SUBJECT: CCL 24/11/15 - REVIEW OF THE INSTRUMENTS OF DELEGATION

REPORT BY: EXECUTIVE MANAGEMENT
CONTACT: INTERIM CHIEF EXECUTIVE OFFICER / MANAGER COUNCIL AND LEGAL SERVICES

PURPOSE

To provide comments on operational concerns with implementation of the Instruments of Delegation to the Chief Executive Officer and Lord Mayor in the form as tabled at the Council meeting held on 27 October 2015, and implementation of changes to the organisational structure, also proposed at the same Council meeting.

RECOMMENDATION

1. Adopt the suggested amended Instruments of Delegation to the Chief Executive Office and Lord Mayor as specified in Attachment A.

2. Adopt the organisation structure set out in Attachment B such that the Manager Legal and Governance reports directly to the Chief Executive Officer with the Legal and Governance Business Unit comprising the functions of Legal Services (including Access to Information and Governance), Council Services, Business Improvement and Internal Audit.

KEY ISSUES

3. The Instruments of Delegation and the amended organisational structure remain unimplemented because of Councillor Luke's rescission motion that was foreshowed at the last Ordinary Council meeting in respect of Part A of the recommended resolution.

Concerns with regard to the Instruments of Delegations to the Chief Executive Officer and Lord Mayor

4. Some substantive practical and operational concerns with the implementation of the Instruments of Delegation to the Chief Executive Officer and Lord Mayor tabled at the Council meeting on 27 October 2015 have been identified. Detailed comments setting out those concerns are outlined in the table at Attachment C. In summary, the concerns relate to:

5. Creating inconsistency with current practice
Since 2008, Council delegations have been reviewed to ensure the General Manager is delegated all day to day operational functions unconditionally, consistent with s. 335 of the Local Government Act 1993 (the Act), with limitations as per s. 377 of the Act and minor additional limitations. A review of delegations over a number of years have streamlined the delegations. Refer to the following documents for further details:

- Instrument of Delegation to the General Manager and Lord Mayor dated 24 September 2013 (Attachment D);
- Instrument of Delegation to the General Manager and Lord Mayor dated 5 July 2011 (Attachment E);
• Instrument of Delegation to the General Manager and Lord Mayor dated 30
  September 2008 (Attachment F).

6 Council policy, procedures and systems have been developed and rely on
deliverables whereby the General Manager is able to freely perform the operational
day to day functions of Council in accordance with the requirements of s.355 of the
Act. As such, the Instruments, as currently drafted, pose some practical and time
consuming operational concerns which are included in the table at Attachment C.

7 Ambiguity and lack of clarity in some clauses
The Instrument of Delegation to the CEO contains subjective words, such as
'significant' and 'unfavourably', (refer to clauses 7, 18, 20 and 26) As such, the
Instruments, as currently drafted, pose some practical interpretational issues,
which will inhibit Council management staff to engage in the efficient, timely and
prompt decision-making that is necessary to best provide for services to the
community and to readily meet community expectations.

8 The use of subjective language leaves the delegations open to interpretation and
may create dispute and a need for legal advice on the correct interpretation. Even
legal interpretation may not ultimately be able to provide a reasonably prompt and
practical outcome to meet the timely needs of Council management to properly
and efficiently manage Council business and service functions.

9 Council sought advice from the Office of Local Government (OLG) on the possible
difficulties and confusion with the use of subjective words. The OLG has provided
the following advice:

"Ultimately, it is a matter for the Council to ensure that its delegations are
sufficiently clear and unambiguous to convey with reasonable specificity which
functions of the Council are to be exercised by the delegate and in what
circumstances.

The Office agrees that a failure to do so has the potential to expose decisions
of the Council, made through its delegates, to the risk of legal challenge on
grounds that the exercise of the Council’s functions lay outside the delegation
conferred on the decision maker.

It is also this Office’s experience that where the respective roles of the Mayor
and general manager are not sufficiently clearly defined and delineated,
including through the delegations conferred on them by the Council, this can
be a source of ongoing conflict and dysfunction within a council."

10 The cross reference to the Lord Mayor’s Instrument of Delegation in the CEO’s
Instrument of Delegation creates further uncertainty. This has the impact of
restricting the functions of the CEO (and staff) further than was intended. As such,
it is suggested that the cross reference to the Lord Mayor's delegation be deleted.
The CEO will still be limited in the performance of his functions by the specific
limitations listed (specific examples of the problems created, are set out in the
table at Attachment C).
Concerns with regard to new proposed organisational structure

11 Part A of the General Manager’s Performance Review Committee Report did not provide the background and reasoning to explain the changes to the organization structure.

12 The proposal for Councillor Services to report to the Chief Executive Officer and, indirectly to the Lord Mayor, doesn’t heed the fact that the functions of Councillor Services, including the preparation of Council meeting agendas, business papers and the drafting of Council meeting minutes, are part of the functions given to the General Manager in accordance with the Local Government (General) Regulation 2005 (Regulation).

13 Specifically, clause 240 of the Regulation provides as follows:

240 Agenda and business papers for council meetings

(1) The general manager must ensure that the agenda for a meeting of the council states:
   (a) all matters to be dealt with arising out of the proceedings of former meetings of the council, and
   (b) if the mayor is the chairperson-any matter or topic that the chairperson proposes, at the time when the agenda is prepared, to put to the meeting, and
   (c) subject to subclause (2), any business of which due notice has been given.

(2) The general manager must not include in the agenda for a meeting of the council any business of which due notice has been given if, in the opinion of the general manager, the business is (or the implementation of the business would be) unlawful. The general manager must report (without giving details of the item of business) any such exclusion to the next meeting of the council.

(3) The general manager must cause the agenda for a meeting of the council or a committee of the council to be prepared as soon as practicable before the meeting.

(4) The general manager must ensure that the details of any item of business to which section 9 (2A) of the Act applies are included in a business paper for the meeting concerned.

(5) Nothing in this clause limits the powers of the chairperson under clause 243.

[Emphasis added]

14 Clause 254 of the Regulation also provides that:

254 Matters to be included in minutes of council meeting

The general manager must ensure that the following matters are recorded in the council’s minutes:
(a) details of each motion moved at a council meeting and of any amendments moved to it,
(b) the names of the mover and seconder of the motion or amendment,
(c) whether the motion or amendment is passed or lost.

[Emphasis added]

15 Clause 240(5) of the Regulation confirms that if the Lord Mayor wishes the Councilors to consider a matter not on the Agenda, the appropriate means for doing so is via a Mayoral minute (refer to Clause 44 of Council's Code of Meeting Practice (COMP).

16 An organisation structure that has Councillor Services staff having a broken reporting line into the Lord Mayor's Office is potentially open to political direction from the Lord Mayor. This is inconsistent with the above quoted clear and unambiguous functions of the General Manager and also potentially in breach of s. 352 of the Local Government Act which provides as follows:

352 Independence of staff for certain purposes

(1) A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.
(2) This section does not prevent the council or the mayor from directing the general manager of the council to provide advice or a recommendation.

17 This could also give rise to potential breaches of Council's Code of Conduct (clause 23 entitled "Obligations of Councillors and Administrators" and clause 26 entitled "Inappropriate interactions" and Council's Interaction between Councillors and Staff Policy.

18 The potential for a conflict to arise in the discharge of the General Manager's functions as envisaged under the Regulation is heightened, for example, if the Lord Mayor were to request the Councillor Services staff to include an item on the agenda which the General Manager considers to be unlawful (refer to Clause 19.5 of the COMP which provides that):

"The General Manager must not include in the agenda for any Meeting any business of which due notice has been given if, in the opinion of the General Manager, the business is (or the implementation of the business would be) unlawful. The General Manager must report any such exclusion to the Meeting."

19 The end result is that the proposed organisational structure has the possibility of enabling the Lord Mayor and the Lord Mayor's Office staff to determine agendas and business papers which is in direct conflict with the legislative intention which gives the relevant functions to the General Manager. For this reason, the proposed change is not recommended.

20 As a general proposition, Councillor Services staff need to report into a business unit manager for supervision purposes and for normal day-to-day technical advice, assistance and direction. In the present circumstances, the most appropriate person for the Councillor Services staff to report to is the Manager, Council and Legal Services.
21 The proposal appears to limit the Chief Executive Officer from directly overseeing Council's legal team (made up of the Manager Council and Legal Services, 2 x Lawyers, a Legal and Information Officer and a Governance Officer who are all lawyers, and who hold current NSW Legal Practising Certificates and provide independent legal advice or make independent decisions to or on behalf of Council).

22 It is inappropriate for Council's lawyers to report to a Director rather than to the Chief Executive Officer, because independent legal advice needs to go directly to the Chief Executive Officer, not through multiple layers of management such that legal professional privilege may be lost or waived. In this regard, three examples are offered:

   (i) Port Stephens Council where the Council and GM Support, Legal Services, Corporate Planning and Governance functions report directly to the GM (refer to the copy of the Port Stephens Council organisation structure attached at Attachment G);

   (ii) Warringah Council in Sydney where the head of Legal Services reports directly to the GM. In the latter instance, the issue of Council's claim in respect of legal professional privilege in the context of an appeal concerning legal advice given in the context of a GIPA request was tested and successfully upheld. The judgement of the Civil and Administrative Tribunal decision in Holman v Warringah Council [2015] NSWCAT 215 was handed down on 19 October 2015. A copy of the judgement is attached as Attachment H. On page 5 of the judgement, the Senior Member of the Tribunal makes the relevant statement:

       "The general manager [of Warringah Council] insists on the professional independence of the in-house lawyers, the most senior of whom reports directly to him".

   In addition, it is typical in the private sector for the General Counsel/Company Secretary of companies to report directly to the CEO/Managing Director.

   (iii) City of Sydney Council where the Manager, Legal and Governance reports directly to the CEO (refer to the copy of the City of Sydney Council organisation structure attached as Attachment I).

23 The Warringah Council case concerned the merits of the claim by the Council for legal professional privilege in the context of its in-house lawyers in respect of documents that were confidential and had been brought into existence by them in respect of a claim by a ratepayer against Council. Because the relevant documents were created for the dominant purpose of the provision of legal advice, Council was ultimately successful in being able to use an exception under the GIPA legislation to refuse access to the relevant documents on the grounds that they were legally privileged.

24 For an employer of an in-house lawyer to satisfy that the legal advice provided by an in-house lawyer can successfully be the subject of a claim for legal professional privilege, the relevant lawyer must hold a current legal practising certificate issued by Law Society of NSW; the legal advice provided was done so
in the context of the existence of a client and lawyer relationship between Council and the in-house lawyer; the confidential nature of the communication or document, and that the latter was brought into existence for the dominant purpose either of enabling the client to obtain, or the lawyer to give, legal advice or provide legal services or for use in existing or anticipated litigation.

25 As part of this process is it important that the in-house lawyers are able to demonstrate their professional independence. In the particular case, the lawyers' contracts of employment incorporated clauses such as the "need for independence of the Employee due to the Employee's role as a Corporate Lawyer" and "that, when acting as Legal Practitioner, the Employee's obligations as a legal practitioner, including to the court, are paramount and prevail over the Employee's duties to the Council." Other provisions dealt with the employed in house lawyers undertaking to take practicable steps to implement protocols to achieve the requisite independence. Copies of the relevant contractual provisions from the contracts of employment were provided to NCAT as evidence

26 As a consequence of the judgement, Council is currently reviewing the Position Descriptions of all of the lawyers employed by Council with a view to incorporating the aforesaid provisions in order to best protect Council's interests. The need for this exercise is to take pro-active action to protect Council's legal position if ever in the future Council is ever challenged as to the merits of any claim by Council in respect of legal professional privilege in respect of legal advice documents whether in the context of a GIPA request or, alternatively, in respect of a legal claim or legal proceedings against Council.

27 Further for the protection of legal privilege, it is important that Council's Legal and Information Officer and Governance Officer are included as part of Legal Services and as such 'Access to Information' should not appear as a separate function. When Council's Legal and Information Officer is involved in making a decision about access to information, this is a legal decision made in accordance with the provisions of the Government Information (Public Access) Act 2009.

28 The Internal Audit International Professional Practices Framework, OLG guidelines, best practice, and independence requirements all require that the Internal Audit function report to the CEO and not be part of the same Directorate that incorporates the Finance function. At a meeting on 5 November 2015, Council's Audit Committee by resolution, recommended that Council revert to the organisational structure adopted at the Ordinary Council meeting on 24 September 2013, as it ensures good governance and best practice by having the Internal Audit function reporting more directly to the CEO.

FINANCIAL IMPACT

29 If the delegation to the Lord Mayor provides authority to the Lord Mayor to waive or reduce fees and charges and engage a consultant to obtain independent advice is adopted, a budget for these items will need to be established. This funding need is currently unbudgeted.

COMMUNITY STRATEGIC PLAN ALIGNMENT

30 Open and collaborative leadership.
IMPLEMENTATION PLAN/IMPLICATIONS

31 Significant work will need to be completed to reassign staff sub-delegations following the adoption of new delegations to the Interim Chief Executive Officer. This work will take some time to undertake and complete.

RISK ASSESSMENT AND MITIGATION

32 There is a risk if the delegations tabled at the Council meeting on 27 October 2015 are adopted, the existing General Manager's sub-delegations to staff are not valid and will need to be reviewed and amended accordingly. This scenario poses the very real risk that legislative functions of Council cannot be carried out thereby slowing delivery of Council services for a period.

33 The proposed new structure may compromise the independence of Council's Internal Audit function and compromise or waive legal professional privilege.

RELATED PREVIOUS DECISIONS

34 Note the copies of the previous Instruments of Delegations to the General Manager referred to in Paragraph 4.

CONSULTATION

35 Consultation was undertaken with all Directors and Managers of Business Units to obtain feedback on the operational implications of the Instruments. All feedback is summarised in Attachment C.

