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This document provides responses to questions from the Independent broad-based Anti-corruption Commission about the use of local planning panels and conflicts of interest in development assessment in NSW, an area of reform in which I have had close involvement over recent years, as well as in the relationship between council CEOs and Councillors, an issue I have also had close involvement with through my role as Professor of Local Government. I provide policy advice to Australian state governments with respect to strategic land use planning and to Ministers regarding reviews of planning codes.

I have worked extensively with councils around Australia and internationally – with both senior staff and Councillors. Much of this work has been in strengthening systems and capacity for transparency and accountability.

### Local Planning Panels

**Can you briefly describe the role of Local Planning Panels (including in relation to advice and determinations) in NSW?**

- a. **What was the impetus or policy objective of the introduction of Local Planning Panels? In particular, why was responsibility for some planning decisions transferred from Councillors to a panel?**
- b. **How does the panel model help prevent corruption in the determination of planning proposals and development applications?**
- c. **Two years on from the introduction of Local Planning Panels, do you believe they have met their policy objectives?**
- d. **Are there further reforms you would recommend to further minimise corruption risks?**

### Regional Planning Panels

In NSW, the local planning panels sit alongside regional planning panels which determine development application matters over the value of \$30M. Sydney and Regional Planning Panels were introduced to NSW in 2009 to strengthen decision making on regionally significant development applications (DAs) and other planning matters. There are five Sydney Planning Panels and four Regional Planning Panels across NSW. Each panel is an independent body that is not subject to the direction of the Minister of Planning.

The Planning Panels may undertake independent reviews of some council and Department of Planning, Industry and Environment decisions in the plan making process. By providing an opportunity for an independent body to give advice on local environment plans (LEPs) or rezonings, the review processes allow councils and proponents to have decisions about the strategic merits of proposed amendments reconsidered.

### Local Planning Panels

The NSW Government requires all 34 councils in Sydney and Wollongong to establish an Independent Hearing and Assessment Panel (IHAP), known as a local planning panel, under the *Environmental Planning and Assessment Act 1979* (the Act). They were introduced in 2018, although a number of councils had existing panels prior to the requirement for all councils to introduce them.

Panels seek to bring a more strategic approach to council planning by freeing up Councillors to focus on providing stronger strategic vision and the delivery of council plans while relieving them of their role in development assessment or land rezoning processes.

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The main objectives of local planning panels (LPP) are to:

- minimise corruption risks in local planning
- promote better planning outcomes through greater expertise, independence and probity in decision-making
- ensure people with expertise have a determinative role on DAs
- promote consistent decision-making and enable faster decisions, and
- improve capacity for councils to undertake strategic planning functions.

Following the introduction of the LPPs the *Kaldas Review of Governance and Decision-Making in the NSW Planning System* (the Kaldas Review) found introduction of the panels has provided time for Councillors to engage more effectively in strategic planning.<sup>1</sup>

### Referral criteria and minimising the risk of corruption

The role of a panel is to determine certain types of DAs on behalf of councils and provide expert advice on planning proposals. Panels are referred and determine DAs:

- where there is risk of a conflict of interest (e.g. an applicant or landowner is the council, councillor or council staff, or a member of State or Federal parliament)
- that are contentious (multiple objections received)
- that depart from the development standards, or
- propose sensitive development.

These criteria have two key objectives:<sup>2</sup>

- Ensure local planning panels focus on contentious and complex DAs and applications with the greatest corruption risk, while council staff continue to determine routine applications.
- Build flexibility into the criteria to reflect differences in the types of development and community expectations across local government areas.

When setting up the panels, the NSW Planning Department sought feedback from the Independent Commission Against Corruption (ICAC). ICAC emphasised the need for clear and certain criteria and noted any system that allows discretion poses a higher corruption risk. Therefore, it was determined councils should not have flexibility to refer or not refer any matter to a panel based on the opinion of staff or Councillors. However, the Kaldas Review also found limited corruption risk in providing flexibility for councils to recommend *more* matters to the panels than the criteria allow.

### Development assessment and the role of Councillors

Planning decisions often involve windfall gains, that is, the distribution of private financial benefit through public decisions. When elected Councillors vote to adopt plans that rezone land or deliver infrastructure, they decide who may financially benefit from these public decisions. They are, in effect, 'setting the rules'.

Councillors have three main roles:<sup>3</sup>

- Establishing strategic development standards through the preparation of local environment plans
- Considering development and rezoning applications
- Acting as constituent representatives.

