

LOCAL GOVERNMENT
ASSOCIATION
OF QUEENSLAND INC.

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20 February 2008

Hon Warren Pitt MP
Minister for Main Roads and Minister for Local Government
PO Box 15031
City East QLD 4002

Dear Minister

Local Government and Industrial Relations Amendment Bill 2008

I refer to the Bill introduced into State Parliament last week and write to identify concerns about its impact on Local Government and to request your consideration for possible changes.

The Association (LGAQ) is fully aware of the industrial relations objectives behind the Local Government and Industrial Relations Amendment Bill 2008 (LGIRA). Our concerns are not in relation to those objectives per se but about the possible implications of the de-corporatisation of Local Government which is the means of achieving those objectives.

Our concerns and requests are as follows:

Separate legal entity

Having regard to new *Local Government Act* sections 34, 35, 36(6) and 38, proposed in LGIRA clauses 10 to 12, and to the "Chaff and Hay Acquisition Committee" High Court decision, LGAQ is satisfied that local governments will remain separate legal entities.

However, our remaining concern relates to how certain extreme factions within the community will view these changes. It is not a fanciful prospect that some elements within the community might view section 34 as meaning that a Council is not a legal entity if one (or more) councillors vacates office after a quadrennial election. Whilst we consider that, if asked, a Court will give section 34 a purposeful interpretation (i.e. that section 34(1) is to be read as meaning that a local government is constituted by the councillors, for the time being, of a local government), in an endeavour to eliminate one of the potential challenges to the legal status of a local government, we suggest that the following sub-paragraph be included (after section 34(1)): -

"For avoidance of doubt, the vacation of a person's office as a local government councillor does not effect the constitution of a local government."

Ability to sue and be sued / personal liability of councillors

Sections 35 and 36(6), as proposed by LGIRA, in conjunction with the other sections proposed, satisfies LGAQ that local governments will retain the ability to sue and be sued.

On a related issue, section 38A, as proposed by LGIRA, protects councillors, the CEO, and an administrator, "in the administration of this Act or in the performance or exercise, or intended performance or exercise, of any of the local government's functions or powers under an Act" from liability for things done "honestly". This contrasts with existing



sections 240 and 1144, which protects councillors and the CEO (but not an administrator) from civil liability for actions done “honestly *and without negligence* under this Act” (our emphasis).

The explanatory note to LGIRA clause 12 (introducing proposed section 38A) states, relevantly:

“The protection (offered by section 38A) is in addition to any other protections under law or an Act, such as the protection in section 240 of the LG Act.”

Whilst section 240 does provide “other protection” in terms of the explanatory note, it affords no protection *additional* to that provided by proposed section 38A.

What section 240 does do (which proposed section 38A will not) is to attach to the local government the liability (if any) for councillor action that, whilst damaging, has been both honest and non-negligent. Section 1144 has similar operation for a CEO.

Section 240, then, offers no additional *councillor* protection. However, it does provide a form of protection for those adversely affected by honest, non-negligent councillor action, by transferring to the council the liability that otherwise would attach to the councillor. Section 1144 provides similar protection for a CEO.

The clause 12 explanatory note also terms the proposed section 38A protections as an indemnity. Our advice is that the section provides no such thing (nor, for that matter, do sections 240 and 1144). It does not require or entitle the council to indemnify a councillor, a CEO or an administrator against anything. Thus, a councillor/CEO/administrator sued unsuccessfully upon an allegation of dishonesty possesses under section 38A no entitlement to indemnity from his or her council. There is also no indemnity entitlement under either of sections 240 and 1144 unless a court is prepared to imply the entitlement by reference to each section heading (*Indemnity for councillors/Indemnity for local government employees*) despite the absence of any provision in the section contents.

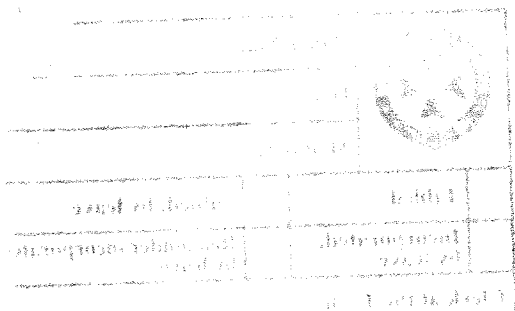
If indemnity entitlement is intended, all three sections should be redrawn to make the entitlement express and clear. Our suggested wording for an indemnity for section 38A, for example, is as follows: -

“38B - Indemnity for councillors etc. acting honestly

The local government must indemnify a councillor, chief executive officer or administrator against any civil liability, including reasonable costs, incurred by a councillor, chief executive officer or administrator because of something done by a councillor, chief executive officer or administrator acting honestly in the administration of this Act or in the performance or exercise, or intended performance or exercise, of any of the local government’s functions or powers under an Act.”

Sunset provisions

Regrettably, none of the sunset provision we had proposed to the Departments appear in LGIRA. The second reading speech of your Ministerial colleagues Hon RJ Mickle does



not include any statement indicating that the existing (body corporate) status of local governments will be returned after Federal government amendments to Work Choices take full effect.

In the explanatory notes to LGIRA, under the heading, "Consultation", LGAQ's request for reinstatement of councils' (existing) body corporate status is noted. Further, LGAQ's request for indemnification for any other losses that councils may suffer from unintended adverse consequences of LGIRA is noted. However, the explanatory notes record no agreement to the requests. The government's only commitment reads:-

"Subject to amendments to the *Workplace Relations Act 1996 (Cwlth)* the government will consider the ongoing need for these new arrangements for local government entities in Queensland."

Consequently, the LGAQ again requests an unequivocal statement to the Parliament to the effect that:

1. The body corporate status of local governments will be reinstated following amendments to the *Commonwealth's Workplace Relations Act 1996* removing Queensland local governments from being subject to that Act;
2. The State Government will indemnify local governments for any loss or damage suffered from any unintended consequences arising from the enactment of the LGIRA; and
3. The State will act immediately to rectify any shortcomings in LGIRA should the current rights, powers, privileges and obligations of councils in the day to day performance of their roles and responsibilities be jeopardised.

The Association requests your urgent consideration of the matters raised above and I am available to discuss these with you at any time.

Yours sincerely

Paul Bell

Cr Paul Bell AM
PRESIDENT