OPTIONS

Option 1

36 The recommendation as at Paragraphs 1 and 2. This is the recommended option.

Option 2

37 Defer the implementation of any changes for a three month period in which time further consultation with Councillors can be undertaken and an implementation plan developed.

BACKGROUND

38 N/A

REFERENCES

ATTACHMENTS

Attachment A: Proposed draft Instruments of Delegation to the Chief Executive Officer and Lord Mayor
i) mark-up copy highlighting recommended amendments
ii) clean copy without mark-up
| Attachment B: | Organisation Structure |
| Attachment C: | Instruments of Delegation for the Chief Executive Officer and the Lord Mayor annotated to include comments on proposed changes |
| Attachment D: | Instrument of Delegation to the General Manager and Lord Mayor dated 24 September 2013 |
| Attachment E: | Instrument of Delegation to the General Manager and Lord Mayor dated 5 July 2011 |
| Attachment F: | Instrument of Delegation to the General Manager and Lord Mayor dated 30 September 2008 |
| Attachment G: | Port Stephens Council Organisation Structure Chart |
| Attachment H: | Judgement of NCAT in Holman v Warringah Council |
| Attachment I: | City of Sydney Council Organisation Structure Chart |
| Attachment J: | Contracts Management Procedure |

Distributed under separate cover
ATTACHMENT A: Proposed draft Instruments of Delegation to the Chief Executive Officer and Lord Mayor

i) mark-up copy highlighting recommended amendments
DRAFT INSTRUMENT OF DELEGATIONS TO THE CHIEF EXECUTIVE OFFICER

OFFICER INTERPRETATION OF DELEGATIONS

A. This instrument of delegation should be construed as operating in a manner which is valid and within the powers conferred on the Council under the Local Government Act 1993;

B. References to the Chief Executive Officer are references to the General Manager appointed under the Local Government Act 1993;

C. References to the decisions of Council are references to decisions made by Council from time to time; and

D. References to policies of the Council are references to policies required to be adopted by resolution of Council from time to time.

The Council of the City of Newcastle:

A. Recognises that certain powers are conferred on the Chief Executive Officer under Section 377 of the Local Government Act 1993 (Act) and delegates to the person holding the position of Chief Executive Officer from time to time to exercise and/or perform Council’s functions under the Local Government Act 1993 and all other acts and regulations in force and as amended from time to time conferring functions on Council subject to any conditions or limitations in Schedule 1.

B. Recognises that Section 68 of the Noxious Weeds Act 1993 and delegates authority to the Chief Executive Officer to exercise and/or perform the functions of the local control authority.

C. Recognises that the NSW Food Authority delegates Council as an enforcement agency under the Food Act 2033.

D. Recognises that the Roads and Maritime Authority delegates power to the Chief Executive Officer to appoint Council Officers as authorised officers for the purposes of certain sections of the Road Transport (General) Act 2005.

EC. Recognises that the Chief Executive Officer may be delegated any function which is taken to be conferred or imposed on Council pursuant to section 381 of the Act.

FD. Notes that the delegations in this Instrument are subject to, and are to be exercised in accordance with, the requirements of the relevant legislation, any limitations set out in Schedule 1, and any resolution of Council.

GE. All previous delegations of functions the subject of this Instrument be revoked.
HF. For the purpose of this Instrument, function includes powers, authorities and duties and anything ancillary or related to the exercise or performance of that function.

IG. These delegations are not intended to limit the Chief Executive Officer’s ability to carry out such other functions and exercise such other powers as the Council may determine from time to time or as may be functions of the Chief Executive Officer under the Act.

SCHEDULE 1: LIMITATION OF DELEGATIONS TO THE CHIEF EXECUTIVE OFFICER

GENERAL

1. the functions which are required by or under the Local Government Act 1993 or by or under any other Act or instrument to be performed by the governing body of the Council;

2. functions and authorities delegated to the Lord Mayor or matters referred to Committees of Council including the Development Applications Committee;

POLICY AND PROCEDURE

3. the power to make or amend Council policy (for the avoidance of doubt, the Chief Executive Officer is delegated authority to adopt operational policies of Council);

4. witnessing the affixing of the Common Seal of the Council;

45. the release for public exhibition and comment of any plan or policy, which is required by legislation to be exhibited;

56. the exercise of authorities and functions in a manner not consistent with the policies and decisions of Council, or reasonable and lawful direction of the Lord Mayor;

BUDGET AND RESOURCE ALLOCATION

67. approving expenditure so as to unfavourably impact on the net operating result approved by Council in the adopted Operational Plan;

78. the setting and variation of priorities for Council’s programs, including priorities relating to the Capital Works program, studies, policy development programs and other initiatives specified by Council;
9. variation of any contract sum or contingency exceeding the amount approved by Council except where cumulative variations are not more than 10% of the contract sum or contingency and the Lord Mayor has concurred with the variation;

10. the approval of the final design in relation to any new capital works item and any other capital works item specified by Council in the budget approval process where the budget exceeds $5m;

11. determination of applications for donations to charities, cultural and other organisations except in accordance with a resolution of Council or policy approved by Council;

12. authorising any expenditure from operational contingency funds within the annual budget without the approval of the Lord Mayor;

13. authorising any expenditure greater than $150,000 per project from the capital contingency funds;

14. writing off bad debts or waiving fees and charges, for amounts above $10,000 (including GST);

ORGANISATIONAL STRUCTURE AND PERSONNEL MATTERS

15. the approval of the organisation structure at Director level, except for transitional or temporary arrangements;

16. the appointment of Senior Staff Directors (that is, Director Management Level 2 positions) unless prior consultation with Council has occurred, or for the CEO may make transitional or temporary arrangements in respect of Director positions;

17. structural changes involving Senior Staff Officers Directors (Management Level 2 positions) except after consultation with the Lord Mayor;

18. entering into any significant new enterprise agreement except after consultation with Council;

19. approve any overseas travel including all related expenses and Council related business attended subject to the expenditure being reported in Council’s annual report (as such a Council resolution is required to approve overseas travel).
COUNCIL OPERATIONS AND SERVICES

1469. carrying out new non-core services not already approved by Council;

1720. significant variation of any existing Council service that would have ongoing implications for Council in terms of cost or service delivery;

2185. setting or altering the Schedule of Fees and Charges, except in accordance with the relevant categories as determined within the Council’s Operational Plan;

LEGAL PROCEEDINGS

16922. the giving of instructions to Council’s legal representatives to commence legal proceedings in the NSW Supreme or Federal Courts, except in relation to an urgent injunction proceedings and after consultation with the Lord Mayor where practical and possible;

172023. the giving of instructions in legal proceedings contrary to a resolution of Council except in planning or regulatory appeals where instructions can be given to resolve an appeal;

18. the status of all NSW Supreme and Federal Court proceedings will be reported to Council on a quarterly basis.
PROPERTY, LAND USE AND RELATED MATTERS

1924. granting of approvals to occupy and use public land (as defined in the Local Government Act 1993), crown land or any other land managed by Council except approvals:

i. with a maximum rental or fee not exceeding $150,000 per annum and a term not exceeding 5 years with any option not exceeding 5 years; or

ii. involving the erection of a hoarding for a period not exceeding 5 years and which conform to Council’s policy on hoardings; or

iii. relating to a temporary use of public land (as defined in the Local Government Act 1993) or crown land (including parks and open spaces) not exceeding forty days;

with such approvals being reported to Council in the Quarterly Report.

All leases with a term exceeding 5 years entered into under delegated authority by the Chief Executive Office (or delegate) will be reported to the elected Council on a quarterly basis.

2025. adoption of a plan of management for community land;

26. granting of owner’s consent to the lodgement of an application to carry out development on significant property or land (including roads) owned or managed by Council except where such development involves:

i. alterations or additions to the fit-out or internal fabric or appearance of the building;

ii. minor changes to the external fabric or appearance of the building;

iii. a use of public or crown land, such as tables and chairs on a footway, and that such consent, granted for a period of up to 3 years, is given on the basis that it does not fetter Council’s discretion as consent authority;

iv. works by Council in accordance with an approved budget;

CULTURAL

2721. the development or formation of relationships with other cities, including sister city agreements;
228. the approval of civic and ceremonial events;

293. the granting of civic honours;
PLANNING AND DEVELOPMENT

3024. determination of applications for development consent under the Environmental Planning and Assessment Act 1979 that are to be referred to the Development Application Committee;

31. determination of applications for development consent under the Environmental Planning and Assessment Act 1979 where a request is made by Councillors for the development application to be the subject of a report to Council, through the Development Applications Committee, provided that the request is in writing (email acceptable) to the Chief Executive Officer or delegate, from two or more Councillors;

32. determination of applications for approval to demolish a heritage item but this does not prevent determination of application for works modifying a heritage item in accordance with a development consent

33. determination of applications where there is a conflict with Council’s adopted objectives and policies (except in relation to minor departures where strict compliance would be unreasonable or unnecessary) and Council Officers are recommending approval of the application.
ATTACHMENT B:

DRAFT INSTRUMENT OF DELEGATIONS TO THE LORD MAYOR

Subject to Section 377 and Section 379 of the Local Government Act 1993 and as a matter of policy, Council delegates to the Lord Mayor, on an ongoing basis, the following functions (to be exercised in a manner consistent with Council's policies and decisions as applicable from time to time), additional to those contained in the Local Government Act 1993:

INTERPRETATION OF DELEGATIONS

(a) This instrument of delegation should be construed as operating in a manner which is valid and within the powers conferred on the Council under the Local Government Act 1993;

(b) references to the Chief Executive Officer are references to the General Manager appointed under the Local Government Act 1993;

(c) references to the decisions of Council are references to decisions made by the Council from time to time;

(d) references to policies of the Council are references to policies adopted by the Council from time to time;

(e) these delegations are not intended to limit the Lord Mayor’s ability to carry out such other functions and exercise such other powers as the Council may determine from time to time or as may be functions of the Lord Mayor under the Local Government Act 1993.

DELEGATIONS

1. General and Policy Direction

(a) to direct, request advice or seek a recommendation from the Chief Executive Officer, except as otherwise provided by the Local Government Act 1993.

2. Management of Council meetings and business

(a) the authority to call and schedule meetings of Council and Committees, briefings of Councillors and inspections by Councillors in accordance with the requirements of Council's Code of Meeting Practice;

(b) to request the Chief Executive Officer to include items on the agendas for all meetings of Council and Council Committees, subject to the Local Government Act 1993 and the Local Government (General) Regulation 2005.
and any other Act or Regulation. Provided that if the Council has —by resolution determined that a specific item should be placed on its agenda, the function exercised under this delegation must be exercised in accordance with that resolution;
(c) for the purposes of subsection 10(2) of the Local Government Act 1993 and clause 258(b) of the Local Government (General) Regulation 2005 Council authorises the Lord Mayor or another chairperson of the meeting, in respect of a Council meeting, and the chairperson of each Council Committee of which all members are Councillors in respect of a meeting of that Committee, to exercise the power to expel a person or persons from a meeting;

3. Expenditure

(a) to approve all reasonable travel by staff to destinations outside Australia, and all expenses associated with overseas travel and Council related business attended to, subject to such expenditure being reported in the annual report as well as in quarterly performance reports to Council;

(ab) to determine requests for the waiver or reduction of fees in accordance with the relevant categories as determined within Council’s Policies and Council’s Operational Plan up to $20,000 per year;

4. External relations and representations

(a) to act as Council’s official spokesperson of Council in accordance with Council’s Media Policy;

(bab) to determine:

(i) who should represent Council on external organisations and committees and inter-agency working parties (for the avoidance of doubt, this does not include any committees that have Council staff as members); and

(ii) who should represent Council at civic ceremonial and social functions, where the Lord Mayor is unable to attend and Council has not determined its representative,

(cbc) provided that before a determination is made that a staff member should so represent Council, the Lord Mayor must first consult—seek approval from with the Chief Executive Officer;

(dcd) to determine to whom Civic awards and honours should be presented in accordance with Council’s Policy;

(ede) determine Council’s representation, and exercise Council’s Local Government NSW (LGNSW) voting rights whether directly or through subsequent delegations to Councillor attendees.
5. **Organisational Accountability and Performance Management**

Subject to any provided actions are not not being inconsistent with Division of Local Government Department of Premier and Cabinet Guidelines for the Appointment & Oversight of General Managers, July 2011 issued pursuant to section 23A of the Local Government Act 1993 and Council General Manager Performance Review Policy:

(a) to negotiate and settle terms of a contract of employment with the Chief Executive Officer including determining the appropriate remunerations, bonuses and incentives in accordance with Council Policy, and inform Councillors accordingly;

(b) to review, approve and implement governance and accountability structures and processes for the performance of the organisation and to oversee the performance of the Chief Executive Officer (and, through the Chief Executive Officer, the performance of the organisation and program areas within the organisation);

(c) to settle performance standards, and plan, and carry out performance reviews, of the Chief Executive Officer, in accordance with any performance review panel or policy in effect;

(d) to, in accordance with the requirements of the contract, vary the terms of the contract of employment with the existing Chief Executive Officer, provided that:

(i) the Lord Mayor must consult with Councillors in relation to changes that the Lord Mayor reasonably considers to be substantial changes; and

(ii) the Lord Mayor may not extend the contract of employment unless such extension is provided for in the contract and is for a period of not more than 3 months beyond the original term of employment;

(e) to suspend the Chief Executive Officer at short notice and, only after prior consultation with Councillors to terminate the Chief Executive Officer’s employment;

(f) to accept the resignation of the Chief Executive Officer;

(g) to negotiate and settle termination arrangements with the Chief Executive Officer, including any termination payments to be made;

(h) to appoint and replace a Director as an Acting Chief Executive Officer from time to time, as might be required by the absence of the Chief Executive Officer for any reason and (except due to annual leave) such appointment is to be considered by Council at the earliest opportunity;
(i) to take other administrative actions in connection with the Chief Executive Officer’s contract including, but not limited to, approval of annual leave;
(j) to direct that Council's internal auditor carry out a review or audit;

