime), on the basis that councillor advisors are not "local government employees" (as defined).

4. It appears that the intent is that local governments must rely on the contract of employment (rather than a statutory regime or industrial framework) to impose employment terms and conditions, including to establish an effective disciplinary regime and to create linkages between the statutory appointment and contractual employment of the councillor advisor.

5. Council is concerned that this approach will create both practical issues, and legal industrial relations issues, that could leave Council exposed to liability (e.g. in the event that a councillor advisor's appointment is revoked by a councillor, or the chief executive officer seeks to take steps to terminate a councillor advisor's employment).

6. In this regard, if this regime is to progress, Council requests that the Committee give further consideration to, and clarification about, the following matters:

(a) If appointed by a Councillor, the advisor must enter into a written contract of employment with the local government that provides for the items prescribed by section 197A(4) and so becomes an employee of Council. It is not clear whether the Queensland Local Government Industry (Stream A) Award State 2017 as well as the certified agreements of individual local governments will apply to the councillor advisors. This relates to whether they fall within the classifications in those instruments (given the focus of the classifications on reporting within a local government's broader organisational structure), and if so whether they fall within the exceptions for senior officers provided for in those instruments.

Council recommends that the application (or otherwise) of these instruments be made clear in the legislation, as this will impact on the benefits that apply to councillors advisors and the salaries payable.

(b) It is also not clear whether the minimum notice of termination and redundancy provisions under the Industrial Relations Act 2016 will apply to councillor advisors in addition to any entitlements that may apply under the Award and certified agreements mentioned above.

(c) If a councillor advisor who is appointed by a Councillor is a current local government employee, it is not clear whether the employee will be entitled to keep all rights accrued or accruing to the person as a local government employee as if service as a councillor advisor were a continuation of service as a local government employee.

(d) There is also no limitation on the termination or redundancy benefits that may be incorporated in the contract of employment entered into between a councillor advisor and a local government.

(e) A councillor advisor must enter into a written employment contract with Council. However, it is not clear as to what would occur if a councillor appoints an advisor, but the advisor does not agree to the terms required by the local government under sections 197A(3) and (4) or does not comply with these terms. Presumably, this would be intended to be a breach of the advisors' code of conduct.

If so, then it should be clear that the advisor's appointment automatically ends if the advisor does not enter into a written employment contract with Council or if Council terminates the employment contract for breach of its terms. Given that Council is not responsible for the appointment of the advisor and does not have any express powers of revocation, this should be clarified.

(f) On the basis that councillor advisors are not "local government employees" (as defined), the chief executive officer will only have rights to discipline and terminate the employment of a councillor advisor as prescribed by the contract of employment. The statutory regime generally applicable to local government employees will not apply. Council considers that this could create tension and a lack of certainty as between the appointing councillor, and the CEO, but may still leave Council exposed in the event that industrial action is taken by a councillor advisor. As noted above, Council considers that the proposed institutional framework (which relies on the administrative arm of Council to deal with industrial issues of council advisors) is inadequate to address these issues.

Powers of direction regarding provision of administrative support

7. Under the amended section 170 of the Act, councillors will have the ability to issue directions to local government employees in accordance with guidelines about the provision of "administrative support" made by a local government's chief executive officer under the new section 170AA.

8. The Mayor is prevented under s170(2) of the Act from giving a direction to the chief executive officer that would be inconsistent with a resolution, or direction adopted by resolution of the local government. Council considers that this same limitation should apply to directions under any guidelines made pursuant to s170AA.

9. Given the potential breadth of what might constitute administrative support, it should also be considered whether directions given under the administrative support regime should be subject to the same record keeping obligation as exists under section 170(4) for directions given to the CEO by the mayor.

10. Further, while the issue may be dealt with in the guidelines, Council considers that it would be worthwhile for the legislation to provide that if a councillor gives a direction to a local government employee that is inconsistent with a direction to the same employee given by another councillor, then both directions are of no effect.

Councillor's conflicts of interest

11. Under Chapter 5B, (Councillors' conflicts of interests), a "councillor or other person" is deemed to participate in a decision in certain circumstances (new section 150EE). Council recommends that it be clarified as to who would be an "other person" for the purpose of this provision, and also recommends that new section 150EK should be clarified to address whether an "other person" would also be subject to the offence created by this provision. Is this provision, for example, intended to extend to councillor advisors?

12. In relation to the new conflict of interest provisions in respect of "ordinary business matters":

(a) Section 150EF(1)(c) states that new Chapter 5B will not apply to a conflict of interest in a matter that relates solely to (the making of) a resolution for the *adoption* of a budget. However, it is not clear whether a resolution for the *adoption of an amendment* of a budget would also be an ordinary business matter to which the new Chapter 5B applies. Council suggests that this issue be clarified.