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<sup>1</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>2</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>3</sup> *ibid*

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The combination of these roles has the potential to create conflict for Councillors. The absence of a 'separation of powers' allowing Councillors to establish development standards (i.e. setting the rules) and assess applications against those standards (making determinations against those rules) has been frequently criticised.

Indeed, there are many instances where rezoning and subsequent development assessment decisions by Councillors have led to their personal financial and/or political gain.

To maintain the integrity of planning systems and minimise risk of corruption, it is crucial that those setting the rules are restricted from benefiting from the making of those decisions or subsequent decisions made in accordance with those rules.

Following the implementation of the LPPs, the ability of Councillors to take a greater, more strategic role in land use planning in local government areas has also been supported by the introduction of *Local Strategic Planning Statements*, which require councils to set a local vision for land use planning, and articulating how those land use planning strategies will support the delivery of their council and their communities' overall objectives.

### Panels and the expert decision-making model

The intent of the panels is for experts to consider contentious DAs to depoliticise local planning decisions, reduce corruption risks and provide more consistent, transparent decision making. In his second reading speech the then-Minister noted:<sup>4</sup>

*...the benefits of [local planning panels] extend not only to reducing corruption risks; they are also fundamental to providing strategic, streamlined and balanced decision-making. Panels can achieve greater certainty for all parties by providing rigorous and credible determinations on the merits of an application, reducing the likelihood of reviews and appeals. Panels also elevate the role of the council—they allow the council to focus on the strategic task of setting the overall vision, policies and controls for development in the local area. It is for these reasons that we are introducing this vital, game-changing reform to the planning system.*

Development assessment is an important public task. Making judgments about the merit and impacts of development is best entrusted with experts with appropriate skills to read and interpret plans, synthesise and balance complex information, and understand and apply regulatory rules. It is appropriate these highly technical tasks be done by people with expertise in them and independent of Councillors who have set the rules.

Each panel comprises three independent expert members (one chair and two experts) and a community representative. The model requires experts have expertise in a specified field (planning, architecture, heritage, etc.) and chairs must have expertise in law or government and public administration. Community representatives are not required to have expertise in these areas, but are required to demonstrate their connection with a local area.

Councillors, property developers and real estate agents are ineligible to be panel members as this undermines the objective of having DAs determined by independent experts that depoliticise the assessment process.<sup>5</sup> Whilst some stakeholders have expressed concern this framework impedes on the 'democratic process', the Kaldas Review found inclusion of the community representatives on the panel allows for an adequate balance between independence and democracy.<sup>6</sup>

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<sup>4</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

## Outcomes of Local Planning Panel Reforms

Since introduction of the panels, DAs are being determined on a merit/technical basis by experts and local (meaning councillor) politics has been removed from the process. The use of the expert/merit-based model of decision-making provides a more consistent framework for decision-making and certainty that expert judgment of merit and impacts against established rules (determined by elected Councillors who are accountable through elections to constituents) will be determinative of the decisions, rather than for any other reason such as personal financial or political gain.

The independent evaluation of the LPPs in NSW, which I led, surveyed chairs, experts, council directors of planning, and community members who reported the panel process is operating well and expressed the view the panel reform objectives were largely being achieved two years following implementation.<sup>7</sup> This was also found by the Kaldas Review, which noted panels bring expertise, transparency and integrity to the assessment processes. Through that review, the vast majority of stakeholders said that the establishment of the panels is a positive addition to the planning system in NSW with robust and proportionate governance procedures and the overall impact of the panels has been 'extremely positive'.<sup>8</sup>

The NSW local planning panel evaluation<sup>9</sup> also found a high level of expertise and familiarity with planning controls is being brought to the assessment process, positive community perceptions of panel expertise, and the panel processes bring expertise to decisions.<sup>10</sup>

The Kaldas Review noted independent assessment panels provide for the professional determination of non-routine projects and make the process of gaining planning approval more efficient and timely.<sup>11</sup> It found the decision-making process is more streamlined and consistent and that consideration and determination of applications by panel members who have the relevant experience has brought more rigour to the DA determination process and professionalism to decision-making.

Some stakeholders commented to the Kaldas Review that the panels are more like courts; everyone knows where they stand and that the process is respected even if the outcome of a decision is not supported. The use of local planning panels to provide independent advice on rezoning proposals, whilst some of these proposals are still determined by Councillors, was found to add further weight and a level of probity to staff recommendations.

