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Hon Michael Mischin MLC  
Chair  
Legislative Council Standing Committee on Legislation  
Parliament House  
PERTH WA 6000

Dear Minister

Thank you for your letter of 15 July 2011 regarding the Western Australia Legislative Council Inquiry into the *Local Government Amendment (Regional Subsidiaries) Bill 2010* (the Bill) that has been referred to the Standing Committee of which you are the Chair.

I note that the Standing Committee's objective is to determine whether the Bill satisfactorily effects its policy objectives.

Please find attached a response to the questions in your letter regarding the Department of Planning and Local Government's practical experience with regional subsidiaries and their regulation.

Yours sincerely

Ian Nightingale  
**CHIEF EXECUTIVE**  
**DEPARTMENT OF PLANNING AND LOCAL GOVERNMENT**

26/7/2011

Attachments: Attachment 1 (*Regional Subsidiaries in South Australia*)

## ATTACHMENT 1

### **Regional Subsidiaries in South Australia 25 July 2011**

#### **For what purposes are regional subsidiaries established in South Australia (SA)?**

The *Local Government Act 1999* (the SA Act) provides councils with a broadly expressed range of functions, including to establish or support organisations or programs that benefit people in its area or local government generally, and to manage, improve and develop resources available to the council and the ability to engage in commercial activities or enterprises. Council subsidiaries are the corporate mechanism available to councils to engage in business activities in the performance of their functions, at arms length, but with no limitation of liability, on a competitively neutral basis.

Section 43 of the SA Act enables two or more councils (the constituent councils) to establish a regional subsidiary to:

- provide a specified service or services or to carry out a specified activity or activities; or
- perform a function of the councils under the Act or another Act.

In South Australia (SA) regional subsidiaries have been used for two main purposes, that is, for regional Local Government Associations (LGAs) to 'organise' themselves by setting up a structure to carry out major infrastructure work or service delivery (eg waste management authorities) or drainage authorities (eg flood mitigation strategies).

In establishing a regional subsidiary, some regional LGAs have taken a whole set of council responsibilities and have grouped them into an entity (regional subsidiary) that performs a whole range of functions under more than one Acts eg including in relation to public health.

At present there are 22 regional subsidiaries in SA that have been established under s43 of the SA Act (listed in Schedule 3 of the *Local Government (General) Regulations 1999* (SA)). A copy of the Department of Planning and Local Government (DPLG) Guidance Paper No. 3 2009 regarding the establishment of regional subsidiaries in SA is attached for information.

#### **What, if any, issues have arisen in their relationship with the local governments that create them?**

The approval of the Minister for State/Local Government Relations (the SA Minister) is required for the establishment of a regional subsidiary and the Office for State/Local Government Relations assesses a regional subsidiary's proposed charter for compliance as part of the approval process.

Reportedly, the formality required around setting up a regional subsidiary and drawing up a charter is substantial and councils now more carefully weigh up their options prior to setting up a regional subsidiary.

The SA Act does not authorise regional subsidiaries to undertake any activities they might choose and the powers of a regional subsidiary are limited by the powers of the establishing councils. Therefore, a regional subsidiary cannot exceed the powers of the creating bodies, except if specifically permitted by statute.

For the purposes of the SA Act, the power of a regional subsidiary to act outside the geographical areas of its constituent councils is limited in that it must be *only to the extent considered by the council(s) to be necessary or expedient*<sup>1</sup> to the performance of (their) functions.

The constituent councils have to carefully address this question when drafting the charter. For example, if the collection and disposal of waste outside the areas of the constituent councils is expedient in terms of the making the cost of the collection and disposal of waste within the areas of the constituent councils economically viable (or the dispersal of waste outside the council area may be necessary in practice) this should be clear on the face of the charter.

Charters may be reviewed by the constituent councils at any time in order to refine the checks and balances regulating the scope of activities in which a regional subsidiary is purporting to engage or if concerns arise as to the appropriate exercise of power by a regional subsidiary. The approval of the Minister for State/Local Government (the SA Minister) is not required, however, a copy of an amended charter must be provided to the SA Minister and be published in the SA Government Gazette.