(k) to obtain direct and independent advice relevant to Council functions, all such cases to be reported to Council, where appropriate; (see also Authority to Obtain Legal Services)

(l) to make changes to the organisational structure in the Lord Mayor's Office which the Lord Mayor reasonably considers to be minor changes in consultation with the Chief Executive Officer;

6. Authority to Obtain Legal Services

(a) to instruct Council's legal representatives position directly or through with the Chief Executive Officer or Manager Legal and Governance Services, as appropriate:

   (i) provided the instruction discussion is not inconsistent with Council policies or decisions; or

   (ii) where there is an inconsistency (such as to settle court proceedings where Council's prospects are poor) if it is in Council's interest to do so and the Lord Mayor has been so advised (by the Chief Executive Officer, delegate, or external counsel); and

   (iii) provided that if the Lord Mayor proposes to give instructions (either directly or indirectly) to commence legal proceedings (including an appeal), the Lord Mayor shall consult the Chief Executive Officer, unless it is inappropriate to do so, in which case the Lord Mayor shall consult at least 2 Councillors seek a Council resolution, (in confidence if necessary), before doing so. On the day such proceedings are commenced, the Chief Executive Officer shall be advised of the nature of the proceedings, unless they have a conflict of interest. Additionally, this will be brought to the next Council meeting for confirmation;

7. Mayoral and Civic Role

(a) in respect of the Office of the Lord Mayor, to:

   (i) determine the structure of the Office

   (ii) allocate expenditure within the Office, not exceeding the global budget of the Unit approved annually by Council

   (iii) determine the number and description of all staff positions
(iv) be fully and formally consulted in respect of the appointment (or
(v) direct staff within the Office and allocate tasks,

in consultation with the Chief Executive Officer;

8. **General authority of Council during recesses**

(a) to exercise, during recesses of Council, the powers, authorities, duties and functions of Council other than:-

(i) those reserved to the Council itself by Section 377 and Section 379 of the Local Government Act 1993;

(ii) those powers and functions delegated to the Chief Executive Officer by Council resolution from time to time;

with such delegations to be effective from midnight on the day of the last Council meeting prior to a recess period as approved by the Council, up to the time of commencement of the first meeting at the conclusion of the recess period, subject to:

(iii) such delegations are to be exercised following receipt by the Lord Mayor of reports or other business papers in a form similar to the form of reports or other business papers normally submitted to Council or a Council Committee;

(iv) those reports or other business papers are to be circulated to Councillors at least three business days prior to the exercise of delegations;

(v) where written objections by three Councillors on any one item are received by the Lord Mayor, stating relevant reasons for objection, the item is to be deferred until the next relevant Committee meeting of Council, and

(vi) any such decisions made by the Lord Mayor pursuant to such delegation to be reported to the next meeting of Council.
ATTACHMENT A: Proposed draft Instruments of Delegation to the Chief Executive Officer and Lord Mayor

ii) Clean copy - without mark-up
DRAFT INSTRUMENT OF DELEGATIONS TO THE CHIEF EXECUTIVE OFFICER

INTERPRETATION OF DELEGATIONS

A. This instrument of delegation should be construed as operating in a manner which is valid and within the powers conferred on the Council under the Local Government Act 1993;

B. References to the Chief Executive Officer are references to the General Manager appointed under the Local Government Act 1993;

C. References to the decisions of Council are references to decisions made by Council from time to time; and

D. References to policies of the Council are references to policies required to be adopted by resolution of Council.

The Council of the City of Newcastle:

A. Recognises that certain powers are conferred on the Chief Executive Officer under Section 377 of the Local Government Act 1993 (Act) and delegates to the person holding the position of Chief Executive Officer from time to time Council’s functions under the Local Government Act 1993 and all other acts and regulations in force and as amended from time to time conferring functions on Council subject to any conditions or limitations in Schedule 1

B. Recognises Section 68 of the Noxious Weeds Act 1993 and delegates authority to the Chief Executive Officer to exercise and/or perform the functions of the local control authority.

C. Recognises that the Chief Executive Officer may be delegated any function which is taken to be conferred or imposed on Council pursuant to section 381 of the Act.

D. Notes that the delegations in this Instrument are subject to, and are to be exercised in accordance with, the requirements of the relevant legislation, any limitations set out in Schedule 1, and any resolution of Council.

E. All previous delegations of functions the subject of this Instrument be revoked.

F. For the purpose of this Instrument, function includes powers, authorities and duties and anything ancillary or related to the exercise or performance of that function.

G. These delegations are not intended to limit the Chief Executive Officer’s ability to carry out such other functions and exercise such other powers as the Council may determine from time to time or as may be functions of the Chief Executive Officer under the Act.
SCHEDULE 1: LIMITATION OF DELEGATIONS TO THE CHIEF EXECUTIVE OFFICER

GENERAL

1. the functions which are required by or under the Local Government Act 1993 or by or under any other Act or instrument to be performed by the governing body of the Council;

2. functions and authorities delegated to Committees of Council including the Development Applications Committee;

POLICY AND PROCEDURE

3. the power to make or amend Council policy (for the avoidance of doubt, the Chief Executive Officer is delegated authority to adopt operational policies of Council);

4. the release for public exhibition and comment of any plan or policy, which is required by legislation to be exhibited;

5. the exercise of authorities and functions in a manner not consistent with the policies and decisions of Council, or reasonable and lawful direction of the Lord Mayor;

BUDGET AND RESOURCE ALLOCATION

6. the approval of the final design in relation to any new capital works item and any other capital works item specified by Council in the budget approval process where the budget exceeds $5m;

7. determination of applications for donations to charities, cultural and other organisations except in accordance with a resolution of Council or policy approved by Council;

8. writing off bad debts or waiving fees and charges, for amounts above $10,000 (including GST);

ORGANISATIONAL STRUCTURE AND PERSONNEL MATTERS

9. the approval of the organisation structure at Director level, except for transitional or temporary arrangements;

10. the appointment of Directors (Management Level 2 positions) unless prior consultation with Council has occurred, (the CEO may make transitional or temporary arrangements in respect of Director positions);

11. structural changes involving Directors (Management Level 2 positions) except after consultation with the Lord Mayor;
12. entering into any new enterprise agreement except after consultation with Council;

13. approve any overseas travel including all related expenses and Council related business attended subject to the expenditure being reported in Council's annual report (as such a Council resolution is required to approve overseas travel).

COUNCIL OPERATIONS AND SERVICES

14. carrying out new non-core services not already approved by Council;

15. setting or altering the Schedule of Fees and Charges, except in accordance with the relevant categories as determined within the Council’s Operational Plan;

LEGAL PROCEEDINGS

16. the giving of instructions to Council's legal representatives to commence legal proceedings in the NSW Supreme or Federal Courts, except in relation to an urgent injunction proceedings and after consultation with the Lord Mayor where practical and possible;

17. the giving of instructions in legal proceedings contrary to a resolution of Council except in planning or regulatory appeals where instructions can be given to resolve an appeal;

18. the status of all NSW Supreme and Federal Court proceedings will be reported to Council on a quarterly basis.

PROPERTY, LAND USE AND RELATED MATTERS

19. granting of approvals to occupy and use public land (as defined in the Local Government Act 1993), crown land or any other land managed by Council except approvals:

   i. with a maximum rental or fee not exceeding $150,000 per annum and a term; or

   ii. involving the erection of a hoarding for a period not exceeding 5 years and which conform to Council's policy on hoardings; or

   iii. relating to a temporary use of public land (as defined in the Local Government Act 1993) or crown land (including parks and open spaces) not exceeding forty days;

with such approvals being reported to Council in the Quarterly Report.

All leases with a term exceeding 5 years entered into under delegated authority by the Chief Executive Office (or delegate) will be reported to the elected Council on a quarterly basis.
20. adoption of a plan of management for community land;

CULTURAL

21. the development or formation of relationships with other cities, including sister city agreements;

22. the approval of civic and ceremonial events;

23. the granting of civic honours;

PLANNING AND DEVELOPMENT

24. determination of applications for development consent under the Environmental Planning and Assessment Act 1979 that are to be referred to the Development Application Committee;
ATTACHMENT B:

DRAFT INSTRUMENT OF DELEGATIONS TO THE LORD MAYOR

Subject to Section 377 and Section 379 of the Local Government Act 1993 and as a matter of policy, Council delegates to the Lord Mayor, on an ongoing basis, the following functions (to be exercised in a manner consistent with Council's policies and decisions as applicable from time to time), additional to those contained in the Local Government Act 1993:

INTERPRETATION OF DELEGATIONS

(a) This instrument of delegation should be construed as operating in a manner which is valid and within the powers conferred on the Council under the Local Government Act 1993;

(b) references to the Chief Executive Officer are references to the General Manager appointed under the Local Government Act 1993;

(c) references to the decisions of Council are references to decisions made by the Council from time to time;

(d) references to policies of the Council are references to policies adopted by the Council from time to time;

(e) these delegations are not intended to limit the Lord Mayor’s ability to carry out such other functions and exercise such other powers as the Council may determine from time to time or as may be functions of the Lord Mayor under the Local Government Act 1993.

DELEGATIONS

1. General and Policy Direction

(a) to request advice or seek a recommendation from the Chief Executive Officer, in accordance with s.352 of the Local Government Act 1993.

2. Management of Council meetings and business

(a) the authority to call and schedule meetings of Council and Council Committees, briefings of Councillors and inspections by Councillors in accordance with the requirements of Council's Code of Meeting Practice;

(b) to request the Chief Executive Officer to include items on the agendas for all meetings of Council and Council Committees, subject to the Local Government Act 1993 and the Local Government (General) Regulation 2005 and any other Act or Regulation. Provided that if the Council
has by resolution determined that a specific item should be placed on its agenda, the function exercised under this delegation must be exercised in accordance with that resolution;

3. **Expenditure**
   (a) to determine requests for the waiver or reduction of fees in accordance with the relevant categories as determined within Council’s Policies and Council’s Operational Plan up to $20,000 per year;

4. **External relations and representations**
   (a) to act as an official spokesperson of Council in accordance with Council’s Media Policy;
   (b) to determine:
      (i) who should represent Council on external organisations and committees and inter-agency working parties (for the avoidance of doubt, this does not include any committees that have Council staff as members); and
      (ii) who should represent Council at civic ceremonial and social functions, where the Lord Mayor is unable to attend and Council has not determined its representative,
   (c) provided that before a determination is made that a staff member should so represent Council, the Lord Mayor must first seek approval from the Chief Executive Officer;
   (d) to determine to whom Civic awards and honours should be presented in accordance with Council’s Policy;
   (e) determine Council’s representation, and exercise Council’s Local Government NSW (LGNSW) voting rights whether directly or through subsequent delegations to Councillor attendees
5. Organisational Accountability and Performance Management

Subject to any actions not being inconsistent with Division of Local Government Department of Premier and Cabinet Guidelines for the Appointment & Oversight of General Managers July 2011 issued pursuant to section 23A of the Local Government Act 1993 and Council General Manager Performance Review Policy:

(a) to negotiate and settle terms of a contract of employment with the Chief Executive Officer including determining the appropriate remunerations, bonuses and incentives in accordance with Council Policy, and inform Councillors accordingly;

(b) to review, approve and implement governance and accountability structures and processes for the performance of the organisation and to oversee the performance of the Chief Executive Officer (and, through the Chief Executive Officer, the performance of the organisation and program areas within the organisation);

(c) to settle performance standards, and plan, and carry out performance reviews, of the Chief Executive Officer, in accordance with any performance review panel or policy in effect;

(d) to, in accordance with the requirements of the contract, vary the terms of the contract of employment with the existing Chief Executive Officer, provided that:

(i) the Lord Mayor must consult with Councillors in relation to changes that the Lord Mayor reasonably considers to be substantial changes; and

(ii) the Lord Mayor may not extend the contract of employment unless such extension is provided for in the contract and is for a period of not more than 3 months beyond the original term of employment;

(e) to suspend the Chief Executive Officer at short notice and, only after prior consultation with Councillors to terminate the Chief Executive Officer’s employment;

(f) to accept the resignation of the Chief Executive Officer;

(g) to negotiate and settle termination arrangements with the Chief Executive Officer, including any termination payments to be made;

(h) to appoint and replace a Director as an Acting Chief Executive Officer from time to time, as might be required by the absence of the Chief Executive Officer for any reason and (except due to annual leave) such appointment is to be considered by Council at the earliest opportunity;
(i) to take other administrative actions in connection with the Chief Executive Officer's contract including, but not limited to, approval of annual leave;

(k) to obtain direct and independent advice relevant to Council functions, all such cases to be reported to Council, where appropriate; (see also Authority to Obtain Legal Services)

(l) to make changes to the organisational structure in the Lord Mayor's Office which the Lord Mayor reasonably considers to be minor changes in consultation with the Chief Executive Officer;

6. Authority to Obtain Legal Services

(a) to discuss Council's legal position with the Chief Executive Officer, as appropriate:

   (i) provided the discussion is not inconsistent with Council policies or decisions; or

   (ii) where there is an inconsistency (such as to settle court proceedings where Council's prospects are poor) if it is in Council's interest to do so and the Lord Mayor has been so advised (by the Chief Executive Officer, delegate, or external counsel); and

   (iii) provided that if the Lord Mayor proposes to give instructions (either directly or indirectly) to commence legal proceedings (including an appeal), the Lord Mayor shall consult the Chief Executive Officer, unless it is inappropriate to do so, in which case the Lord Mayor shall seek a Council resolution, (in confidence if necessary), before doing so. On the day such proceedings are commenced, the Chief Executive Officer shall be advised of the nature of the proceedings, unless they have a conflict of interest. Additionally, this will be brought to the next Council meeting for confirmation;

7. Mayoral and Civic Role

(a) in respect of the Office of the Lord Mayor, to:

   (i) determine the structure of the Office

   (ii) allocate expenditure within the Office, not exceeding the global budget of the Unit approved annually by Council