The use of independent assessors, whether experts or community members, and greater transparency of process and deliberations can help guard against corruption. However, the Kaldas Review noted it is reasonable to provide a forum for frank discussion among decision makers to occur away from the public, provided the decision is handed down in public and the reasons for the decision are clear and coherent and publicly available. A greater pool of potential assessors who are frequently rotated can also help guard against corruption by randomising who the decision-makers are to some extent which can lessen the risk panel members will be subject to undue influence.<sup>12</sup>

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<sup>7</sup> *Ibid*

<sup>8</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>9</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/Assess-and-regulate/Development-assessment/Local-Planning-Panels/local-planning-panels-evaluation-final-report-2019-03.pdf>

<sup>10</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/Assess-and-regulate/Development-assessment/Local-Planning-Panels/local-planning-panels-evaluation-final-report-2019-03.pdf>

<sup>11</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>12</sup> *Ibid*

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The Kaldas Review found there does not appear to be evidence demonstrating membership on multiple panels is a corruption risk. The remuneration for panel members is set at a level that would generally require panel members to work in a capacity other than on the panels and the ability for panel members to work in another capacity is constrained by the conflict of interest provisions which often prohibit members from continuing to work as planning consultants, planning lawyers or other planning professionals. The Review considered that the corruption risk created by panel members being appointed to numerous panels is far less than that of members continuing employment in the planning system that may contravene conflict of interest provisions.<sup>13</sup>

### Conflicts of interest

**In October 2018 you completed an evaluation of Local Planning Panels in NSW. In that report you noted:**

- **only a small proportion of development applications were referred to the panel due to conflict of interest at the council level (approx. 10 per cent)**
- **complaints about *panel members* often involved concerns about pecuniary or non-pecuniary conflict of interest.**

**Have Local Planning Panels effectively addressed risks associated with conflicts of interest or just shifted the risk from Councillors to panel members?**

Whether decisions are determined by elected representatives or experts, there will always be some risk of conflict of interest, and complaints about pecuniary and non-pecuniary conflicts of interest will continue. As noted by the Kaldas Review, these is a potential for actual or perceived corruption risks in circumstances where elected officials have decision making or approval powers that involve significant windfall gains for property owners or developers.

This is not a risk confined to any particular jurisdiction. A recent Queensland Crime and Corruption Commission report found that 'there are perceptions of compromised council processes and decision-making, especially where Councillors have received campaign funding from donors involved in the property and construction industries. These perceptions are compounded by the failure of many Councillors to adequately deal with conflicts of interest'.<sup>14</sup>

Whilst the panel reforms may have shifted the degree of risk to panel members, these are appropriately borne by them as experts in assessing the merits and impacts of a proposal. These risks can be managed through the determination process through guidelines and training, which have been developed in NSW to provide clarity to panel members, particularly community representatives, as to what constitutes a conflict of interest and to provide clarity to panel members of the importance of declaring and addressing conflicts prior to determining a matter.<sup>15</sup>

During the determination process, panel members with actual or potential conflicts of interest are required to disclose these. This is stated on the record at the commencement of a meeting. There are

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<sup>13</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>14</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>15</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/code-of-conduct-for-local-planning-panel-members-2018-09.pdf> ; <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

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also strict guidelines in place which require panel members to declare if anyone involved in a matter before the panel has approached them.

In addition, probity checks (including criminal and financials) and merit checks (regarding qualifications) are also conducted when potential members apply to join the panel system. However, whilst probity checks are mandatory for expert panel members, they are not for community representatives and the Kaldas Review noted probity checks should be a consistent feature for all members in order to avoid conflicts.

The Kaldas Review found the conflict of interest process for the panels ensures members are required to actively turn their mind to each matter on the agenda to determine if a conflict exists. It also considered there are adequate measures in place to manage conflicts and minimise the risk of undue influence or corruption in the determination of DAs. It also found panels had decreased political influence in development assessment, and that the upsurge of expertise and decrease in political motivations had contributed to increasing the quality and consistency in decision-making, which was viewed as a welcome outcome.<sup>16</sup>

Challenges remain in the use of planning consultants as panel members, for them in managing their perceived conflicts of interest – particularly if they work for large firms and they may not know if their colleagues are or have worked on a project or with an applicant.