Importantly, charters should also specify *the process or mechanism by which a regional subsidiary will be subject to direction by the constituent councils*. Thus the need to consult with councils before entering into any activities that will be undertaken outside the area of the constituent councils can be provided for by a mechanism by which councils can oversee the activities of a regional subsidiary without the need to amend a charter on each occasion that an issue may arise.

A balance must be achieved between, on the one hand, defining the extent to which a regional subsidiary may engage in activities outside the area of the constituent councils in the charter, and, on the other hand, allowing a regional subsidiary to operate unimpeded on a day to day level. Adequate mechanisms must be in place to ensure regional subsidiaries can readily consult with constituent councils concerning the extent of operations outside the constituent councils' areas.

**Has the prescriptive nature of Schedule 2 of the Local Government Act 1999 (the SA Act) given rise to any difficulties for the Department of Planning and Local Government (DPLG) or, to DPLG's knowledge, local government?**

Reportedly, difficulties for local government include the:

- requirement that all the constituent councils have to agree to a change of a regional subsidiary's charter;
- funding contributions by the constituent councils; and
- formalised reporting requirements under the SA Act.

In relation to reporting requirements, clause 30(2) of Schedule 2 of the SA Act has been amended to require a regional subsidiary, unless exempted by regulation, to establish an audit committee. The amendments, which took effect on 1 July 2010, were prepared in response to concerns about the administration and financial management of councils.

The requirement in the legislation for councils, subsidiaries and regional subsidiaries to establish and maintain audit committees, is an important financial regulatory provision that offers protection.

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<sup>1</sup> The High Court in the case of *Shanahan v Scott* adopted a narrow interpretation of the words 'necessary or expedient' meaning the words cannot be interpreted as intending to widen the scope of a power. They merely permit ancillary or incidental means of achieving the principal object or objects of the regional subsidiary.

While the obligation to establish an audit committee is not necessarily an onerous one, unlike councils and subsidiaries, some regional subsidiaries are very small and there may be instances where the additional burden on them may not be warranted.

Although the general policy position is not to have any exemptions, the smaller regional subsidiaries with fewer assets that do not directly raise funds from ratepayers, have limited contact with the general public, do not manage any compliance functions or provide general services to ratepayers, may only have a limited role for an audit committee, and the costs may outweigh the benefits of having such an arrangement in place.

Regulation 18 of the *Local Government (Financial Management) Regulations 2011* provides for the Minister to grant exemptions, subject to any conditions specified by the Minister. The regulation also requires an application to the Minister to be made by the regional subsidiary's constituent councils. Where an exemption is granted, a notice must be published in the Gazette.

The framework to determine if an exemption is warranted includes:

- The regional subsidiary has in place relevant internal control policies and procedures and these are periodically reviewed and updated;
- the regional subsidiary's external auditor has provided an audit opinion to the regional subsidiary that its internal controls are sufficient to provide a reasonable assurance that its financial transactions are being conducted properly and lawfully;
- all reports by the regional subsidiary's auditor are (or will be in the future) circulated to each constituent council;
- no evidence has come to light which strongly suggests that the regional subsidiary is not complying with its obligations under the Local Government Act 1999 and associated Regulations in all material respects;
- the value of assets owned by the regional subsidiary does not appear unduly high for one not subject to audit committee requirements;
- the level of annual operating expenses of the regional subsidiary does not appear unduly high for one not subject to audit committee requirements; and
- the predominant source of income of the regional subsidiary does not involve rates or charges levied directly on Council ratepayers.

**Has the experience been that there are advantages to regulation through primary legislation?**

Yes, the principles underlying the provisions for regional subsidiaries include the provision of appropriate checks and balances for the exercise of power within local government and to ensure accountability and transparency in decision-making.