(b) Additionally, there should be clarity within the Bill around what constitutes a "budget". For example, the usual practice of Council is to resolve a range of other financial planning documents at the same time as it issues its budget, including the a 5-year corporate plan; a long-term asset management plan; a long-term financial forecast and an annual operational plan (see section 104(5) of the Act). Given that these documents have application across the full range of Council's activities, it would be appropriate for such documents, when issued as part of the budgetary process, to also be considered ordinary business matters that are not subject to Chapter 5B.

13. The new section 150EO(1)(b) provides that a councillor will not have a declarable conflict of interest in a matter if the conflict arises "solely" because of one of a number of listed matters. However, more than one of the listed matters could apply in a particular situation. Council therefore recommends that section 150EO(1)(b) be amended to provide that even if more than one listed matter applies (such that the conflict does not relate "solely" to one matter), this situation would still not be a declarable conflict of interest.

14. Under the new section 150EP(1)(a), a person will be a "related party" of a councillor if the person is an entity in which the councillor has an "interest". The reference to an "interest" seems very broad, so as to even cover an interest in a publicly listed companies in which a councillor has only a very small shareholding. Council therefore recommends that the term "interest" be defined to exclude the situation in which the councillor has interest of, for example, less than 5% in a listed corporation (similar to the exclusion in new section 150EJ(1)(f)).

15. The concept of a "close personal relationship", as it appears within the definition of "related party" of a councillor created by the new section 150EP(1)(d), is unclear. Council recommends that further guidance around the term "close personal relationship" be provided, perhaps by way of listed examples. For instance, it could be made clear that a councillor does not have a "close personal relationship" with an individual merely where the councillor has previously had business dealings with an individual.

16. The new section 150EW(3) provides that a councillor must also inform the presiding member at a council meeting, or the chief executive officer, of the facts and circumstances forming the basis of the belief and suspicion that another councillor is participating in a decision in contravention of a relevant provision. If this obligation is to be imposed here, Council recommends that it should also be clarified as to what the chief executive officer is then required to do upon receipt of that information.

17. In respect of the offence to influence others in the new section 150EZ(2), a number of submitters for the Stage 2 Bill in 2019 raised issue with the use of the words, " *... or discuss the matter with ...* ". Council wishes to reiterate these concerns, as these words still appear in the Bill, noting (as the Local Government Association of Queensland has previously) that:

    (a) councillors should be allowed to make basic inquiries about matters (for instance about their status); and

    (b) the provision may not be workable in practice, given that councillors may receive basic details about certain matters, but not become aware of their true nature until later, by which time this provision will already have been triggered.

Register of interests

18. The new Chapter 6, Part 45A sets out the obligations of councillors and councillor advisors regarding the interests which must be recorded on the register of interests for councillors and councillor advisors. The *Local Government Regulation 2012* (**Regulations**) currently contains in Schedule 5 a number of provisions which are somewhat unclear in respect of how interests must be recorded in the register of interests on a practical level. Council requests that there be further consultation with local government stakeholders regarding the content of the interests which must be disclosed, to ensure that the provisions are practical and workable.

19. In particular, Council seeks clarification around the following aspects of Part 5 and Schedule 5 of the Regulations flowing from the implementation of the Bill:

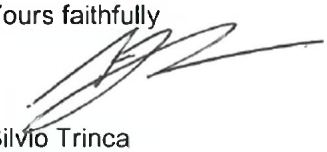
    (a) Councils should be provided with guidance as to how the register is to be published. Is it intended that local governments must publish a consolidated register of interests at all times, or is it sufficient that local governments publish changes to the register as they occur?

    (b) How far back does a councillor or councillor advisor have to record old interests they may hold on the register?

Thank you for the opportunity to make this submission to the Economics and Governance Committee.

If you would like to discuss this submission further, please contact the Corporate Governance Manager, Sue McDonald via email at [redacted] or telephone on [redacted].

Yours faithfully



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5 February 2020

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4114

Via Email: egc@parliament.qld.gov.au

Dear Sir/Madam

FURTHER SUBMISSION REGARDING THE ELECTORAL AND OTHER LEGISLATION (ACCOUNTABILITY, INTEGRITY AND OTHER MATTERS) AMENDMENT BILL 2019

I refer to your invitation for further submissions to the Economics and Governance Committee (**Committee**) on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* (**the Bill**) dated 28 January 2020 in relation to a proposal contained within the submission from the Crime and Corruption Commission (**CCC**) regarding the Bill dated 9 January 2020 (**CCC Submission**).

Please accept this letter as Logan City Council's (**Council**) further submission regarding the CCC Submission.

I note that on 9 January 2020, Council provided a submission to the Committee in respect of the Bill regarding the amendments to the *Local Government Act 2009* (**Act**) and the *City of Brisbane Act 2010* (**COBA**) generally in respect of the new process for managing councillor conflicts of interest and new obligations in relation to disclosures on the register of interest.