The value of local planning panels in addressing these issues can be seen from the evaluation, which found no evidence or current problems with respect to influence or probity but that risk should be monitored.<sup>17</sup> The membership of the panels is critical. It also found recruitment of specific expertise, with the determinative role of the panels, demonstrates the reforms have delivered expert based local decision-making. It can also be seen in the finding of the Kaldas Review that referring contentious and complex DAs to a panel for determination reduces the potential for corruption.<sup>18</sup>

### Relationship between CEOs and Councillors

**In Victoria, council is responsible for employing the CEO, managing their performance and their tenure (under both the *Local Government Act 1989* and the *Local Government Act 2020*).**

- a. **What, if any, risks does this arrangement pose for the integrity and effective operation of councils?**
- b. **What are the political risks for an effective CEO?**
- c. **How does the role of the councillor fit in modern council organisations that are becoming more complex service delivery businesses?**
- d. **Is there a more effective governance structure to oversight the business of council?**

**You have previously noted that the way legislation frames the relationship between CEO and Mayor is critical to corruption prevention and that state governments need to monitor the relationship more closely.**

- a. **How do you consider the relationship between the council and the CEO should be framed in legislation? In particular can it be framed in a way that assists in the prevention of misconduct and corruption?**
- b. **Can it be framed to protect the community interests from politically motivated decisions?**

<sup>16</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

<sup>17</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Other/Assess-and-regulate/Development-assessment/Local-Planning-Panels/local-planning-panels-evaluation-final-report-2019-03.pdf>

<sup>18</sup> <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf>

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The relationship between the CEO and Councillors, particularly the mayor, is perhaps the most important in any council. In the same way the Mayor/CEO relationship is critical, the senior staff/CEO relationship is also critical as senior staff are more likely to stay if they receive strong professional support from the CEO who creates the right environment for them to succeed.<sup>19</sup>

Councillors are responsible for, amongst other things, setting a strategic vision for their area, understanding their community aspirations and needs and taking decisions that guide them in that direction. It is their involvement in the running of the organisation that is the cause of many challenges – often described as operational interference. It is this space which is the most contested in councils – i.e. the boundary between the elected members and their role in the functioning of the organisation. The effectiveness of the management of this intersection is a key capability for all local government CEOs.

The CEO, along with the senior executive and staff, are heads of the administrative arm of a council and are responsible for implementing and running the organisation day-to-day in a way that aligns with and delivers on these directions.

Therefore, CEOs in contemporary local government have ‘three edges’ with which they must interact: (i) the operating edge, dealing with day-to-day management and operations; (ii) the stakeholder edge, dealing with the community and other external agencies who wish to interact with the organisation and in many instances from which councils require cooperation and collaboration to achieve their aspirations; and (iii) the political edge, dealing with the mayor and councillor expectations.

For CEOs, it is critical to work with the mayor and Councillors to identify clear and achievable outcomes through key performance indicators that can be used for performance management.<sup>20</sup> The terms and conditions under which performance management is undertaken need to be established as part of a CEO’s contract. The most successful CEOs are those who establish clear ground rules with the mayor and Councillors about roles and responsibilities and, specifically, about the boundaries between each of their responsibilities.<sup>21</sup> This clarity about roles and responsibilities lessens risks associated with a breakdown in the relationship between the mayor and CEO.

There are well known instances, in every jurisdiction, of employment and performance management relationships between CEOs and Councillors that are either too close or have broken down and hampered council organisational effectiveness. This can lead to corruption risks. These can take the form of mayors asking CEOs to do things that are inappropriate and because of the power that mayors have over the employment of CEOs it can be difficult to manage. Likewise, mayors/Councillors may be acting inappropriately, and it is difficult for CEOs of guide or influence this behaviour.

Some Councillors may not agree with the style or day-to-day decisions of a CEO and take politically motivated action, or use the CEO as a wedge in battles with political opponents. In others, a political and organisation leadership faction that is too cosy or dominant can stymie public debate and reap the spoils of public office. When these relationships unravel, there can be significant organisational disruption and dysfunction, and sometimes corruption – little gets done and the public interest is not served.

Depending on the framing of the legislation, the fact that the CEO is ‘employed by’ the mayor/Councillors creates significant barriers to CEOs managing the actions of Councillors when they are either inappropriate or simply incompetent. Conversely it is important that mechanisms exist for mayors/councillor to manage underperformance or inappropriate behaviour by CEOs.

