



# Appendix twelve – NSW Crown Solicitor's advice

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**CROWN SOLICITOR**  
NEW SOUTH WALES

## Advice

Local Government Act 1993 - County councils and joint organisations

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**Prepared for:** AUD018 Audit Office of NSW  
**Date:** 7 August 2018  
**Client ref:** Liz Basey  
**CSO ref:** 201802643 T08 Alexandra Brown

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## **1. Summary of advice**

- 1.1 You seek my urgent advice as to whether the Auditor-General is to be the auditor for joint organisations and county councils under s. 422(1) of the *Local Government Act 1993* ("LG Act").
- 1.2 As to question 1, subject to certain exceptions that are not presently relevant, the *LG Act* applies "to county councils in the same way as it applies to councils" with such exceptions and modifications (if any) as the regulations may provide (s. 400(1), *LG Act*). Part 3 of Ch. 13 (ss. 408-427) of the *LG Act* contains provisions regarding financial management, including auditing, of councils. As there are no relevant exceptions or modifications in the regulations, Pt. 3 of Ch. 13 applies to county councils in the same way as it applies to councils and, by application of s. 422(1), the Auditor-General is to be the auditor for a county council.
- 1.3 As to question 2, other than the "excluded provisions" and any modification or exclusion in the regulations, the *LG Act* applies "to a joint organisation in the same way as it applies to a council" (s. 400ZH(1), *LG Act*). As Pt. 3 of Ch. 13 is not an "excluded provision", that Part applies to a joint organisation in the same way as it applies to a council (subject to the modified application of s. 413(1) by cl. 397N of the *Local Government (General) Regulation 2005*). By application of s. 422(1), the Auditor-General is to be the auditor for a joint organisation.
- 1.4 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

## **2. Background**

- 2.1 You instruct me that it is accepted throughout the sector that the Auditor-General is to be the auditor for county councils. Your office currently contracts out the audits of all ten county councils.
- 2.2 You are concerned because s. 422(1) of the *LG Act* provides that "The Auditor-General is to be the auditor for a council" but there is no specific reference in that provision to the Auditor-General being the auditor for a county council or a joint organisation.

## **3. Advice sought**

- 3.1 By letter dated 30 July 2018, you seek my urgent advice as to the following questions:
  - "1. Is it reasonable to conclude that I do not have the mandate to audit county councils on the basis the Act does not specifically appoint me as the auditor of county councils? Or could it be argued that as the provisions in Chapter 13, Part 3 of the Act on financial management apply to county councils in the same way as councils, county councils are subject to my oversight in the same way as councils? Are there other considerations I should be aware of?

2. Do the principles that apply to the audit of county councils apply in the same way to joint organisations?"
- 3.2 I understand question 2 to be asking whether Pt. 3 of Ch. 13 of the *LG Act* applies to joint organisations, and, specifically, whether the Auditor-General is to be the auditor for a joint organisation.
- 3.3 You also seek my advice on any other issues I consider relevant. Whilst I have not raised any other issues in this advice, I would of course be pleased to provide further advice, if required.

#### **4. Advice**

##### **Question 1 – county councils**

- 4.1 The provisions with respect to financial management of councils are found in Pt. 3 of Ch. 13 of the *LG Act* (ss. 408-427). Division 2 of Pt. 3 of Ch. 13 is concerned with, among other things, the obligation on a council to prepare financial reports and to refer them for audit (s. 413); the auditing of a council's financial reports (s. 415); the time for preparation and auditing of a council's financial reports (s. 416); and the reports to be prepared by a council's auditor (s. 417).
- 4.2 Division 3, "Auditors", of Pt. 3 of Ch. 13 includes s. 422, which relevantly provides:
- "(1) The Auditor-General is to be the auditor for a council.
  - (2) The Auditor-General may appoint, in writing, a person (whether or not that person is employed in the Public Service) or a firm to be an auditor for the purposes of this Act."
- 4.3 Division 3 also provides for access to and production of documents to the Auditor-General (s. 423), including access to records of deposit-taking institutions (s. 424), in addition to setting out secrecy provisions (s. 425) and imposing an obligation on the Auditor-General to communicate with the Minister (s. 426). Division 2A of Pt. 3 of Ch. 13 includes provision for the Auditor-General to conduct performance audits of all or any particular activities of one or more councils.
- 4.4 County councils are dealt with in Pt. 5 of Ch. 12. Section 400 is concerned with the application of the *LG Act* to county councils, and relevantly provides as follows:
- "(1) This Act (except Part 1 and Divisions 1 and 2 of Part 2 of Chapter 9, Chapter 10, section 365, Part 7 of this Chapter and the provisions of Chapter 15 concerning the making and levying of ordinary rates) applies:
    - (a) to county councils in the same way as it applies to councils, and
    - (b) to the members of county councils in the same way as it applies to the councillors of councils,with such exceptions and modifications (if any) as the regulations may provide."
- 4.5 The effect of s. 400(1)(a) is that the *LG Act* applies "to county councils in the same way as it applies to councils" with the exception of those provisions specified in parentheses

and with such exceptions and modifications (if any) as the regulations provide. As explained above, the provisions relevant to the auditing of councils are found in Pt. 3 of Ch. 13. None of these provisions are specified in s. 400(1) as not applying to county councils, nor do the regulations make any exceptions or modifications to the application of Ch. 13 to county councils (see *Local Government (General) Regulation 2005* ("the Regulation")).