The benefits include that the provisions enable groups of councils to cooperate in a formal way especially in relation to funding, management and maintenance of assets because the structure (consisting of the legislative provisions *and* the charter) creates the opportunity to do that across the boundaries of the constituent councils.

**Have any provisions been identified as requiring amendment?**

From DPLG's perspective, the principles underlying the requirements for the establishment of regional subsidiaries provide appropriate checks and balances for the exercise of power within local government and ensure accountability and transparency in decision-making.

**Have any issues arisen that suggest legislative gaps or deficiencies?**

It seems that problems arising are not so much to do with a legislative inadequacy, but arise from the failure of councils and regional subsidiaries to adequately turn their attention to the issues. Further definition might be of assistance if Parliament is clear about what should be imposed and while it seems obvious that councils need to be geographically limited in the ambit of their power, it is not so easy to set out guidelines which would be of assistance in a multitude of circumstances.

**What is the practical effect of the subsidiary nature of South Australia's regional subsidiaries?**

The establishment of a regional subsidiary provides constituent councils with an opportunity to be involved with the regional subsidiary's activities in a supervisory role on an ongoing basis. It is a very good legal structure to enable councils to formalise major pieces of work across council boundaries.

Precise drafting in the charters of regional subsidiaries makes clear which activities are within power and allow less scope for misapprehension of which activities are permitted.

The power for a regional subsidiary to act outside of the geographical areas of its constituent councils is limited and the legislative provisions place the onus squarely upon constituent councils to limit the ambit of the regional subsidiary's activities as councils cannot carry out activities that they have no legal power to carry out by way of a regional subsidiary that they have created under the SA Act (as it is also the Act that establishes the councils).

There are risks that, if challenged, the activities of a regional subsidiary may be considered by a review body to be beyond power.

**Does this status deliver any benefits or result in any obstacles to local government regional cooperation?**

Each council gets a report annually from the regional subsidiary for inclusion in their annual report. The current legislative provisions provide a useful and effective structure for constituent councils that remain in agreement and who know what they want to achieve by establishing and maintaining a regional subsidiary, however, if councils have differences of opinion, the mechanisms do not necessarily provide for conflict resolution.

If there is a difference of policy, funding or opinion at the constituent council level there may not be an easy way of resolving that. Success is heavily dependent on the provisions of a regional subsidiary's charter and if the charter does not provide clarity about interaction with the constituent councils or problem solving mechanisms, this may cause difficulties at an operational level. Goodwill is required on an ongoing basis..

For example, if councils disagree about a change to the regional subsidiary's charter, there is no easy mechanism to resolve that and if the constituent council relationships are not right the regional subsidiary model may not work well.





**Government of South Australia**

Department of Planning  
and Local Government

**SUBSIDIARIES – MINISTERIAL APPROVAL**  
Guidance Paper No. 3 2009

# Legislation and Governance Division

[www.localgovt.sa.gov.au](http://www.localgovt.sa.gov.au)

## Introduction

The purpose of this paper is to provide councils with guidance on the legislative requirements and better practices in relation to seeking the approval of the Minister for State/Local Government Relations (**the Minister**) for the creation and establishment of subsidiaries or for the amendment of their Charters.

## Legislation

Under sections 42 and 43 of the Local Government Act 1999 (**the LG Act**) councils are given the power to establish single council subsidiaries and regional subsidiaries respectively. This power is subject to obtaining the approval of the Minister to the conferral of corporate status. (Sections 42(3) and 43(4))

Schedule 2 of the LG Act contains other provisions relevant to council subsidiaries.