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<sup>19</sup> [https://www.uts.edu.au/sites/default/files/ACELG\\_RRI\\_Recruitment\\_Vol-1-Report.pdf](https://www.uts.edu.au/sites/default/files/ACELG_RRI_Recruitment_Vol-1-Report.pdf)

<sup>20</sup> Ibid

<sup>21</sup> Ibid

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Depending on the legislative boundaries of this relationship, the skill of the CEO and the role of state agencies in intervening if there is unsatisfactory or indeed corrupt behaviour, it is within this relationship where there are significant integrity risks for individuals involved and the council organisation. The oxygen, effort and energy these issues take to address if either the relationship between Councillors themselves or the Councillors/mayor the CEO is poor or under pressure simply detracts from the functioning of the organisation. It usually attracts media attention and detracts from debate on important matters of policy, planning and service delivery, can damage reputations and future employment prospects, lead to misconduct or illegal behaviour, and, ultimately, sub-optimal outcomes for communities, as well as the reputation of local government in general. Ultimately state governments are responsible for sorting these issues out if that cannot be resolved locally. State governments have an interest in ensuring the effectiveness of these 'boundaries' through the legislation that governs these relationships.

### Role of Councillors in the context of complex public service delivery organisations

The demanding job of delivering public services requires significant skills, experience and capabilities to deal with complex issues such as infrastructure provision and asset management, regulatory compliance and enforcement, social and environmental services, workforce and organisational planning and development, and budgeting. It is largely misunderstood and underappreciated how complex the work of local government is, the range of services and functions for which they are responsible, and the level of generalist and specific management required to effectively lead a council.

Whilst Councillors are responsible for providing some limited and sometimes poorly defined organisational oversight, many are drawn from backgrounds with limited experience running such complex organisations and may not fully appreciate the skills, capabilities, and experience needed to do this. It is also not their role. They have a political role. They are elected as 'representatives' of communities and are responsible for the strategic direction of the organisation, which reflects the aspirations of those they represent, but they are NOT<sup>22</sup> responsible for the means by which that strategy is delivered.

However, a study by Hutchinson, Walker and McKenzie (2013) on Western Australian local governments and the role of leadership in affecting the appointment of CEOs noted:<sup>23</sup>

- elected members were perceived as inexperienced in recruitment processes generally, and in executive recruitment specifically, and there appeared to be limited development of recruitment skills for elected members
- CEO recruitment processes were often ad hoc and lacked rigour, but the use of recruitment agencies was not widely supported.

Indeed, the notion of the public service is based on the presumption that the complex job of public service delivery should be done by those trained in what is a highly specialised field. The Western Australian Government's December 2019 *Draft Guidelines on Standards and Guidelines For Local Government CEO Recruitment and Selection, Performance Review and Termination* note the specific skills and experience required of the CEO in local government and the competencies the council looks for in its CEO should reflect the council's strategic priorities.

### Recruiting CEOs

Given the time and effort involved in finding a competent CEO, and the cost (financial and other broader and arguably more important impacts) of recruiting an unsuitable CEO, there can also be a good business case for spending money on an independent consultant. This expertise can be sourced through private firms or as in most jurisdictions provided on a fee-for-service basis by the state local

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<sup>22</sup> 'NOT' added as per email confirming correction – 11 June 2020 (CD/20/29221)

<sup>23</sup> [https://www.uts.edu.au/sites/default/files/ACELG\\_RRI\\_Recruitment\\_Vol-1-Report.pdf](https://www.uts.edu.au/sites/default/files/ACELG_RRI_Recruitment_Vol-1-Report.pdf)

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government association. Councillors may decide a human resources consultant undertakes the initial due diligence of candidate qualifications, experience and performance, shortlisting of candidates, for example, conducting initial interviews and compiling a short-list of applicants for review, and participate by sitting in on the interviews, providing advice on the recruitment and selection process, obtaining written referee reports, and writing up recommendations.

As also noted in the draft Western Australian Guidelines, a member of the human resources team within a local government should not be involved in the recruitment of a new CEO because when the CEO is employed, he or she would be their employer. This approach can also be supported by independent advice from a human resources consultant with rigorous checks conducted on any consultants before they are engaged to ensure they have the necessary skills and experience in senior executive recruitment and appointments to effectively assist council.

The new Victorian *Local Government Act 2020* requires councils to introduce CEO Employment and Remuneration Policies consistent with the Government of Victoria's Policy on Executive Remuneration in Public Entities. This is intended to:

- ensure CEO salaries and allowances align with existing State Government policies for public sector executives; and
- require councils to obtain independent professional advice on CEO appointments.