   (iii) determine the number and description of all staff positions

   (iv) be fully and formally consulted in respect of the appointment (or
dismissal) of all staff

(v) direct staff within the Office and allocate tasks,

in consultation with the Chief Executive Officer;

8. **General authority of Council during recesses**

(a) to exercise, during recesses of Council, the powers, authorities, duties and functions of Council other than:

(i) those reserved to the Council itself by Section 377 and Section 379 of the Local Government Act 1993;

(ii) those powers and functions delegated to the Chief Executive Officer by Council resolution from time to time;

with such delegations to be effective from midnight on the day of the last Council meeting prior to a recess period as approved by the Council, up to the time of commencement of the first meeting at the conclusion of the recess period, subject to:

(iii) such delegations are to be exercised following receipt by the Lord Mayor of reports or other business papers in a form similar to the form of reports or other business papers normally submitted to Council or a Council Committee

(iv) those reports or other business papers are to be circulated to Councillors at least three business days prior to the exercise of delegations;

(v) where written objections by three Councillors on any one item are received by the Lord Mayor, stating relevant reasons for objection, the item is to be deferred until the next relevant Committee meeting of Council, and

(vi) any such decisions made by the Lord Mayor pursuant to such delegation to be reported to the next meeting of Council.
ATTACHMENT B: Organisation Structure
ATTACHMENT C: Instruments of Delegation for the Chief Executive Officer and the Lord Mayor annotated to include comments on proposed changes
## COMMENTS ON DRAFT INSTRUMENT OF DELEGATIONS TO THE CHIEF EXECUTIVE OFFICER

<table>
<thead>
<tr>
<th>Suggested amendment</th>
<th>Operational concerns</th>
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<tbody>
<tr>
<td><strong>INTERPRETATION OF DELEGATIONS</strong></td>
<td>The Local Government Act 1993 (NSW) (Act) provides for a General Manager and Newcastle City Council has historically had a General Manager. There is a significant body of work to be completed to amend all Council documentation to reflect the name change to CEO including and importantly all sub-delegations to staff. Best practice would be to plan for a name change and change to delegations, allowing considerable lead time to ensure all flow on tasks can also be undertaken simultaneously to avoid any risks associated with failure to complete such actions (highest risk being sub-delegations to staff). Clause D should be amended to make it clear that the elected Council is responsible for adopting policies required to be adopted by Council resolution and the CEO is responsible for adopting operational policies.</td>
</tr>
<tr>
<td>A. This instrument of delegation should be construed as operating in a manner which is valid and within the powers conferred on the Council under the Local Government Act 1993;</td>
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<tr>
<td>B. References to the Chief Executive Officer are references to the General Manager appointed under the Local Government Act 1993;</td>
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<tr>
<td>C. References to the decisions of Council are references to decisions made be Council from time to time; and</td>
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<tr>
<td>D. References to policies of the Council are references to policies adopted by Council from time to time.</td>
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<tr>
<td>The Council of the City of Newcastle:</td>
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<tr>
<td>A. Recognizes that certain powers are conferred on the Chief Executive Officer under Section 377 of the <em>Local Government Act 1993</em> (Act) to exercise and/or perform Council’s function under all acts and regulations in force and as amended from time to time subject to any conditions or limitations in Schedule 1</td>
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<tr>
<td>B. Recognises that Section 68 of the <em>Noxious Weeds Act 1993</em> delegates authority to the Chief Executive Officer to exercise and/or perform the functions of the local control authority.</td>
<td>This section fails to delegate any function whatsoever to the Chief Executive Officer (CEO). Amendment suggested which reflects the wording of the City of Sydney Delegations to the Chief Executive Office.</td>
</tr>
<tr>
<td>C. Recognises that the NSW Food Authority delegates Council as an enforcement agency under the Food Act 2033.</td>
<td>It is recommended that a new clause I be inserted for consistency with the Lord Mayor’s delegation and to ensure the CEO may perform functions delegated by way of specific Council resolution - for example execute the contract for sale of a property.</td>
</tr>
<tr>
<td>D. Recognises that the Roads and Maritime Authority delegates power to the Chief Executive Officer to appoint Council Officers as authorized officers for the purposes of certain sections of the <em>Road Transport (General) Act 2005</em>.</td>
<td>Clause B is necessary as the delegation of a local control authority’s functions is pursuant to the power of delegation under s.68 of the <em>Noxious Weeds Act 1993</em> not under s.377 of the LG Act (this is because of the wording of s.68 being to a “person”)</td>
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<tr>
<td>E. Recognises that the Chief Executive Officer may be delegated any function which is taken to be conferred or imposed on Council pursuant to section 381 of the Act.</td>
<td>An amendment to B is required to make it clear that the CEO is being delegated the functions of s.68 of the <em>Noxious Weeds Act 1993</em>.</td>
</tr>
<tr>
<td>F. Notes that the delegations in this Instrument are subject to, and are to be exercised in accordance with, the requirements of the relevant legislation, any limitations set out in Schedule 1, and any resolution of Council.</td>
<td>C and D are unclear as what this wording is seeking to achieve.</td>
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<tr>
<td>G. All previous delegations of functions the subject of this Instrument be revoked.</td>
<td>It is suggested that C and D are unnecessary and should be deleted. The CEO is effectively delegated such powers by the new Part A.</td>
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<td>H. For the purpose of this Instrument, function includes powers, authorities and duties and anything ancillary or related to the exercise or performance of that function.</td>
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<td><strong>Schedule 1 : Limitations of delegations to the Chief Executive Officer</strong></td>
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<td><strong>GENERAL</strong></td>
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<tr>
<td>1. the functions which are required by or under the Local Government Act 1993 or by or under any other Act or instrument to be performed by the governing body of the Council;</td>
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<td>By limiting the CEO’s functions to preclude him/her from undertaking any of the functions delegated to the Lord Mayor, the CEO and staff will be unable to perform a number of essential operational functions, including:</td>
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<td>• to determine requests for the waiver or reduction of fees</td>
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<td>• to review, approve and implement governance and accountability structures and processes for the performance of the organisation</td>
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<td>• to instruct Council’s legal representatives directly</td>
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<td>As is evidenced from the examples listed above, the cross reference to the Lord Mayor’s delegation in the CEO delegation creates confusion and perhaps restricts the functions of the CEO (and staff) further than intended. It appears the intended meaning is that the CEO (and staff) as well as the Lord Mayor are to be able to perform certain functions such as waive fees and provide legal instructions.</td>
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<td>It is recommended that the cross reference to the Lord Mayor’s delegation be deleted.</td>
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<td>The CEO will still be limited in the performance of functions by the specific limitations listed in the Instrument of Delegation to the CEO.</td>
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<td><strong>POLICY AND PROCEDURE</strong></td>
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<td>3. the power to make or amend Council policy;</td>
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<td>4. witnessing the affixing of the Common Seal of the Council;</td>
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<td>5. the release for public exhibition and comment of any plan or policy, which is required by legislation to be exhibited;</td>
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<td>6. the exercise of authorities and functions in a manner not consistent with the policies and decisions of Council, or reasonable direction of the Lord Mayor;</td>
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<tr>
<td>3. This clause should make it clear that the CEO can adopt operational policies.</td>
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<td>4. It is common for the General Manager to be a witness to the affixing of Council’s seal, together with a Councillor. Clause 400 of the Local Government (General) Regulation 2005 NSW specifically provides for the General Manager to be such a witness.</td>
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<td>Noting Council's seal of must not be affixed to a document unless the Council has resolved (by resolution specifically referring to the document) that the seal be so affixed, Council may use this mechanism to determine who should affix the seal on a case by case basis by setting this out in the Council resolution. Deletion of clause 4 is recommended.</td>
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<td>6. Section 352 of the Act prohibits the Lord Mayor from directing the General Manager. The wording of clause 6 should be amended for consistency</td>
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<td>Suggested amendment</td>
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<td><strong>BUDGET AND RESOURCE ALLOCATION</strong></td>
<td>7. The use of the word ‘unfavorably’ is ambiguous. The wording is also very restrictive and difficult to apply in practice as the Operation Plan details annual operating budgets and actual financial results are not determined until after the completion of the annual audit. All variations to the Operational Plan are currently reported monthly to the elected Council.</td>
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<tr>
<td>7. approving expenditure so as to unfavourably impact on the net operating result approved by Council in the adopted Operational Plan;</td>
<td>8. The definition of a program is unclear. Normal practice is for Council to adopt an annual budget, in which there are programs and projects. The elected Council are then informed of re-prioritisation of programs through Council's existing quarterly review process. Priorities can change for various reasons including weather or grant delivery requirements. The need to report to the elected Council when a variation occurs would hinder and add time to the completion of programs. It is for this efficiency reason that Council adopts the budget and is then informed on a quarterly basis of variations to program and work priorities within that adopted budget. It is recommended this clause be deleted.</td>
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<td>8. the setting and variation of priorities for Council’s programs, including priorities relating to the Capital Works program, studies, policy development programs and other initiatives specified by Council;</td>
<td>9. The current wording is very restrictive and requires that variations to all contracts exceeding the amount approved by Council (no matter how small) are required to be approved by the elected Council. For example, for a contract with a value of $10,000, a report to Council would be required to approve a variation of $1,050. The requirement to have all variations, regardless of value concurred by the Lord Mayor (in the case where the cumulative variation values do not exceed 10%) is problematic and unworkable. Minor variations are dealt with directly on a daily basis by suitably delegated field staff to ensure timely and cost effective delivery of services. The requirement to seek concurrence form the Lord Mayor is considered unworkable on a day to day basis.</td>
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<td>9. variation of any contract sum or contingency exceeding the amount approved by Council except where cumulative variations are not more than 10% of the contract sum or contingency and the Lord Mayor has concurred with the variation;</td>
<td>10. the approval of the final design in relation to any new capital works item and any other capital works item specified by Council in the budget approval process;</td>
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<td>10. the approval of the final design in relation to any new capital works item and any other capital works item specified by Council in the budget approval process;</td>
<td>11. determination of applications for donations to charities, cultural and other organisations except in accordance with a resolution of Council or policy approved by Council;</td>
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<td>11. determination of applications for donations to charities, cultural and other organisations except in accordance with a resolution of Council or policy approved by Council;</td>
<td>12. authorising any expenditure from operational contingency funds within the annual budget without the approval of the Lord Mayor;</td>
</tr>
<tr>
<td>12. authorising any expenditure from operational contingency funds within the annual budget without the approval of the Lord Mayor;</td>
<td>13. authorising any expenditure greater than $150,000 per project from the capital contingency funds;</td>
</tr>
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<td>13. authorising any expenditure greater than $150,000 per project from the capital contingency funds;</td>
<td>14. writing off bad debts, for amounts above $10,000 (including GST);</td>
</tr>
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<td>14. writing off bad debts, for amounts above $10,000 (including GST);</td>
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| awaiting Variation Approvals  
- Significant delays in project delivery  
- Loss of reputation  
- Inability to manage scope change in a cost effective manner |

Variations occur within most contracts, often as result of necessary scope changes due to latent conditions and other requirements that only become apparent during the delivery phase. The inability of a Project Manager not to order variations would be unusual practice.

A procedure for managing contract variations has been developed and adopted in Council's Contract Management Procedure. This requires all contract variations greater than the higher of 10% or $100,000 to be reported to Council monthly in the financial report. Part 9 of Council's Contracts Management Procedure (Part 9) as at Attachment I, sets out this requirements. As such, it is suggested that this limitation be removed.

If not, the alternative is to apply this limitation to a major project budget as distinct to 'contract' to allow staff to facilitate delivery within an overall approved budget which includes contingency.

10. Council has approximately 600 capital works projects that require design approvals per year of various dollar values.

Some discretion for asset renewal priorities practically needs to be left with Business Unit Managers and Directors. Further, some clarity is needed in respect of thresholds and criteria for “final designs” going to the elected Council to avoid them being overwhelmed with a high volume of Council papers dealing with final design changes.

At the City of Sydney, this is only applied to large projects for which there is significant community interest and consultation.

For certainty, it is suggested that the words ‘where the budget exceeds $5m’ be added.

12 and 13. Council does not have an operational contingency fund. Council has a completely different budgetary process to that of the City of Sydney whereby Council only has reserves (internal and externally restricted) for certain purposes. Any other funds are unrestricted. The control of the use of these funds is via a combination of budget and specific project approval processes. Approval for quarterly budget variations is already sought through the
<table>
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<td>1.</td>
<td>elected Council and the Local Government Act 1993 requires all expenditures in accordance with s. 55 of the Local Government Act greater than $150k to be put to Council for approval.</td>
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<tr>
<td>13.</td>
<td>Council also does not have a Capital Contingency fund. It is recommend that clauses 12 and 13 be deleted as they have no practical effect due to the fund referred to being non-existent at Newcastle and using the City of Sydney wording without proper research into Council’s budget processes.</td>
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<tr>
<td>14.</td>
<td>It is recommended clause 14 should be amended to confirm that the CEO can waive or reduce fees and charges up to $10,000.</td>
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**ORGANISATIONAL STRUCTURE AND PERSONNEL MATTERS**

15. the approval of the organisation structure at Director level, except for transitional or temporary arrangements;

16. the appointment of senior staff (that is, Director level positions) unless prior consultation with Council has occurred, or for transitional or temporary arrangements;

17. structural changes involving Senior Staff Officers except after consultation with the Lord Mayor;

18. entering into any significant enterprise agreement except after consultation with Council;

16 and 17. Senior Staff includes Business Unit Managers and the current wording is unclear. It is recommended that clauses 16 and 17 be amended to refer specifically to Directors and include a reference to Management Levels. In addition, it should be made clear that the CEO may appoint a person to act in the role of Director. This recommended amendment is consistent with the City of Sydney.