Council's view on the CCC's proposal

The CCC Submission recommends, relevantly to this further submission, that the Bill should establish strict liability offences in relation to a contravention by a Minister or Councillor of conflict of interest and register of interest requirements.

The CCC Submission differs from the currently proposed "dishonest conduct" offence provisions for councillors proposed in the Bill,[1] which currently provide that an offence will only occur where the councillor has a dishonest intent to gain some benefit or to cause a detriment to another person.

[1] Proposed s 198D of the COBA and s 201D of the Act.

Rather, the CCC Submission is that effective enforcement of the various disclosure obligations, and the prevention of corruption, requires offence provisions which sanction the failure to disclose relevant interests when the person knew or ought to have known of the relevant interest.[2]

The CCC Submission notes that, in respect of the existing scheme relating to both material personal interests and conflicts of interest under the Act and COBA, "*failing to comply with these requirements constitutes offences and, for these offences, there is no requirement to prove an intent to dishonestly obtain a benefit or cause a detriment*".[3] The CCC submits that the Bill constitutes a significant change which introduces a corruption risk by discouraging openness and transparency, as well as watering down appropriate escalations for recidivist behaviour.

Council recognises the need for the imposition of suitable penalties for dishonest conduct offences, including the availability of appropriate enforcement options for regulators. However, even accepting the spirit of the CCC's views as outlined above, Council would make the following observations in respect of the proposal to create strict liability offence provisions regarding the conflict of interest and register of interest requirements:

1. It has been recognised on many occasions that "fault liability" is one of the fundamental protections of criminal law.[4] To exclude this protection, as proposed by the introduction of strict liability offences as proposed by the CCC Submission, is a serious matter that should only be adopted after careful consideration of all possible implications of a councillor being convicted of the offence.

2. A key outcome of a councillor being convicted of an offence against the proposed s.201D of the Act is that their appointment will automatically end pursuant to the proposed s.197B. This is in recognition of the fact that an offence against that provision involves the element of dishonesty.

   Council submits that if the element of dishonesty is to be removed to protect the integrity of the regulatory regime, which seems to be the position of the CCC, then the ramifications of an unintentional breach of the conflict of interest or register of interest requirements should also be reviewed. In particular, where there is a mere oversight or slight delay in the updating of a councillor's register of interest (without dishonest intent), it should be made clear that this does not constitute an offence which automatically leads to the termination of a councillor's appointment.

   Council submits that an approach consistent with the current Act, which provides that the offence of failing to update the register of interests (under s.171(2)) is an "integrity offence" only where the councillor "intentionally" fails to comply, would be reasonable.

3. In respect of the proposed amendments to the Integrity Act 2009 under the Bill, the CCC submission notes that:

   > *The proposed section 97D of the Opposition's Bill would apply when a minister 'is aware or ought reasonably to have been aware' that they have a conflict of interest in the matter. The CCC notes that this broader approach is more consistent with the CCC's recommendations than the proposed new section 40A. The strict liability introduced by this provision is adequately mitigated by the requirement to prove*

[2] Transcript of Public Hearing - Inquiry into the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019, p 57.

[3] CCC Submission, p 12.

[4] See, for example, the report by the Senate Standing Committee for the Scrutiny of Bills entitled "Application of Absolute and Strict Liability Offences in Commonwealth Legislation", Chapter 4, dated 26 June 2002 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries.

knowledge or objectively reasonable knowledge. An alternative approach would be to provide a defence where a minister could not reasonably be expected to have been aware of the conflict.

Council notes that the same in-built safeguard, as acknowledged by the CCC, should be implemented alongside any proposal to create a strict liability offence in respect of councillors' conflicts of interest and registers of interests. That is, the offence should only be triggered if the councillor is aware or ought reasonably to have been aware of the conflict or the requirement to amend the register of interests.

4. If the CCC Submission is to be adopted, in the light of points 1 to 3 above, it will be imperative that there is absolute clarity as to what a councillor is required to disclose on the register of interests in accordance with the Schedule 5 of the *Local Government Regulation 2012*. Council therefore reiterates its comments made in its previous submission on the Bill that there needs to be further consultation with local government stakeholders regarding the content of the interests which must be disclosed, to ensure that the provisions are practical and workable.

5. Finally, Council understands that the legislative intent is to create a regime for disclosures of interests by councillors that mirrors (to some extent) the regime for Ministers at the State level. In keeping with this intent, Council considers that there is no basis to impose a strict liability offence for councillors, if no corresponding strict liability offence is imposed on Ministers at the State level.

Thank you for the opportunity to provide this further submission, which I hope will assist the Committee's inquiries into the Bill.

If you would like to discuss this submission further, please contact the Corporate Governance Manager, Sue McDonald via email at [redacted] or telephone on 07[redacted].

Yours faithfully

per

David Hansen
ACTING CHIEF EXECUTIVE OFFICER

CC: Local Government Association of Queensland
[redacted]

Local Government Manages Australia Queensland Inc
[redacted]