A subsidiary can be established to provide services, carry out activities, or perform functions of the council/s. In addition, a single council subsidiary may be established to manage or administer property or facilities on behalf of a council. (Sections 42(1) and 43(1))

The establishment of a subsidiary does not derogate from the power of the council/s to act in a matter. (Sections 42(4) and 43(4))

### Regulatory Activities

A single council subsidiary cannot be established for the primary purpose of performing a regulatory activity of a council. (Section 42(2))

Where a regional subsidiary is established to perform a regulatory activity of the constituent councils, the subsidiary cannot also perform a significant, and related, service activity. (Section 43(2))

### Ministerial Approval

Schedule 2 of the LG Act requires a council/s proposing to establish a subsidiary (or regional subsidiary) to apply to the Minister for approval to establish a subsidiary:

- in a form approved by the Minister; and
- accompanied by information required by the Minister; and
- accompanied by a copy of the proposed charter for the subsidiary.

(Schedule 2, Part 1, Clause 1 and Schedule 2, Part 2, Clause 17)

A subsidiary comes into existence when the Minister, by notice in the Gazette, signifies his or her approval of the establishment of the subsidiary. (Schedule 2, Part 1, Clause 1(3) and Schedule 2, Part 2, clause 17(3))

A council must, in conjunction with the publication of the Minister's notice ensure that a copy of the charter of the subsidiary is published in the Gazette. (Schedule 2, Part 1, Clause 1(4) and Schedule 2, Part 2, Clause 17(4))

### Activities outside Council Area/s

The powers of a subsidiary are necessarily limited by the powers of the establishing council/s. This means that a subsidiary cannot carry out activities that the council/s have no power to carry out themselves.

Section 36(2) of the LG Act provides that a council may act outside its area:

- to the extent considered by the council to be necessary or expedient to the performance of its functions; or
- in order to provide services to an unincorporated area of the State.

Charters of subsidiaries must therefore not express a purpose that is beyond the power of the constituent councils (*ultra vires*) and subsidiaries can only act outside of the area of the council or councils so far as section 36(2) permits.

#### Example

A regional subsidiary may be established by several councils for the delivery of waste management services to their area. It may be that the collection and disposal of waste *outside* the areas of the constituent councils is expedient in order to make the cost of collection and disposal of waste *within* the areas of the constituent councils economically viable (or the dispersal of waste outside the council area may be necessary in practice). If the collection and disposal of waste outside the areas of the constituent councils is necessary or expedient to the performance of the constituent councils' functions, this should be clear on the face of the Charter.

#### **Matters that must be addressed in Charters of Subsidiaries**

Clauses 3 and 19 of Schedule 2 of the LG Act set out the specific matters that must be addressed in a subsidiary's charter.

All Charters must address:

- the purpose for which the subsidiary is established;
- the constitution of a board of management as the subsidiary's governing body;
- whether board members will be required to submit returns under the "Register of Interests" provisions in Chapter 5, Part 4, Division 2 of the LG Act;
- the powers, functions and duties of the subsidiary;
- the nature and scope of any activities that will be undertaken outside the area of the council or constituent councils;
- staffing issues, including whether the subsidiary may employ staff and, if so, the process by which conditions of employment will be determined;
- whether the subsidiary is intended to be partially or fully self-funding, and other relevant arrangements relating to costs and funding;
- any special accounting, internal auditing or financial systems or practices to be established or observed by the subsidiary;
- the acquisition or disposal of assets;
- the manner in which surplus revenue is to be dealt with by the subsidiary;
- the nature and scope of any investment which may be undertaken by the subsidiary;
- the subsidiary's obligations to report on its operations, financial position and other relevant issues; and
- other matters contemplated by Schedule 2 (Part 1 for single council subsidiaries and Part 2 for regional subsidiaries) or prescribed by the regulations.

Note: There are currently no requirements prescribed by regulation.

Regional Charters must also address:

- the method by which board members will be appointed, and their terms of office determined;
- the conditions of appointment, or the method by which those conditions will be determined;
- the appointment of a board member to chair meetings;



- the appointment of deputies to board members;
- the ability to raise revenue and the financial contributions to be made by the constituent councils;
- the processes for other forms of reporting to the constituent councils;
- the process or mechanism by which the subsidiary will be subject to direction by the constituent councils;
- the manner in which disputes between the constituent councils relating to the subsidiary will be resolved;
- any issues surrounding a council becoming a constituent council, or ceasing to be a constituent council;
- the manner in which the property of the subsidiary is to be distributed in the event of a winding up; and
- the proportions in which the constituent councils are to be responsible for the liabilities of the subsidiary in the event of its insolvency.