18. The use of the word 'significant' is ambiguous. It is recommended that it is changed to 'new'.

**COUNCIL OPERATIONS AND SERVICES**

19. carrying out new non-core services not already approved by Council;

20. significant variation of any existing Council service that would have ongoing implications for Council in terms of cost or service delivery;

21. setting or altering the Schedule of Fees and Charges, except in accordance with the relevant categories as determined within the Council’s Operational Plan;

The word "significant" is subjective and open to interpretation and ambiguity. As set out at clause 7 of the Council report, this clause should be deleted or re-worded to provide certainty. The elected Council determine Council’s budget in any event so already has control of money spent on new services. It is recommended that clause 20 be deleted.
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<td><strong>LEGAL PROCEEDINGS</strong></td>
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<tr>
<td>22. the giving of instructions to Council's legal representatives to commence legal proceedings in the NSW Supreme or Federal Courts, except in relation to an urgent injunction proceedings and after consultation with the Lord Mayor where practical and possible;</td>
<td>The function of instructing Council's legal representatives is delegated to the Lord Mayor. This means the CEO (and staff) is precluded from giving any legal instructions to Council's legal representatives. It is assumed the intention in the delegations is for the CEO (as well as Directors and Managers of Business Units) to provide instructions to Council's legal representatives on day to day matters such as dangerous dog matters, parking matters, settling third party compensation (eg sewer pipes blocked by council tree roots) and workers compensation claims and negotiating and agreeing on contract terms.</td>
</tr>
<tr>
<td>23. the giving of instructions in legal proceedings contrary to a resolution of Council except in planning or regulatory appeals where instructions can be given to resolve an appeal;</td>
<td>It would be appropriate for the elected Council to make a decision on commencing legal action in the NSW Supreme or Federal Courts (which is currently the case and it is noted the General Manager put a report to the elected Council on 27 October 2015 seeking Council's approval for Council to seek leave of the Court to be joined as a respondent in the legal proceedings for the Native Title Claim Application made by the Awabakal and Guringai People in the Federal Court of Australia). This clause will only be effective if the reference to the Lord Mayor's delegations in clause 2 is deleted.</td>
</tr>
<tr>
<td></td>
<td>It is noted that Council's understanding is that the City of Sydney is encountering practical operational problems with the Lord Mayor's delegations relating to legal proceedings. This delegation is applied only in large cases. In Sydney a quarterly legal update report is supplied to Council to keep them informed.</td>
</tr>
<tr>
<td></td>
<td>The CEO will commence a practice of reporting all NSW Supreme and Federal Court matters to the elected Council on a quarterly basis.</td>
</tr>
<tr>
<td>Suggested amendment</td>
<td>Operational concerns</td>
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</tr>
<tr>
<td>PROPERTY, LAND USE AND RELATED MATTERS</td>
<td>24. The Manager Commercial Property currently negotiates leases with a value up to $150,000 per annum (regardless of the term of the lease). The proposed limitation would significantly restrict commercial negotiations as the potential lessee would have to be made aware that any such negotiation is subject to a Council resolution.</td>
</tr>
<tr>
<td>24. granting of approvals to occupy and use public land (as defined in the Local Government Act 1993), crown land or any other land managed by Council except approvals:</td>
<td>It is recommended that the reference to 5 years be removed leaving the limitation at $150,000.</td>
</tr>
<tr>
<td>i. with a maximum rental or fee not exceeding $150,000 per annum and a term not exceeding 5 years with any option not exceeding 5 years; or</td>
<td>A quarterly report to Council of leases granted could be a practical alternative.</td>
</tr>
<tr>
<td>ii. involving the erection of a hoarding for a period not exceeding 5 years and which conform to Council’s policy on hoardings; or</td>
<td>26. At present, all Business Unit Managers who are responsible for assets, have the authority to grant owner's consent to any DA being lodged.</td>
</tr>
<tr>
<td>iii. relating to a temporary use of public land (as defined in the Local Government Act 1993) or crown land (including parks and open spaces) not exceeding forty days;</td>
<td>Greater clarity is required as to the meaning of 'significant property' as the current exemption could restrict Business Unit Managers from giving &quot;owner's consent&quot; to DAs.</td>
</tr>
<tr>
<td>with such approvals being reported to Council in the Quarterly Report.</td>
<td>Further, following owner's consent, a DA will still need to be lodged and the DA will go to the elected Council in accordance with delegations to the Development Application Committee.</td>
</tr>
<tr>
<td>25. adoption of a plan of management for community land;</td>
<td>Finally, as per previous comments, the use of the word &quot;significant&quot; is open to interpretation and ambiguous.</td>
</tr>
<tr>
<td>26. granting of owner’s consent to the lodgment of an application to carry out development on significant property or land (including roads) owned or managed by Council except where such development involves:</td>
<td>As such, it is recommended that clause 26 be deleted.</td>
</tr>
<tr>
<td>i. alterations or additions to the fit-out or internal fabric or appearance of the building;</td>
<td></td>
</tr>
<tr>
<td>ii. minor changes to the external fabric or appearance of the building;</td>
<td></td>
</tr>
<tr>
<td>iii. a use of public or crown land, such as tables and chairs on a footway, and that such consent, granted for a period of up to 3 years, is given on the basis that it does not fetter Council’s discretion as consent authority;</td>
<td></td>
</tr>
<tr>
<td>iv. works by Council in accordance with an approved budget;</td>
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<tr>
<td>Suggested amendment</td>
<td>Operational concerns</td>
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<td>---------------------</td>
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</tr>
<tr>
<td><strong>CULTURAL</strong></td>
<td></td>
</tr>
<tr>
<td>27. the development or formation of relationships with other cities, including sister city agreements;</td>
<td>No comment</td>
</tr>
<tr>
<td>28. the approval of civic and ceremonial events;</td>
<td></td>
</tr>
<tr>
<td>29. the granting of civic honours;</td>
<td></td>
</tr>
<tr>
<td><strong>PLANNING AND DEVELOPMENT</strong></td>
<td></td>
</tr>
<tr>
<td>30. determination of applications for development consent under the Environmental Planning and Assessment Act 1979 that are to be referred to the Development Application Committee;</td>
<td>Council already has a detailed delegation to the Development Applications Committee which clearly and effectively sets out the functions delegated to staff and the functions reserved for the elected Council (sitting as the DAC). Clauses 31, 32 and 33 are superfluous and only serve to confuse and potentially compromise the existing delegations to the Development Applications Committee. It is recommended that clauses 31, 32 and 33 be deleted</td>
</tr>
<tr>
<td>31. determination of applications for development consent under the Environmental Planning and Assessment Act 1979 where a request is made by Councillors for the development application to be the subject of a report to Council, through the Development Applications Committee, provided that the request is in writing (email acceptable) to the Chief Executive Officer or delegate, from two or more Councillors;</td>
<td></td>
</tr>
<tr>
<td>32. determination of applications for approval to demolish a heritage item but this does not prevent determination of application for works modifying a heritage item in accordance with a development consent</td>
<td></td>
</tr>
<tr>
<td>33. determination of applications where there is a conflict with Council’s adopted objectives and policies (except in relation to minor departures where strict compliance would be unreasonable or unnecessary) and Council Officers are recommending approval of the application.</td>
<td></td>
</tr>
</tbody>
</table>
### DRAFT INSTRUMENT OF DELEGATIONS TO THE LORD MAYOR

#### INTERPRETATION OF DELEGATIONS

A. This instrument of delegation should be construed as operating in a manner which is valid and within the powers conferred on the Council under the Local Government Act 1993;

B. References to the Chief Executive Officer are references to the General Manager appointed under the Local Government Act 1993;

C. References to the decisions of Council are references to decisions made by the Council from time to time;

D. References to policies of the Council are references to policies adopted by the Council from time to time;

E. These delegations are not intended to limit the Lord Mayor's ability to carry out such other functions and exercise such other powers as the Council may determine from time to time or as may be functions of the Lord Mayor under the Local Government Act 1993.

#### DELEGATIONS

**General and Policy Direction**

a) To direct the Chief Executive Officer, except as otherwise provided by the Local Government Act 1993.

Section 352 of the Act provides:

1. A member of staff of a council is not subject to direction by the council or by a councillor as to the content of any advice or recommendation made by the member.
2. This section does not prevent the council or the mayor from directing the general manager of the council to provide advice or a recommendation.

The current wording of clause a) is inconsistent with the Act as the Lord Mayor and Councillors are not permitted to direct staff, including the General Manager. The General Manager's role is to ensure the efficient and effective operation of Council's organisation and the implementation of Council resolutions. It would be inappropriate for the Lord Mayor to direct the General Manager about how to conduct the General Manager's role.
<table>
<thead>
<tr>
<th>Delegation</th>
<th>Operational issues</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Management of Council meetings and business</strong>&lt;br&gt;a) the authority to call and schedule meetings of Council and Council Committees, briefings of Councillors and inspections by Councillors;</td>
<td>It is recommended Clause a) should be re-worded for consistency with s352 of the Act.</td>
</tr>
<tr>
<td></td>
<td>(a) The meeting schedule for the following year is adopted by the elected Council via a Council resolution at the Council meeting held in November each year for the following year. The Code of Meeting Practice allows the Lord Mayor to call an extraordinary meeting.</td>
</tr>
<tr>
<td></td>
<td>(b) All Councillors may submit a Notice of Motion to have an item listed on the agenda. In addition, where a Council resolution calls for an item to be listed on the agenda the General Manager must enact the resolution. As such the delegation seems to have no practical effect and provide nothing in addition to the mechanisms currently available.</td>
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<td></td>
<td>It is noted that cl. 242(2) of the Local Government (General) Regulation 2005 provides that the General Manager must not include an item on the agenda if in the opinion of the General Manager, the business is unlawful. As such, the General Manager has a statutory obligation to not place an unlawful item on the agenda regardless of a Council resolution.</td>
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<tr>
<td></td>
<td>Despite this delegation to the Lord Mayor, the CEO may determine the agenda item unlawful.</td>
</tr>
<tr>
<td></td>
<td>(c) Is acceptable but inconsistent with the current Code of Meeting Practice and the Code of Meeting Practice should be amended prior to this delegation coming into effect (noting this will require a 42 day exhibition period). It is recommended that clause c) be deleted.</td>
</tr>
<tr>
<td><strong>Expenditure</strong>&lt;br&gt;a) to approve all reasonable travel by staff to destinations outside Australia, and all expenses associated with overseas travel and Council related business attended to, subject to such expenditure being reported in the annual report as well as in quarterly performance reports to Council;</td>
<td>(a) The Lord Mayor is not in control of budgets for staff travel and as such is not in a position to approve such travel. This function could appropriately be reserved for a decision of the elected Council instead of the Lord Mayor. It is recommended clause a) be deleted. At the City of Sydney this delegation effectively only applies to travel by the GM. The CEO’s delegation has been amended to make it clear that any overseas travel must be approved by the elected Council. This is consistent with past practice and provides for openness and transparency as Council resolutions are made available to the public. This is also consistent with Councillor’s Payment of Expenses and Provision of Facilities Policy.</td>
</tr>
<tr>
<td></td>
<td>b) Approving the waiver of fees and charges would need to be in accordance with an established budget. It is suggested this budget be $20,000 per year.</td>
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<tr>
<td></td>
<td>b) to determine requests for the waiver or reduction of fees in accordance with the relevant categories as determined within Council’s Policies and Council’s Operational Plan;</td>
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<tr>
<td>Delegation</td>
<td>Operational issues</td>
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<td></td>
<td>c) Given the limitation placed on the CEO’s function precluding him from performing any function delegated to the Lord Mayor, the CEO (and any other staff members) will not be in a position to waive fees. Fees of minor amounts are waived regularly by Business Unit Managers and in the libraries, staff working on the front counter have delegation to waive fees up to $50 where a person has been, for example, hospitalised and unable to return their library books for an extended period. It seems impractical that the Lord Mayor would be available to waive fees in such circumstances.</td>
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<td></td>
<td>It appears the intention may be for the Lord Mayor as well as the CEO (and staff sub-delegated authority by the CEO) to be authorised to waive or reduce fees or charges in accordance with established categories and frameworks. A budget would need to be established to provide for the Lord Mayor to exercise this function and account for the waivers or reductions.</td>
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<td></td>
<td>At the City of Sydney, this delegation is used very rarely, and then only in ‘emergency’ situations. Their approach is to maintain strict adherence to fees so as not to create inequity in the community. Their alternative solution is to have a small fund for ‘quick response’ grants, approved by the CEO after consultation with the LM.</td>
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<td></td>
<td>It is recommended that the cross reference to the Lord Mayor’s delegation in the CEO’s delegation be deleted.</td>
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<table>
<thead>
<tr>
<th>External relations and representations</th>
<th>Operational issues</th>
</tr>
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<tbody>
<tr>
<td>a) to act as Council’s official spokesperson in accordance with Council’s Media Policy;</td>
<td>(a) The Media Policy provides for the General Manager to be the official spokesperson on operational matters. By virtue of the CEO being precluded from performing any functions delegated to the Lord Mayor means the CEO cannot comment on operational issues nor fulfill his obligations under the Media Policy.</td>
</tr>
<tr>
<td>b) to determine:</td>
<td>It appears the intention may be for Media Policy to stand with the CEO being the spokesperson on operational issues and the Lord Mayor on other issues.</td>
</tr>
<tr>
<td>i. who should represent Council on external organisations and committees and inter-agency working parties; and</td>
<td>It is recommended clause a) be deleted and the Media Policy to stand.</td>
</tr>
<tr>
<td>ii. who should represent Council at civic ceremonial and social functions, where the Lord Mayor is unable to attend and Council has not determined its representative,</td>
<td>It is noted that this clause deviates from the City of Sydney’s delegation which provides for the Lord Mayor to issue press statements.</td>
</tr>
<tr>
<td>c) provided that provided that before a determination is made that a staff member should so represent Council, the Lord Mayor must first consult with the Chief Executive Officer;</td>
<td>(b) (i) Determination of who should represent Council on external organisations has in the past been determined by Council resolution not by the CEO except in relation to operational inter-agency committees. In Sydney, this delegation is not applied to operational committees.</td>
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<tr>
<td>Delegation</td>
<td>Operational issues</td>
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<tr>
<td>d) to determine to whom Civic awards and honours should be presented in accordance with Council’s Policy;</td>
<td>(b) (ii) Council elects a Deputy Lord Mayor by Council resolution with the Deputy Lord Mayor being able to exercise the role of the Lord Mayor in the Lord Mayor’s absence. As such, Council has determined that the Deputy Lord Mayor is the alternative representative to the Lord Mayor. As such, this function could only be utilised in the case of the Deputy Lord Mayor being unavailable.</td>
</tr>
<tr>
<td>e) Determine Council’s representation, and exercise Council’s Local Government NSW (LGNSW) voting rights whether directly or through subsequent delegations to Councillor attendees.</td>
<td>(c) The Lord Mayor would need to seek approval from the CEO before appointing a staff representative, otherwise this would be the Lord Mayor directing staff which is inconsistent with section 352 of the Act.</td>
</tr>
</tbody>
</table>

