

Subsidiaries – *Ministerial Approval*

Guidance paper no. 3

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This document and others in the series are provided as a guide to good practice and not as a compliance requirement.

The content is based on officer's knowledge, understanding, observation of, and appropriate consultation on, current good practice. Information papers may also include the Office of Local Government's views on the intent and interpretation of the legislation.

The material does not constitute legal advice.



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 responsible for the *Local Government Act 1999* (the LG Act) for—

- the creation and establishment of a subsidiary;
- the amendment of subsidiary charters; and
- the winding up of a subsidiary.

Applicable legislation

Under sections 42 and 43 of the LG Act, councils are given the power to establish single council subsidiaries and regional subsidiaries, respectively. This power, however, is subject to obtaining the approval of the Minister for the conferral of corporate status [see sections 42(3) and 43(4) of the LG Act].

Schedule 2 to the LG Act contains other provisions relevant to subsidiaries, including requirements related to the content of a subsidiary's charter and the review of charters.

Ministerial approval to wind up a subsidiary is also required under Schedule 2 to the LG Act.

Establishment of a subsidiary

A subsidiary can be established to provide services, carry out activities, or perform functions of the council/s [sections 42(1) and 43(1) of the LG Act].

In addition, a single council subsidiary may be established to manage or administer property or facilities on behalf of a council.

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) of the LG Act].

The council may not delegate the power to establish a subsidiary, or participate in the establishment of a regional subsidiary [section 44(3)(i) of the LG Act].

Regulatory activities

A single council subsidiary cannot be established for the primary purpose of performing a regulatory activity of a council [section 42(2) of the LG Act].

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) of the LG Act].

Activities outside council area/s

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.

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) does not have the power to carry out itself.

The charter of a subsidiary must therefore not express a purpose that is beyond the power of the constituent councils, and subsidiaries can act outside of the area of the council or councils only so far as section 36(2) of the LG Act 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 disposal of waste outside the council area may be necessary in practice).

In this example, 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 clearly stated in the charter.

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.

Matters that must be addressed in charters of subsidiaries

Clauses 3 and 19 of Schedule 2 to 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 1, Subdivision 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 regulations¹.

Regional subsidiary charters must also address—

¹ There are currently no requirements prescribed by regulation.

- 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.

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.

A subsidiary is a separate legal entity to a committee, and as such, names containing a reference to a 'committee' are incorrect and confusing.

Similarly, a name with 'Pty' or 'Inc' in the title is misleading, as a subsidiary of a council is not a company or an incorporated association.

Accordingly, names containing the above words, or similar, which may cause confusion as to the operation and powers of the subsidiary, should be avoided.

Ministerial approval

Schedule 2 to 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 Minister²; and
- accompanied by information required by the Minister; and
- accompanied by a copy of the proposed charter for the subsidiary.

A subsidiary comes into existence when the Minister, by notice in the *Government Gazette*, signifies his or her approval of the establishment of the subsidiary.

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 *Government Gazette*.

Seeking the approval of the Minister

Each council must make an appropriate resolution to submit the proposed charter to the Minister for approval. In relation to a proposed regional subsidiary, all of the constituent councils must individually resolve to seek the Minister's approval. The best practice is that the executive officer of the regional subsidiary compiles these separate resolutions, along with the relevant reports, and writes to the Minister, providing all required information in one package.

Information to be provided to the Minister

For the purposes of Schedule 2 to the LG Act, the following information should be provided (but is not limited to) to the Minister along with the request to establish the subsidiary—

- background information on the reason(s) to establish the subsidiary or regional subsidiary;
- a copy of the charter that has been prepared in accordance with the requirements of the Act;
- a statement that the Australian Business Register has been checked;

² Currently, there is no specific form approved by the Minister. A letter signed by the council/constituent councils providing all required information, as set out in this guidance paper, is considered sufficient for seeking Ministerial approval.

- copies of any relevant reports and resolutions by the constituent councils leading-up to the establishment of the subsidiary or regional subsidiary;
- the date the subsidiary or regional subsidiary intends to commence operations (if different from the date of establishment as signified by the notice of the Minister in the *Government Gazette*);
- if the subsidiary/regional subsidiary will be employing persons to carry out its activities, information regarding the intended start date of employment for those workers (if known).