### Performance management

CEO performance management can become an organisational tension within councils. When CEOs are in the early stages of a long contract, with potentially large contract pay-outs, Councillors can be reluctant to terminate a CEO and incur this expense because of the political risk being seen as financially imprudent. In these instances, Councillors can pressure CEOs to the point where they feel they have no other option but to resign.

Knowing their employment is at the discretion of Councillors can lead to a situation where CEOs feel pressured to act or lead the organisation in a certain way or take certain decisions that please their dual employment and political masters. An important safeguard against this can be ensuring CEO employment contracts include performance review criteria and clearly outline the process and grounds for termination with the contract approved by absolute majority of council.

### Performance management processes

Councillors have an important role providing oversight of the organisational performance of council. But the line between oversight and straying too far into operational matters can be blurred and hard to define. Councillors are not elected to run the day-to-day operations of a council in delivering public services, but are entrusted with employing and managing the performance of CEOs who are responsible for this.

Councillors should engage in regular discussions with the CEO about their performance and key result areas, progress, and ways the CEO can be supported. Councils could also choose to have a separate performance agreement with additional review criteria including indicators in relation to specific projects and how the criteria will be assessed. Once the CEO's performance has been assessed, it is essential any areas requiring attention or improvement are identified, discussed with the CEO and a plan is agreed and put in place to address these. The plan should outline the actions to be taken, who is responsible for the actions and an agreed timeframe.

Undoubtedly, the performance of a council in its day-to-day operations – the responsibilities of the CEO - is also a reflection of the performance of Councillors in providing oversight of the organisation. It is important to keep in mind that a local government falling short of its goals is not always attributable to the CEO. External factors may have resulted in initial performance expectations becoming unrealistic. Failure to meet key result areas does not necessarily mean the CEO has

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performed poorly and, for this reason, performance and outcome should be considered separately. Therefore, the performance of those responsible running a large and complex public service delivery organisation, should be managed by those with experience in this specialised task.

### *Performance review processes*

Councillors should engage in regular discussions with the CEO about their performance and key result areas, progress, and ways the CEO can be supported. Councils could also choose to have a separate performance agreement with additional performance review criteria including indicators in relation to specific projects and how the criteria will be assessed. Once the CEO's performance has been assessed, it is essential any areas requiring attention or improvement are identified, discussed with the CEO and a plan is agreed and put in place to address these. The plan should outline the actions to be taken, who is responsible for the actions and an agreed timeframe.

If a CEO is deemed to have been performing poorly, the council must be transparent and inform the CEO of this. It is important that the CEO is given an opportunity to remedy the issues within a reasonable timeframe as agreed between the CEO and the council. The council should clearly outline the areas in need of improvement, and with the CEO's input, determine a plan to help the CEO improve. If a plan for improvement is put in place and the CEO's performance remains poor, then termination may be necessary.

Councils should delegate CEO performance review to a panel (e.g. comprising certain council members and an independent) with a duty to gather as much evidence as possible upon which to base their assessments. A useful way of doing this is to increase the scope of people involved in CEO performance management to include external expertise. There is a large cohort of former Mayors, Councillors, CEOs and senior executives who are often willing and eager to give back to the sector, who can be available for this task.

The role of the review panel includes conducting the performance review and reporting on the findings and recommendations of the review to council. The panel must then decide on an appropriate course of action that will address the performance issue. This may include professional development courses, training, counselling, mediation, mentoring or developing new work routines to ensure specific areas are not neglected. The panel should then arrange for regular discussion and ongoing feedback on the identified performance issues, ensuring improvements are being made.

If a council lacks the resources and expertise to meet the expected standard of performance review, the council should engage an external facilitator to assist with the process of performance appraisal and the development of the performance agreement. The local government should ensure that the consultant has experience in performance management and, if possible, experience in local government or dealing with the performance management of senior executives. The consultant should not have any interest in, or relationship with, the council or the CEO.

### *The value of independence in the performance management process*

Involving an independent person with expertise can bring a helpful degree of objectivity and transparency to employment and performance management processes that disincentivises and frustrates the capacity of for canvassing, lobbying, and politically motivated decisions. As noted in the Western Australian Government's *Draft Guidelines on Standards and Guidelines for Local Government CEO Recruitment and Selection, Performance Review and Termination*, an independent human resources consultant will bring expertise, an objective perspective and additional human resources to what is a complex and time-consuming process.<sup>24</sup>

Research has shown CEOs support the use of independent facilitators in performance management processes because it is seen to apply rigour and fairness to the process. This is considered desirable