Organisational Accountability and Performance Management

| a) to negotiate and settle terms of a contract of employment with the Chief Executive Officer including determining the appropriate remunerations, bonuses and incentives in accordance with Council Policy, and inform Councillors accordingly; | All actions undertaken in accordance with clause a) and c) - g) should be consistent with the “Division of Local Government Guidelines for the appointment and oversight of General Managers dated July 2011 issued by the Director General pursuant to section 23A of the Local Government Act 1993” An amendment has been made to reflect this requirement. |
| b) to review, approve and implement governance and accountability structures and processes for the performance of the organisation and to oversee the performance of the Chief Executive Officer (and, through the Chief Executive Officer, the performance of the organisation and program areas within the organisation); | b) The terminology ‘governance and accountability structures’ is very broad. Council has a dedicated Governance Officer who oversees Council’s governance structures and Council’s legislative compliance. Approval from the elected Council must be sought in relation to key governance structures and documents including the Code of Conduct and Internal Reporting Policy. |
| c) to settle performance standards, and plan, and carry out performance reviews, of the Chief Executive Officer, in accordance with any performance review panel or policy in effect; | It is recommended clause b) be deleted and Council continue with the current approach, whereby key governance documents are put to the elected Council for approval. |
| d) to, in accordance with the requirements of the contract, vary the terms of the contract of employment with the existing Chief Executive Officer, provided that: | j) The final decision on carrying out an audit rests with the Audit Committee not the CEO. |

(i) the Lord Mayor must consult with Councillors in relation to changes that the Lord Mayor reasonably
<table>
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<tr>
<th>Delegation</th>
<th>Operational issues</th>
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<td>considers to be substantial changes; and (ii) the Lord Mayor may not extend the contract of employment unless such extension is provided for in the contract and is for a period of not more than 3 months beyond the original term of employment;</td>
<td>which is in accordance with the global internal audit standards (International Professional Practices Framework) and Office of Local Government Internal Audit Guidelines (September 2010) which state in part:&quot;The internal audit activity must be free from interference in determining the scope of internal auditing, performing work, and communicating results&quot; and:</td>
</tr>
<tr>
<td>e) to suspend the Chief Executive Officer at short notice and, only after prior consultation with Councillors to terminate the Chief Executive Officer's employment;</td>
<td>&quot;For local government, the Internal Auditor should report functionally to the audit committee and administratively to the General Manager. If matters involve the conduct of the General Manager, an alternate reporting chain to the Mayor or a protected disclosure to the ICAC, Ombudsman or the Division of Local Government (about serious and substantial waste in local government) should be in place.</td>
</tr>
<tr>
<td>f) to accept the resignation of the Chief Executive Officer;</td>
<td>…Pursuant to section 335 of the Local Government Act the General Manager is responsible for the day-to-day management of council activities including the direction of staff and implicitly the internal audit function. The General Manager may choose to delegate this responsibility provided always that the delegation does not directly or indirectly interfere with the ability of the Internal Auditor to conduct an internal audit function free from interference as required by the IIA’s Standards,…&quot;</td>
</tr>
<tr>
<td>g) to negotiate and settle termination arrangements with the Chief Executive Officer, including any termination payments to be made;</td>
<td>The Audit Committee Charter and membership of the Audit Committee was adopted by resolution of the elected Council. Further, two of the Audit Committee members are Councillors appointed by resolution of the elected Council. Clause j) is inconsistent with the previous decisions of the elected Council. As such, it is recommended that this clause be deleted.</td>
</tr>
<tr>
<td>h) to appoint and replace a Director as an Acting Chief Executive Officer from time to time, as might be required by the absence of the Chief Executive Officer for any reason and (except due to annual leave) such appointment is to be considered by Council at the earliest opportunity;</td>
<td>It is recommend that clause j) be deleted and the elected Council use their representation on the Audit Committee to have input as to the conduct of audits or reviews.</td>
</tr>
<tr>
<td>i) to take other administrative actions in connection with the Chief Executive Officer’s contract including, but not limited to, approval of annual leave;</td>
<td>k) A budget would need to be established for costs if independent consultants providing advice for accounting and reporting purposes.</td>
</tr>
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</table>
| j) to direct that Council’s internal auditor carry out a review or audit; | l) Similar to previous comments, 'minor change' is not clear and it is not appropriate for the Lord Mayor to make decisions about staff below Senior Staff
<table>
<thead>
<tr>
<th>Delegation</th>
<th>Operational issues</th>
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<tbody>
<tr>
<td>Authority to Obtain Legal Services</td>
<td>a) Staff, including Council's lawyers (legal representatives) and Manager Council and Legal Services report to the CEO and it would not be appropriate for staff to take direction from the Lord Mayor.</td>
</tr>
<tr>
<td>a) to instruct Council's legal representatives</td>
<td>Removal of the reference to Manager Council and Legal Services and 'directly' is recommended.</td>
</tr>
<tr>
<td>directly or through the Chief Executive Officer</td>
<td>It is appropriate that the elected Council resolved to commence legal proceedings in Supreme and Federal Court matters. In small local court and debt recovery matters, the relevant Business Unit Manager would be best qualified to provide such instructions.</td>
</tr>
<tr>
<td>or Manager Legal and Governance Services, as appropriate:</td>
<td>As the CEO is precluded from performing functions delegated to the Lord Mayor, the CEO (and staff) are precluded from instructing Council's legal representatives (which arguable include Council's in house legal representatives). Council's legal representatives are provided with instructions on a daily basis from Directors and Business Unit Managers to provide advice on leases, licenses, agreements and other legal documents. This highlights the need for the suggested amendment to clause 2 of the CEO's delegations.</td>
</tr>
<tr>
<td>i. provided the instruction is not inconsistent with Council policies or decisions; or</td>
<td>It is confirmed that the removal of the cross-reference to the Lord Mayor's delegations in the CEO's delegation would overcome any confusion in regard to instructing legal representatives.</td>
</tr>
<tr>
<td>ii. where there is an inconsistency (such as to settle court proceedings where Council's prospects are poor) if it is in Council's interest to do so and the Lord Mayor has been so advised (the Chief Executive Officer, delegate, or external counsel); and</td>
<td></td>
</tr>
<tr>
<td>iii. provided that if the Lord Mayor proposes to give instructions (either directly or indirectly) to commence legal proceedings (including an appeal), the Lord Mayor shall consult the Chief Executive Officer, unless it is inappropriate to do so, in which case the Lord Mayor shall consult at least 2 Councillors, (in confidence if necessary), before doing so. On the day such proceedings are commenced, the Chief Executive Officer shall be advised of the nature of the proceedings, unless they have a conflict of interest. Additionally, this will be brought to the next Council meeting for confirmation;</td>
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<thead>
<tr>
<th>Mayoral and Civic Role</th>
<th>No comment</th>
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<tr>
<td>a) in respect of the Office of the Lord Mayor, to:</td>
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<tr>
<td>i. determine the structure of the Office</td>
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<tr>
<td>ii. allocate expenditure within the Office, not exceeding the global budget of the Unit approved annually by Council</td>
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<tr>
<td>iii. determine the number and description of all staff positions</td>
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<tr>
<td>iv. be fully and formally consulted in respect of the appointment (or dismissal) of all staff</td>
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<tr>
<td>v. direct staff within the Office and allocate tasks, in consultation with the Chief Executive Officer;</td>
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</tr>
<tr>
<td>Delegation</td>
<td>Operational issues</td>
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</tr>
<tr>
<td>General authority of Council during recesses</td>
<td>No comment.</td>
</tr>
<tr>
<td>a) to exercise, during recesses of Council, the powers, authorities, duties and functions of Council other than:-</td>
<td></td>
</tr>
<tr>
<td>i. those reserved to the Council itself by Section 377 and Section 379 of the Local Government Act 1993;</td>
<td></td>
</tr>
<tr>
<td>ii. those powers and functions delegated to the Chief Executive Officer by Council resolution from time to time;</td>
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<tr>
<td>with such delegations to be effective from midnight on the day of the last Council meeting prior to a recess period as approved by the Council, up to the time of commencement of the first meeting at the conclusion of the recess period, subject to:</td>
<td></td>
</tr>
<tr>
<td>iii. such delegations are to be exercised following receipt by the Lord Mayor of reports or other business papers in a form similar to the form of reports or other business papers normally submitted to Council or a Council Committee</td>
<td></td>
</tr>
<tr>
<td>iv. those reports or other business papers are to be circulated to Councillors at least three business days prior to the exercise of delegations;</td>
<td></td>
</tr>
<tr>
<td>v. where written objections by three Councillors on any one item are received by the Lord Mayor, stating relevant reasons for objection, the item is to be deferred until the next relevant Committee meeting of Council, and</td>
<td></td>
</tr>
<tr>
<td>vi. any such decisions made by the Lord Mayor pursuant to such delegation to be reported to the next meeting of Council</td>
<td></td>
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</table>
ATTACHMENT D: Instrument of Delegation to the General Manager and Lord Mayor dated 24 September 2013
SUBJECT: CCL 24/09/13 - INSTRUMENT OF DELEGATION TO THE GENERAL MANAGER

REPORT BY: GENERAL MANAGER
CONTACT: ACTING MANAGER LEGAL & COUNCIL SERVICES

PURPOSE

To adopt an instrument of delegation to the General Manager.

RECOMMENDATION

1 Council adopt the instrument of delegation to the General Manager at Attachment A.

KEY ISSUES

2 Section 380 of the Local Government Act 1993 (NSW) (Act) requires Council to review its delegations during the first 12 months of each term of office.

3 Delegation of functions to the General Manager is necessary for Council to exercise its functions under all acts and regulations in an effective and timely manner.

4 The proposed instrument of delegation incorporates the following amendments:
   (a) Amendments relating to converting the instrument to comply with Hunter Council’s recently issued standard template. This includes the addition of specific references to the Noxious Weeds Act 1993 as well as functions delegated by other authorities to Council.
   (b) Amendments to remove unnecessary limitations and improve the clarity of some limitations.

FINANCIAL IMPACT

5 N/A

COMMUNITY STRATEGIC PLAN ALIGNMENT

6 Open and collaborative leadership

IMPLEMENTATION PLAN/IMPLICATIONS

7 The proposed instrument of delegation will become effective immediately, if adopted.

RISK ASSESSMENT AND MITIGATION
8 The proposed instrument of delegation to the General Manager complies with relevant legislation and allows the functions of Council to be carried out in effective and timely manner.

RELATED PREVIOUS DECISIONS

9 5 July 2011 – adoption of current Instrument of Delegation to the General Manager.

CONSULTATION

10 N/A

OPTIONS

Option 1

11 The recommendation as at Paragraph 1.

Option 2

12 Council does not adopt the proposed instrument of delegation to the General Manager. This is not the recommended option as the current instrument does not address the issues outlined in paragraph 4.

BACKGROUND

13 The Act provides that Council can delegate any of the functions of Council except those detailed in section 377, which must be exercised by the elected Council. These include:

   a) appointing a General Manager
   b) making of a rate
   c) determination under section 549 as to the levying of a rate
   d) making of a charge
   e) fixing of a fee
   f) borrowing of money
   g) voting of money for expenditure on its works, services or operations
   h) compulsory acquisition, purchase, sale, exchange or surrender of any land or other property (but not including the sale of items of plant or equipment)
   i) accepting tenders which are required under this Act to be invited by Council,
   j) adopting an operational plan under section 405
   k) adopting a financial statement included in an annual financial report
   l) deciding to classify or reclassify public land under Division 1 of Part 2 of Chapter 6
   m) fixing of an amount or rate for the carrying out by Council of work on private land
n) decision to carry out work on private land for an amount that is less than the amount or rate fixed by Council for the carrying out of any such work

o) review of a determination made by Council, and not by a delegate of Council, of an application for approval or an application that may be reviewed under section 82A of the *Environmental Planning and Assessment Act 1979*

p) power of Council to authorise the use of reasonable force for the purpose of gaining entry to premises under section 194

q) decision under section 356 to contribute money or otherwise grant financial assistance to persons

r) decision under section 234 to grant leave of absence to the holder of a civic office

s) making of an application, or the giving of a notice, to the Governor or Minister

t) power of delegation provided under section 377 of the Act

u) any function under this or any other Act that is expressly required to be exercised by resolution of Council.

14 The proposed instrument of delegation reserves further functions for exercise by the elected Council. These are provided as limitations to the General Manager’s delegations.