### **Review of Charters**

For single council subsidiaries a review of the charter may be undertaken at any time and must be reviewed by the council whenever it is relevant to do so because of a review of the council's strategic management plans. (Schedule 2, Part 1, Clause 3(4))

For regional subsidiaries, the charter may be reviewed by the constituent councils at any time but must in any event be reviewed at least once in every 4 years. (Schedule 2, Part 2, Clause 19(4))

A council, or constituent councils in the case of regional subsidiaries, must, if it amends a charter, provide a copy of the amended charter to the Minister and ensure the amended charter is published in the Government Gazette. (Schedule 2, Part 1, Clause 3(5) and Schedule 2, Part 2, Clause 19(5))

### **Elements of Better Practice**

The suggested elements of better practice are designed to provide councils with a greater understanding of what is required in a subsidiary charter provided to the Minister for approval and the role the Department of Planning and Local Government (**DPLG**) currently plays in facilitating that approval process.

### **Proposed name of the Subsidiary**

The name of the proposed subsidiary should not contain the word "committee" or any "royal" notation, or any words suggesting that the subsidiary is a company or an incorporated association.

### **Activities outside Council Area/s**

The charter should in addressing the nature and scope of any activities that will be undertaken outside the area of a council:

- provide sufficient guidance and direction to the subsidiary to ensure that it exercises its powers only within the context of its functions;
- provide clear directions of the circumstances that require the subsidiary to consult, or refer back, to the council/s for decision; and
- provide clear and effective reporting arrangements.

## **Review of Charters**

A review of a subsidiary charter should reconsider the matters that must be addressed in the charter to ensure it is still current and reflects the functions or activities of the subsidiary. A review should also ensure that the charter still provides sufficient and relevant guidance and direction to the subsidiary to ensure that it exercises its powers only within the context of its functions.

It is suggested that where a charter provides for, and a subsidiary is, acting outside its council's (or constituent councils') area particular attention is given to ensuring this is necessary or expedient to the performance of the functions of council/s in accordance with s36(2) of the LG Act and made clear on the face of the charter.

## **The Role of the Department of Planning and Local Government**

### Establishment of a Subsidiary

On receipt of a proposal to establish a subsidiary by a council/s, the DPLG:

- provides a review of a proposed charter to ensure that it addresses all matters that must be addressed under Schedule 2 of the LG Act;
- assists councils in finalising their proposed charters;
- checks proposed subsidiary names against the Australian Business Register at [www.abr.business.gov.au](http://www.abr.business.gov.au)
- ensures applications are in the requisite form and accompanied by the information required by the Minister;
- provides advice and recommendations to the Minister to assist in her/his consideration of the application for approval; and on approval
- coordinates the publication of the notice and charter in the Gazette.

### Amendments to a Subsidiary's Charter

Councils must review their subsidiary charters as outlined above and, if amended, provide a copy of the amended charter to the Minister. Councils must also ensure that a copy of the amended charter is published in the Gazette.

DPLG offers advice and assistance to councils that review and decide to amend their subsidiary's charter. This includes advice on the proposed amendments and coordinating the publication of the amended charter in the Gazette.

Note: As it is the council/s responsibility to ensure that the charter for a newly established subsidiary or an amended charter is published in the government gazette, the associated cost of gazettal is to be borne by the council/s. Government Publishing SA is happy to liaise with councils regarding publishing requirements prior to publication. Government Publishing SA can be contacted on ph 8207 1045.

# SUBSIDIARIES – MINISTERIAL APPROVAL

## Guidance Paper No. 3 2009

# Legislation and Governance Division



**Government of South Australia**

**Department of Planning  
and Local Government**

#### **FURTHER INFORMATION**

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