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<sup>24</sup> <https://www.ioondalup.wa.gov.au/files/councilmeetings/2019/Attach8brf191112.pdf>

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because of the interface between the mayor/Councillors and the CEO. However, the success of an independent facilitator depends on the ability and experience of the independent person involved. Some CEOs have noted the cost of using facilitators is not warranted if they already had good review processes and confidence in the professionalism of the mayor and Councillors to undertake their annual performance reviews.<sup>25</sup>

### Performance criteria

Setting performance criteria is an important step. As one of the CEO's key responsibilities is to oversee the implementation of council's strategic direction, it is important to align the performance criteria to a council's strategic goals. The Western Australian Government's recently released *Draft Guidelines on Standards and Guidelines For Local Government CEO Recruitment and Selection, Performance Review and Termination* provide useful guidance on standards for CEO performance review:

- key result areas are specific, relevant, measurable, achievable and time-based
- the key result areas and the performance process are recorded in a written document, negotiated with and agreed upon by the CEO and council
- the CEO is informed about how their performance will be managed and the results of their performance assessment
- the collection of evidence regarding key result areas is thorough and comprehensive
- assessment is made free from bias and based on the CEO's achievement against key result areas and decisions and actions are impartial, transparent and capable of review
- the council has endorsed the performance review assessment by absolute majority.

Key result areas should be set for each critical aspect of the CEO's role, be measurable and clearly defined, assigned priority weightings, and relate to the selection criteria, skills and experience required in appointing a CEO. These could be in relation to:

- service delivery targets from the council's strategic priorities
- budget compliance
- organisational capability
- operational and project management
- financial performance and asset management
- timeliness and accuracy of information and advice to Councillors
- implementation of council resolutions
- management of organisational risks
- leadership (including conduct and behaviour) and human resource management, and
- stakeholder management and satisfaction.

For example, if a CEO is selected due to their financial experience and ability to improve the local government's finances, indicators regarding improved revenue and reduced expenses are obvious starting points.

It is essential CEO performance is measured in an objective manner against the criteria alone. It is important reviews are impartial and not skewed by personal relationships. Close personal relationships can be just as problematic as extremely poor ones. The council should consider any

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<sup>25</sup> [https://www.uts.edu.au/sites/default/files/ACELG\\_RRI\\_Recruitment\\_Vol-1-Report.pdf](https://www.uts.edu.au/sites/default/files/ACELG_RRI_Recruitment_Vol-1-Report.pdf)

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evidence of CEO performance from two perspectives, namely, current CEO performance and future performance if the CEO's current behaviours continue. Evidence of CEO performance may come from an array of sources, many of which the CEO themselves can and should provide to the council as part of regular reporting:

- achievement of key business outcomes
- interactions with the council and progress that has been made towards implementing the council's strategic vision
- audit and risk committee reports
- workforce metrics (e.g. the average time to fill vacancies, retention rate, information about why people leave the organisation and staff absence rate)
- incident reports (e.g. results of occupational health and safety assessments, the number and nature of occupational health and safety incident reports, the number and nature of staff grievances)
- organisational survey results
- relationships (e.g. with relevant organisations, stakeholder groups, professional networks and the relevant unions), and
- insights from key stakeholders (this could be done by way of a survey to obtain stakeholder input).

### Benefits of good performance management

Research has shown council CEOs value credible and professional performance management. Some key elements in relation to performance management for CEOs include:<sup>26</sup>

- the best performance management practices focus on positive feedback, not just problems
- performance management should be used as a motivational tool, especially for senior staff
- a lack of positive feedback can diminish the enjoyment of a role
- the biggest problem is not necessarily that performance management is sometimes done poorly for CEOs, but rather that performance management is not done at all
- elected representatives do not generally initiate CEO performance reviews, and it is important for the CEO to insist/ensure that their performance review is undertaken
- one of the most important benefits of performance reviews is the opportunity for CEOs to discuss and agree on future priorities with the mayor and Councillors, and not just focus on the last 12 months.