15 The following table provides specific comments on the limitations in the current instrument of delegation and the reason for any change in the proposed instrument:

<table>
<thead>
<tr>
<th>Limitation in current instrument</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>To bring to Council recommendations that the General Manager represent Council on boards of organisations that require Council membership for the facilitation of Council business.</td>
<td>This matter is now managed by the standard contract of employment for General Managers issued by the Division of Local Government. As such, this limitation is unnecessary and has been removed from the proposed instrument.</td>
</tr>
<tr>
<td>Functions delegated to the Development Applications Committee.</td>
<td>This limitation has been included in the proposed instrument.</td>
</tr>
<tr>
<td>Functions delegated to the Lord Mayor.</td>
<td>This limitation has been included in the proposed instrument. We have amended the wording for clarity: <em>Functions delegated to, and exercised by, the Lord Mayor.</em></td>
</tr>
<tr>
<td>Limitation in current instrument</td>
<td>Comment</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Adopting Council policy that does not relate to administrative or operational matters.</td>
<td>To ensure this limitation is clear, we have amended the wording in the proposed instrument to: <strong>Adopting strategic plans and policies. For the avoidance of doubt, this does not include any policies or plans related to the functions of the General Manager including staff, administrative or operational matters.</strong></td>
</tr>
<tr>
<td>Determining applications for grants and donations.</td>
<td>This limitation is unnecessary as this function cannot be delegated under section 377 of the Act. As such, this limitation has been removed from the proposed instrument.</td>
</tr>
<tr>
<td>Writing off debts, rates or charges of $10,000 or more.</td>
<td>This limitation has been included in the proposed instrument.</td>
</tr>
<tr>
<td>The approval of the organisation structure.</td>
<td>To ensure this limitation is clear, we have amended the wording in the proposed instrument to: <strong>Determining the permanent organisational structure under section 332(1) of the Act. For the avoidance of doubt, this does not include implementing transitional or temporary arrangements.</strong></td>
</tr>
</tbody>
</table>
| Carrying out new or non-core services which are not being carried out at the date of the adoption of this instrument. | This limitation is unnecessary because this function cannot be delegated by Council under section 377 of the Act, which requires the elected Council to:  
  - vote on money for expenditure on its works, services or operations  
  - adopt an operational plan under section 405.  
  
  As such, this limitation has been removed from the proposed instrument. |
<table>
<thead>
<tr>
<th>Limitation in current instrument</th>
<th>Comment</th>
</tr>
</thead>
</table>
| Significant variation of any existing Council service that would have ongoing implications for Council in terms of cost or service delivery. | This limitation is unnecessary because this function cannot be delegated by Council under section 377 of the Act, which requires the elected Council to:  
  • vote on money for expenditure on its works, services or operations  
  • adopt an operational plan under section 405.  
  As such, this limitation has been removed from the proposed instrument. |
| Granting leases and licenses over operational land, community land and land where Council is the Crown Reserve Trust Manager with an annual rent of $100,000 (plus GST) or more. | We have increased the rent threshold to $150,000 for consistency with the threshold for reporting tenders to Council.                                                                                      |
| Approving applications for the temporary use of operational land, community land and land where Council is the Crown Reserve Trust Manager for a period of 12 months or more. | This limitation is confusing because the meaning of “temporary use” is unclear as is its overlap with the limitation above. In addition, Council’s granting of licences is already regulated by the Local Government Act and the Crown Lands Act.  
  As such, this limitation has been removed from the proposed instrument. |
| Placing a plan or policy on public exhibition which is required by legislation to be exhibited   | This limitation has been included in the proposed instrument.                                                                                                                                              |
| Adoption of a plan of management for community land                                            | This limitation is unnecessary because this is addressed by the limitation relating to strategic plans and policies and the limitation relating to public exhibitions.  
  As such, this limitation has been removed from the proposed instrument. |
<table>
<thead>
<tr>
<th>Matters relating to community land in the absence of a plan of management.</th>
<th>This limitation is unnecessary because Council now has plans of management for the majority of its community land and the use of community land is highly regulated. In addition, the application of planning legislation is more restrictive in the absence of a plan of management. As such, this limitation has been removed from the proposed instrument.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development of sister city relationships and formation of sister city committees</td>
<td>This limitation has been included in the proposed instrument.</td>
</tr>
</tbody>
</table>

**ATTACHMENTS**

**Attachment A:** Proposed Instrument of Delegation to the General Manager
On DATE the Council of the City of Newcastle (Council) resolved that:

1. The person who from time to time holds the position of General Manager of Council (General Manager) be delegated authority under:
   
   1.1 Section 377 of the Local Government Act 1993 (Act), to exercise and/or perform Council's functions under all acts and regulations in force and as amended from time to time:
      
      (a) Subject to any condition or limitation specified in Schedule 1; and
      
      (b) Excluding those functions:
         
         (i) expressly prohibited from delegation as provided in section 377 of the Act; or
         
         (ii) expressly required by legislation to be exercised by resolution of Council.

   1.2 Section 68 of the Noxious Weeds Act 1993, to exercise and/or perform the functions of the local control authority.

   1.3 To exercise and/or perform functions delegated to Council under any instrument of delegation to Council including those set out in Schedule 2 excluding any functions which may not be sub-delegated under the terms of the delegation.

2. The General Manager be delegated any function which is taken to be conferred or imposed on Council pursuant to section 381 of the Act.

3. The delegations in this Instrument are subject to, and are to be exercised in accordance with, the requirements of the relevant legislation, any limitations set out in Schedule 1, and any resolution of Council.

4. All previous delegations of functions the subject of this Instrument be revoked.

5. For the purpose of this Instrument, function includes powers, authorities and duties and anything ancillary or related to the exercise or performance of that function.

<table>
<thead>
<tr>
<th>SCHEDULE 1: LIMITATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Functions delegated to the Development Applications Committee</td>
</tr>
<tr>
<td>(2) Functions delegated to, and exercised by, the Lord Mayor</td>
</tr>
<tr>
<td>(3) Adopting strategic plans and policies. For the avoidance of doubt, this does not include any policies or plans related to the functions of the General Manager including staff, administrative or operational matters.</td>
</tr>
<tr>
<td>(4) Writing off debts, rates or charges of $10,000 or more</td>
</tr>
<tr>
<td>(5) Determining the permanent organisational structure under section 332(1) of the Act. For the avoidance of doubt, this does not include implementing transitional or temporary arrangements</td>
</tr>
<tr>
<td>(6) Granting leases and licences over operational land, community land and land where Council is the Crown Reserve Trust Manager with an annual rent of $150,000 (plus</td>
</tr>
</tbody>
</table>
GST) or more

(7) Placing a plan or policy on public exhibition which is required by legislation to be exhibited

(8) Developing sister city relationships and forming sister city committees.

**SCHEDULE 2: INSTRUMENTS OF DELEGATION TO COUNCIL**

<table>
<thead>
<tr>
<th>Delegator</th>
<th>Regarding</th>
<th>Instrument date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roads Transport Authority</td>
<td>Appointing Council Officers as authorised officers for the purposes of certain sections of the <em>Road Transport (General) Act 2005</em></td>
<td>16 June 2006</td>
</tr>
<tr>
<td>NSW Food Authority</td>
<td>Appointment as enforcement agency under the <em>Food Act 2003</em></td>
<td>19 June 2008</td>
</tr>
</tbody>
</table>
ACTION ITEM

Ordinary Council
Tuesday, 24 September 2013

SUBJECT: CCL 24/09/13 - INSTRUMENT OF DELEGATION TO THE GENERAL MANAGER

RESOLVED: (Councillors B Luke/S Waterhouse)

Council adopt the instrument of delegation to the General Manager at Attachment A.
PURPOSE

To adopt an instrument of delegation to the Lord Mayor.

RECOMMENDATION

1 Council adopt the instrument of delegation to the Lord Mayor at Attachment A.

KEY ISSUES

2 Section 380 of the Local Government Act 1993 (NSW) (Act) requires Council to review all delegations during the first 12 months of each term of office.

3 The proposed instrument of delegation to the Lord Mayor incorporates the following amendments:
   (a) Amendments relating to converting the instrument to comply with Hunter Councils recently issued standard template.
   (b) Minor amendments to remove unnecessary delegations which are already provided to the Lord Mayor directly under the Act.
   (c) Addition of a new delegation to provide for the Lord Mayor to exercise voting rights for LGNSW in accordance with Council’s recent resolution.
   (d) Addition of a new delegation to exercise Council’s functions under the General Manager’s Contract of Employment having regard to any functions of a performance review panel or policy in effect.

FINANCIAL IMPACT

4 N/A

COMMUNITY STRATEGIC PLAN ALIGNMENT

5 Open and collaborative leadership

IMPLEMENTATION PLAN/IMPLICATIONS

6 The proposed instrument of delegation will become effective immediately, if adopted.

RISK ASSESSMENT AND MITIGATION

7 The proposed instrument of delegation to the Lord Mayor complies with relevant legislation and allows the functions of Council to be carried out in effective and timely manner.
RELATED PREVIOUS DECISIONS

8  5 July 2011 – adoption of current Instrument of Delegation to the Lord Mayor.

CONSULTATION

9  N/A

OPTIONS

Option 1

10  The recommendation as at Paragraph 1.

Option 2

11  Council does not adopt an instrument of delegation to Lord Mayor.

BACKGROUND

12  The Act provides that Council can delegate any of the functions of Council except those detailed in section 377, which must be exercised by the elected Council. These include:

   a) appointing a General Manager
   b) making of a rate
   c) determination under section 549 as to the levying of a rate
   d) making of a charge
   e) fixing of a fee
   f) borrowing of money
   g) voting of money for expenditure on its works, services or operations
   h) compulsory acquisition, purchase, sale, exchange or surrender of any land or other property (but not including the sale of items of plant or equipment)
   i) accepting tenders which are required under this Act to be invited by Council,
   j) adopting an operational plan under section 405
   k) adopting a financial statement included in an annual financial report
   l) deciding to classify or reclassify public land under Division 1 of Part 2 of Chapter 6
   m) fixing of an amount or rate for the carrying out by Council of work on private land
   n) decision to carry out work on private land for an amount that is less than the amount or rate fixed by Council for the carrying out of any such work
   o) review of a determination made by Council, and not by a delegate of Council, of an application for approval or an application that may be reviewed under section 82A of the Environmental Planning and Assessment Act 1979
p) power of Council to authorise the use of reasonable force for the purpose of gaining entry to premises under section 194
q) decision under section 356 to contribute money or otherwise grant financial assistance to persons
r) decision under section 234 to grant leave of absence to the holder of a civic office
s) making of an application, or the giving of a notice, to the Governor or Minister
t) power of delegation provided under section 377 of the Act
u) any function under this or any other Act that is expressly required to be exercised by resolution of Council.

13 The Act provides that the role of the Lord Mayor is:
   (a) to exercise, in cases of necessity, the policy-making functions of the governing body of Council between meetings of Council
   (b) to exercise such other functions of Council as Council determines
   (c) to preside at meetings of Council
   (d) to carry out the civic and ceremonial functions of the mayoral office.

14 The proposed instrument of delegation provides additional functions for exercise by the Lord Mayor.

REFERENCES

ATTACHMENTS

Attachment A: Instrument of Delegation to the Lord Mayor dated 24 September 2013

Attached Correspondence: N/A
On DATE the Council of the City of Newcastle (Council) resolved that:

1 The person who from time to time holds the position of Lord Mayor of Council (Lord Mayor) be delegated authority to:

   1.1 Determine Council’s Councillor representative at civic, ceremonial and social functions if:
       (a) the Lord Mayor and Deputy Lord Mayor are unable to attend; and
       (b) Council has not otherwise determined its representative.

   1.2 Act as Council’s official spokesperson in accordance with Council’s Media Policy.

   1.3 Exercise Council’s functions under the General Manager’s Contract of Employment having regard to any functions of a performance review panel or policy in effect.

   1.4 Obtain external legal advice in relation to the appointment and conduct of the General Manager.

   1.5 Determine the structure of the Office of the Lord Mayor and the description of the positions within the structure in consultation with the General Manager and in accordance with Council’s organisational structure and approved resources.

   1.6 Exercise Council’s LGNSW voting rights whether directly or through subsequent delegation to attendees.

2 The delegations in this Instrument are subject to, and are to be exercised in accordance with, the requirements of the relevant legislation and any resolution of Council.

3 All previous delegations of functions the subject of this Instrument be revoked.

4 For the purpose of this Instrument, function includes powers, authorities and duties and anything ancillary or related to the exercise or performance of that function.
SUBJECT: CCL 24/09/13 - INSTRUMENT OF DELEGATION TO THE LORD MAYOR

RESOLVED: (Councillors B Luke/S Waterhouse)

Council adopt the instrument of delegation to the Lord Mayor at Attachment A.
ATTACHMENT E: Instrument of Delegation to the General Manager and Lord Mayor dated 5 July 2011
PURPOSE

To allow Council to review Council’s delegations to the General Manager as part of Council’s delegations review project.

RECOMMENDATION

1 Council adopts the instrument of delegation to the General Manager at Attachment B.

KEY ISSUES

2 Section 335 of the Local Government Act 1993 (NSW) (Act) provides that

   (1) The General Manager is generally responsible for the efficient and effective operation of the council’s organisation and for ensuring the implementation, without undue delay, of decisions of the council.

   (2) The General Manager has the following particular functions:

       • to assist the council in connection with the development and implementation of the community strategic plan and the council’s resourcing strategy, delivery program and operational plan and the preparation of its annual report and state of the environment report
       • the day-to-day management of the council
       • to exercise such of the functions of the council as are delegated by the council to the general manager
       • to appoint staff in accordance with an organisation structure and resources approved by the council
       • to direct and dismiss staff
       • to implement the council’s equal employment opportunity management plan.

   (3) The General Manager has such other functions as may be conferred or imposed on the general manager by or under this or any other Act.

3 In addition to the General Manager’s functions under the Act, Council has delegated further functions to the General Manager. These delegated functions are provided in Council’s current instrument of delegation to the General Manager (Attachment A). The instrument delegates all functions to the General Manager except the functions listed in the instrument (that is, it sets out what the General Manager can not do).