Review and Amendment 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 [clause 3(4) of Schedule 2 to the LG Act].

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 [clause 19(4) and (5) of Schedule 2 to the LG Act].

A council, or constituent councils in the case of regional subsidiaries, must, if a charter is amended, provide a copy of the amended charter together with relevant council resolutions to the Minister, ensure the amended charter is published on a relevant website, and ensure that notice of the fact of the amendment and a website address at which the charter is available for inspection is published in the *Government Gazette* [clauses 3(5) and 19(5) of Schedule 2 to the LG Act, respectively].

A review of a subsidiary's charter should reconsider the matters that must be addressed in the charter to ensure it is still current, and reflect 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 section 36(2) of the LG Act and made clear in the charter.

The Office of Local Government (OLG) offers advice and assistance to councils that review and decide to amend their subsidiary's charter.

Winding up of a subsidiary

Schedule 2 to the LG Act states that the council of a single council subsidiary (clause 16) or the constituent councils of a regional subsidiary (clause 33) must formally request Ministerial approval for the winding up of the regional subsidiary. A subsidiary is wound up by the Minister publishing a notice in the *Government Gazette*.

Where an application is forwarded to the Minister requesting the wind up a subsidiary, the following information should be provided with the request—

- background information on why and when the subsidiary was established, and why the subsidiary needs to be wound up;
- the charter of the subsidiary;
- confirmation that the winding up will comply with clause 16(3) or clause 33(3)³ [whichever is relevant] regarding the assets or liabilities of the subsidiary; and
- copies of the relevant reports and resolutions by the constituent councils relating to the winding up of the subsidiary. Such reports usually contain the above information.

It is best practice for the executive officer of the subsidiary to compile all necessary information and provide it to the Minister in one package.

For regional subsidiaries, this means compiling the relevant resolutions and reports from each constituent council.

When individual constituent councils provide the Minister with individual information and resolutions at different times, the Minister's consideration of the application can be substantially delayed.

The role of the Office of Local Government

The Office of Local Government (OLG)—

- provides a review of a proposed charter to ensure that it addresses all matters required by Schedule 2 to the LG Act;
- can assist councils in finalising their proposed charters (but cannot provide legal advice on the content of the charter);

³ The charter of a regional subsidiary must address the manner in which the property of the subsidiary is to be distributed in the event of a winding up: clause 19(2)(p) of Schedule 2 to the LG Act.

- ensures applications are in the requisite form and accompanied by the information required by the Minister;
- provides advice and recommendations to the Minister in relation to the council(s) compliance with the LG Act and to assist in his/her consideration;
- on approval by the Minister, coordinates the publication of notices in the *Government Gazette*, and liaise with the council/constituent councils regarding the publishing requirements for charters.

Publishing of a newly established or amended subsidiary charters

It is the responsibility of the council(s) to ensure that the charter for a newly established subsidiary, or the web-link of an amended charter, is published in the *Government Gazette*.

Accordingly, 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 and costs prior to publication.

OLG will generally organise the publication of the charter on commencement of the subsidiary, to ensure that it is published in the same edition of the *Government Gazette* as the notice of approval of the Minister for its establishment.

Other Relevant Matters

Australia Business Register

Prior to seeking the approval of the Minister for the establishment of the subsidiary, the council/constituent councils should ensure that the proposed subsidiary name is available for use. This can be done by checking the Australian Business Register www.abr.business.gov.au.

Fair Work Act 2009

The commencement in 2010 of the Commonwealth *Fair Work Act 2009* (Cth) created a national system of industrial relations for the private sector. South Australia has, however, retained a state system of industrial relations covering the public sector and local government employers and employees.

The list of local government sector employers is contained in Schedule 3 to the Local Government (General) Regulations 2013. As a newly created subsidiary of local government, the subsidiary will need to be excluded from the national system of employment, by being included in the list of local government sector employers.

OLG will complete the required paperwork, liaising with the requisite national bodies to have this declaration made. It is for this reason that information regarding the employment intentions of the subsidiary is sought by the OLG.

For further information about this and other guidance papers contact:

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Other guidance papers are available at www.agd.sa.gov.au/local-government