CEOs have identified some helpful tips and practices for performance management which they believed work well in councils:<sup>27</sup>

- Ensuring that the CEO has a performance plan prepared within the first month of their employment. If it is not prepared at that time, it is often simply not done. It is up to the new CEO to manage this process to ensure that it is completed.
- Setting a timetable for all of the annual performance reviews of the CEOs and senior managers, and other council staff, to be undertaken at the same time every year. Locking the annual

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<sup>26</sup> [https://www.uts.edu.au/sites/default/files/ACELG\\_RRI\\_Recruitment\\_Vol-1-Report.pdf](https://www.uts.edu.au/sites/default/files/ACELG_RRI_Recruitment_Vol-1-Report.pdf)

<sup>27</sup> [https://www.uts.edu.au/sites/default/files/ACELG\\_RRI\\_Recruitment\\_Vol-1-Report.pdf](https://www.uts.edu.au/sites/default/files/ACELG_RRI_Recruitment_Vol-1-Report.pdf)

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performance review into a corporate calendar means that there is less likelihood of it being overlooked.

- Seek and provide feedback throughout the year, not just at the annual performance review. The sooner a problem is addressed, the better. Also, the sooner that praise is provided for a job well done, the more effective it is.
- There needs to be a strong correlation between professional development and the performance management system. Use of a performance management system to identify skill shortfalls will encourage senior managers to develop those skills.

### *Role of Councillors and CEOs in the legislation*

The key point here is that both the roles of the CEO and the roles of the mayor/Councillors are clearly articulated in the legislation that governs these relationships.

The *Local Government Act 2020* defines the role of councillor as to: participate in the decision-making of the council; represent the broad interests of the local community in that decision-making; and to contribute to the strategic direction of the council through the development and review of key strategic documents of the council, including the Council Plan. It goes on to define the role of the council CEOs as to lead the administrative arm of council and employ staff.

Elected Councillors and CEOs are usefully guided to do what they do best – for Councillors, setting a vision and taking decisions that guide the council and for CEOs implementing those decisions with skills and experience needed to run a large, complex organisation. Just as, and perhaps indeed because, the services modern councils deliver are becoming more complex so too are the challenges Councillors must navigate in setting strategic direction.

The more direction and clarity that can be put around the role of Councillors and CEOs the better, with the emphasis on strategic direction setting for Councillors and operational leadership and performance for CEOs. Framing the CEO/councillor relationship in such a way that day-to-day operations are at arm's length from the Councillors and that reinforce strong probity, risk and assurance systems can also help guard against corruption. State governments can also monitor and undertake performance improvement processes with councils where there is concern about the relationship.

### *Some ideas*

While the use of audit committees has been mandatory in Victoria since 2003 and there are supporting guides<sup>28</sup> and training to assist their effective implementation, these committees in themselves have not been sufficient to prevent corruption. Historically, the role of the audit committee focused on the financial report, accounting, internal control matters, and on the integrity of accounting systems. Audit committees are now commonly given a broader mandate that covers a wide range of activities. This includes risk management (including fraud prevention strategies), financial and non-financial performance, compliance requirements and other audit and assurance activities not directly related to the financial report. I would argue that key to fraud and corruption prevention lies in the establishment of clear roles for Councillors and mayors and CEOs and the establishment of clear boundaries between them.

While the use and value of codes of conduct are dealt with elsewhere, it is important to note that all the measures that can assist fraud and corruption prevention should be seen as a suite of measures applied and working together.

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[https://www.localgovernment.vic.gov.au/data/assets/pdf\\_file/0021/84081/Audit\\_Committees\\_Guidelines-A-guide-to-good-practice-for-local-government.pdf](https://www.localgovernment.vic.gov.au/data/assets/pdf_file/0021/84081/Audit_Committees_Guidelines-A-guide-to-good-practice-for-local-government.pdf)

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In addressing the key relationship between Councillors and CEOs and the importance of 'good boundaries' as well as appreciating that the state government is ultimately responsible for intervening in the operation of councils if serious dysfunction occurs, a few ideas are canvassed here which may be thought provoking.

In providing the independent support for CEO recruitment and management, it may be useful to have a panel of experts who can be involved in working with Councillors to shape the criteria for assessment for CEO appointments as well as to provide ongoing support for the management of performance and supporting functioning relationships.

Such a panel could be sourced from former successful CEOs, and other relevant experts, who are made available to councils to support recruitment, as well as ongoing monitoring of relationships. These experts can work with Councillors to identify the characteristics of candidates (general and specific to the needs of the councils) and then support the processes in recruitment as well ongoing needs. This could be an extension of and in addition to expert recruitment support as outline above.

This support and capacity building could be established in a routine manner, and not only be used if there are evident difficulties in the relationships. This type of intervention and support should be preventative and routine, rather than reactive and interventionist. Once relationships have soured, they are difficult to recover. Furthermore, this kind of approach introduces a level of transparency and would be a proactive measure in the strengthening of corruption prevention in local government.