- 4.6 Accordingly, in my view, it follows that the effect of s. 400(1)(a) is that Pt. 3 of Ch. 13 (which contains the financial management provisions) applies to county councils in the same way as it applies to councils. In particular, this means that, by application of s. 422, the Auditor-General is to be the auditor for a county council.
- 4.7 For completeness, I note that I am not aware of anything in the extrinsic materials that accompanied the introduction of the *LG Act*, including the provisions with respect to county councils, which would support a different interpretation of s. 400(1)(a).

### Question 2 – joint organisations

- 4.8 Part 7 of Ch. 12 of the *LG Act* contains provisions relating to joint organisations. This Part was inserted into the *LG Act* by the *Local Government Amendment (Regional Joint Organisations) Act 2017* ("Regional Joint Organisations Act"), and commenced on 15 December 2017<sup>1</sup>.
- 4.9 Section 400ZH addresses the application of the *LG Act* to joint organisations. Section 400ZH(1) provides:

"(1) Except as provided by subsection (3), this Act applies:

- (a) to a joint organisation in the same way as it applies to a council, and
- (b) to the representatives on the board of a joint organisation in the same way as it applies to the councillors of councils, and
- (c) to the executive officer of a joint organisation in the same way as it applies to the general manager of a council."

- 4.10 Subsection (3) lists "excluded provisions" of the *LG Act* that do not apply to or in respect of a joint organisation. Parts 2 and 4 of Ch. 13 and ss. 438T, 438ZA and 438ZB are excluded provisions (s. 400ZH(3)(i)). The excluded provisions do not include any of the provisions in Pt. 3 of Ch. 13 (which contains the financial management provisions). The regulations may modify the application of any provision of the *LG Act* that applies to or in respect of a council for the purpose of its application to a joint organisation, or exclude a provision of the *LG Act* from applying to or in respect of a joint organisation (s. 400ZH(5)). As your instructions note, cl. 397N of the *Regulation* modifies the application of s. 413(1) of the *LG Act* with respect to the time in which the first financial reports are required to be prepared for a joint organisation under Pt. 3 of Ch. 13 of the *LG Act*.

<sup>1</sup> By proclamation of the Governor dated 13 December 2017 (NSW Government Gazette, Commencement Proclamation No 730, 2017).

- 4.11 In my view, s. 400ZH(3)(i) evinces a deliberate and specific intention to exclude the application of those provisions of Ch. 13 specified therein to joint organisations and to render the remainder of that Chapter applicable to joint organisations in the same way as it applies to councils, unless modified or exempted by the regulations. Other than cl. 397N of the *Regulation*, I am not aware of any regulation that modifies the application of a provision of Pt. 3 of Ch. 13 of the *LG Act* to joint organisations.
- 4.12 For completeness, I note that the following comments made on behalf of the Minister in the Second Reading speech accompanying the introduction of the *Regional Joint Organisations Act* provide support, in general terms, for the interpretation of s. 400ZH set out above (Legislative Council Hansard, 15 November 2017, pp.52-56):
- "To protect the public interest, the bill will generally require joint organisations to meet the standards of conduct and good governance, transparent reporting, accountability and oversight expected of councils, councillors and council staff.
- In new subsections 400ZH (1) and (2), the bill provides that most provisions in the [*LG Act*] apply to joint organisations and their office holders and staff in the same way as it applies to local councils.
- ...
- Where particular provisions of the [*LG Act*] that apply to councils are not appropriate to be applied to a joint organisation, they are explicitly excluded by new section 400ZH (3). There is also a regulation-making power to prescribe further provisions of the [*LG Act*] as either applying or not applying to joint organisations. This allows for some flexibility if it becomes apparent that further or fewer provisions of the Act should apply as joint organisations' governance and operations are further developed and become more complex over time.
- Joint organisations are also intended to operate with minimal cost and red tape. For that reason there is a broad regulation-making power that will allow adjustments to be made to a range of standard governance requirements, including planning and reporting requirements that would apply to councils. This will help to make sure that joint organisations remain lean and effective."
- 4.13 In summary, the effect of s. 400ZH of the *LG Act* is that Pt. 3 of Ch. 13 applies to a joint organisation in the same way as it applies to a council (subject to the modified application of s. 413(1) by reason of cl. 397N of the *Regulation*). Accordingly, by application of s. 422(1) of the *LG Act*, the Auditor-General is to be the auditor for a joint organisation.

Signed:

  
Lea Armstrong  
Crown Solicitor

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