4 The instrument delegates to the General Manager

   (a) authority to bring to Council a recommendation for the General Manager to represent Council on external boards for organisations that require Council membership for the facilitation of Council business; and
5 The reservations in the instrument of delegation to the General Manager include a number of reservations that are unnecessary or inconsistent with legislation. Our comments on each individual reservation are set out below:

<table>
<thead>
<tr>
<th>Reservation</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The functions which are required by or under the <em>Local Government Act 1993</em> or by or under any Act or instrument to be performed by the governing body of the Council.</td>
<td>This reservation is unnecessary because all delegations are subject to the provisions of any applicable legislation. We have deleted this reservation from our recommended instrument.</td>
</tr>
<tr>
<td>(2) Functions delegated to the Development Applications Committee.</td>
<td>This reservation is appropriate.</td>
</tr>
<tr>
<td>(3) Functions delegated to the Strategic Policy Committee.</td>
<td>This reservation is not required as the Strategic Policy Committee is no longer operational. We have deleted this reservation from our recommended instrument.</td>
</tr>
<tr>
<td>(4) Functions delegated to the Lord Mayor.</td>
<td>This reservation is appropriate.</td>
</tr>
<tr>
<td>(5) Power to make or amend Council policy.</td>
<td>We have amended this reservation in our recommended instrument to clarify that it does not apply to policies regarding administrative or operational matters. For example, human resource policies are adopted by the General Manager as they relate to operational matters.</td>
</tr>
<tr>
<td>(6) Witnessing the affixing of the Common Seal of the Council.</td>
<td>This reservation is inconsistent with clause 400 of the <em>Local Government (General) Regulation 2005</em> (NSW), which provides that, once Council has authorised the affixing of the seal, the seal can be affixed in presence of any two of the General Manager, Lord Mayor, and/or Councillors. We have deleted this reservation from our recommended instrument.</td>
</tr>
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<tr>
<td>---</td>
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</tr>
<tr>
<td>(7) The setting of Council's budget.</td>
<td>This reservation is unnecessary because this function cannot be delegated by Council under section 377 of the Act as it is part of Council’s operational plan. We have deleted this reservation from our recommended instrument.</td>
</tr>
<tr>
<td>(8) The setting of priorities for Council’s Major Projects and Major Asset Preservation Programs.</td>
<td>This reservation is unnecessary because this function cannot be delegated by Council under section 377 of the Act as it is part of Council’s operational plan. We have deleted this reservation from our recommended instrument.</td>
</tr>
<tr>
<td>(9) The allocation of revenue gains outside the budget.</td>
<td>This reservation is unnecessary because this function cannot be delegated by Council under section 377 of the Act as it is part of Council’s operational plan (and quarterly review of the operational plan). We have deleted this reservation from our recommended instrument.</td>
</tr>
<tr>
<td>(10) Any variation of approved expenditure that goes beyond one service unit or beyond a specific program within the Major Projects and Major Asset Preservation Programs.</td>
<td>This reservation is unnecessary because this function cannot be delegated by Council under section 377 of the Act as it is part of Council’s operational plan (and quarterly review of the operational plan). We have deleted this reservation from our recommended instrument.</td>
</tr>
<tr>
<td>(11) Determination of applications for grants and donations.</td>
<td>It is up to Council to determine the appropriateness of this reservation.</td>
</tr>
<tr>
<td>(12) Writing off debts of a value $10,000 or over, in accordance with Clause 17 of the Local Government (Financial Management) Regulation 1999.</td>
<td>The Local Government (Financial Management) Regulation 1999 has been replaced by the Local Government (General) Regulation 2005. We have amended the reservation in our recommended instrument accordingly and combined it with the reservation relating to the writing off of</td>
</tr>
</tbody>
</table>
| (13) Writing off rates and charges of a value $10,000 or over, in accordance with Clause 14 of the Local Government (Rates and Charges) Regulation 1999. | The *Local Government (Financial Management) Regulation 1999* has been replaced by the *Local Government (General) Regulation 2005*.  
We have amended the reservation in our recommended instrument accordingly and combined it with the reservation relating to the writing off of debts. |
| (14) The approval of the organisation structure. | It is up to Council to determine the appropriateness of this reservation. |
| (15) Entering into any enterprise agreement or altering personnel policies that would affect a class of employees and would have ongoing significant implications for Council in terms of cost or service delivery. | In the past, Council has received external legal advice that the functions of the General Manager under the Act include the ability of the General Manager to make decisions about entering into enterprise agreements and approving human resource policies. Such decisions must be made in accordance with Council’s organisational structure and the resources approved by Council.  
This means that this reservation is not effective because it restrains a function of the General Manager under the Act.  
We have deleted this reservation from our recommended instrument. |
| (16) Carrying out new or non-core services not already being undertaken at the date of this resolution of Council. | This reservation is unnecessary because this function cannot be delegated by Council under section 377 of the Act as it is part of Council’s operational plan.  
However, we have not deleted this delegation from the draft instrument. |
| (17) Significant variation of any existing Council service that would have ongoing implications for Council in terms of cost or service delivery. | This reservation is unnecessary because this function cannot be delegated by Council under section 377 of the Act as it is part of Council’s operational plan. |
However, we have not deleted this delegation from the draft instrument.

<table>
<thead>
<tr>
<th>Number</th>
<th>Delegation Description</th>
<th>Appropriateness</th>
</tr>
</thead>
<tbody>
<tr>
<td>(18)</td>
<td>Granting of leases or licenses and approving applications for use of public land, excluding:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- leases on Council’s properties valued at less than $100,000 pa</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- those relating to a temporary use of public land (including parks and open spaces) not exceeding two weeks.</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Point one: leases</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>It is up to Council to determine the appropriateness of this reservation.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>We have suggested some clarification to the wording of this delegation in our recommended instrument.</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Point two: temporary use of public land</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>We suggest that this reservation is amended to apply to the temporary use of public land for a period of 12 months or more.  This is consistent with Council’s treatment of Crown Reserve, which requires Council to obtain the Minister’s consent for temporary use for 12 months or more.</td>
<td></td>
</tr>
<tr>
<td>(19)</td>
<td>Release for public exhibition and comment of any plan or policy which is required by legislation to be exhibited.</td>
<td></td>
</tr>
<tr>
<td>(20)</td>
<td>Adoption of a plan of management for community land.</td>
<td></td>
</tr>
<tr>
<td>(21)</td>
<td>Matters relating to community land pending the adoption of a plan of management.</td>
<td></td>
</tr>
<tr>
<td>(22)</td>
<td>Development of sister city relationships and formation of sister city committees.</td>
<td></td>
</tr>
<tr>
<td>(23)</td>
<td>The approval of civic and ceremonial events.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Under section 226 of the Act, the Lord Mayor’s functions include carrying out the civic and ceremonial functions of the mayoral office.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Because all delegations are subject to the provision of the Act, this reservation is unnecessary. We have deleted this reservation from our recommended instrument.</td>
<td></td>
</tr>
<tr>
<td>(24)</td>
<td>The granting of civic honours.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The granting of civic honours is considered part of the civic and ceremonial functions of the mayoral office, which is a function of the Lord Mayor under section 226 of the Act.</td>
<td></td>
</tr>
</tbody>
</table>
Because all delegations are subject to the provision of the Act, this reservation is unnecessary. We have deleted this reservation from our recommended instrument.

FINANCIAL IMPACT

6 N/A

IMPLEMENTATION PLAN/IMPLICATIONS

7 Council’s delegation of functions and powers to the General Manager (and from the General Manager to Council Officers) is necessary to allow Council to carry out its functions in an effective and timely manner.

RISK ASSESSMENT AND MITIGATION

8 Council’s delegations to the General Manager must comply with relevant legislation.

RELATED PREVIOUS DECISIONS

9 30 September 2008 – authorisation of current instrument of delegation General Manager

CONSIDERATION BY STRATEGIC ADVISORY COMMITTEE

10 N/A

OPTIONS

11 Option 1: Council adopts the recommendation.

12 Option 2: Council considers alternative delegations to the General Manager.

13 Option 3: Council affirms its adoption of the current instrument of delegation to the General Manager. This is not the recommended option because the current instrument contains a number of delegations that are unnecessary or inconsistent with legislation.

BACKGROUND

14 Council can delegate any function except those functions detailed in section 377 of the Local Government Act 1993 (NSW).

15 Council has delegated functions to:
   (a) the Lord Mayor;
   (b) committees (such the Development Applications Committee);
(c) other bodies (such as Newcastle Airport); and
(d) the General Manager.

16 Council is currently undertaking a two stage delegations review project:
(a) Stage One of the project was to review the delegations from the General
   Manager to Council Officers. This is now complete.
(b) Stage 2 of the project is to review the delegations from Council to the:
   (i) Lord Mayor;
   (ii) General Manager; and
   (iii) Development Applications Committee

17 This report asks Council to consider the current instrument of delegation to the
   General Manager in accordance with this project. The primary purpose of this
   review is to remove delegations that are unnecessary and inconsistent with
   legislation. If the new General Manager, Mr Phil Pearce, wishes to suggest
   further amendments to the instrument of delegation, this will be reported to
   Council.

REFERENCES

ATTACHMENTS

Attachment A: Current delegation to General Manager
Attachment B: Revised delegation to General Manager
Attachment A

NEWCASTLE CITY COUNCIL

INSTRUMENT OF DELEGATION TO THE GENERAL MANAGER

The functions of the General Manager are defined in section 335 of the Local Government Act 1993, as:

335 (1) (General responsibilities)
The general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of council.

(2) (Particular functions)
The general manager has the following particular functions:
- the day to day management of the council
- to exercise such of the functions of the council as are delegated by the council to the general manager
- to appoint staff in accordance with an organisation structure and resources approved by the council
- to direct and dismiss staff
- to implement the council's equal employment opportunity management plan.

(3) (Further functions)
The general manager has such other functions as may be conferred or imposed on the general manager by or under this or any other Act.

In relation to point two in s335(2), Council has the authority to delegate any of the functions of Council other than those specifically identified in s377.

Accordingly, pursuant to s377 of the Act, Newcastle City Council delegates the following functions to the General Manager. These delegations revoke all previous delegations to the General Manager and recognise that certain functions are conferred on the General Manager by the Local Government Act 1993.

Newcastle City Council delegates to the person holding the position of General Manager;
A The authority to bring to Council a recommendation for the General Manager to represent Council on external boards for organisations that require Council membership for the facilitation of Council business.

B its functions under the Local Government Act 1993 and any other legislation conferring functions on Council, except:

Powers otherwise dealt with

1 The functions which are required by or under the Local Government Act 1993 or by or under any Act or instrument to be performed by the governing body of the Council.

2 Functions delegated to the Development Applications Committee.
3 Functions delegated to the Strategic Policy Committee.
4 Functions delegated to the Lord Mayor.

**Policy and procedure**

5 Power to make or amend Council policy.
6 Witnessing the affixing of the Common Seal of the Council.

**Financial Matters**

7 The setting of Council's budget.
8 The setting of priorities for Council's Major Projects and Major Asset Preservation Programs.
9 The allocation of revenue gains outside the budget.
10 Any variation of approved expenditure that goes beyond one service unit or beyond a specific program within the Major Projects and Major Asset Preservation Programs.
11 Determination of applications for grants and donations.
12 Writing off debts of a value $10,000 or over, in accordance with Clause 17 of the Local Government (Financial Management) Regulation 1999.
13 Writing off rates and charges of a value $10,000 or over, in accordance with Clause 14 of the Local Government (Rates and Charges) Regulation 1999.

**Organisational structure and personnel matters**

14 The approval of the organisation structure.
15 Entering into any enterprise agreement or altering personnel policies that would affect a class of employees and would have ongoing significant implications for Council in terms of cost or service delivery.

**Council operations and services**

16 Carrying out new or non-core services not already being undertaken at the date of this resolution of Council.
17 Significant variation of any existing Council service that would have ongoing implications for Council in terms of cost or service delivery.

**Property, land use and related matters**

18 Granting of leases or licenses and approving applications for use of public land, excluding:
   - leases on Council’s properties valued at less than $100,000 pa
   - those relating to a temporary use of public land (including parks and open spaces) not exceeding two weeks.
19 Release for public exhibition and comment of any plan or policy which is required by legislation to be exhibited.
20 Adoption of a plan of management for community land.
21 Matters relating to community land pending the adoption of a plan of management.

Cultural

22 Development of sister city relationships and formation of sister city committees.
23 The approval of civic and ceremonial events.
24 The granting of civic honours.

The delegations under this Instrument of Delegation must be exercised in a manner that is consistent with the policies and decisions of Council.

These delegations take effect from 30 September 2008.
THE CITY OF NEWCASTLE

Attachment B

INSTRUMENT OF DELEGATION TO THE GENERAL MANAGER

Pursuant to section 377 of the Local Government Act 1993 (NSW) (Act), the Council of the City of Newcastle delegates the following functions to the General Manager.

A To bring to Council recommendations that the General Manager represent Council on boards of organisations that require Council membership for the facilitation of Council business.

B Its functions under the Act and any other legislation **except for the following functions:**

1. The functions delegated to the Development Applications Committee.
2. The functions delegated to the Lord Mayor.
3. Adopting Council policy that does not relate to administrative or operational matters.
4. Determining applications for grants and donations.
5. Writing off debts, rates or charges of $10,000 or more.
6. Approving Council’s organisational structure.
7. Carrying out new or non-core services which are not being carried out at the date of the adoption of this instrument.
8. Significant variation to an existing Council service that would have ongoing implications for Council in terms of cost or service delivery.
9. Granting leases and licenses over operational land, community land and land where Council is the Crown Reserve Trust Manager with an annual rent of $100,000 (plus GST) or more.
10. Approving applications for the temporary use of operational land, community land and land where Council is the Crown Reserve Trust Manager for a period of 12 months or more.
11. Placing a plan or policy on public exhibition which is required by legislation to be exhibited.
12. Adopting a plan of management for community land.
13. Matters relating to community land pending the adoption of a plan of management.
25 Developing sister city relationships and forming sister city committees.

The General Manager must exercise all delegations under this instrument in a manner that is consistent with legislation and the policies and decisions of Council.

This instrument of delegation takes effect from [day month year] and revoke all previous delegations of Council functions to the General Manager.
SUBJECT: CCL 5/7/11 - REVIEW OF COUNCIL'S DELEGATIONS TO GENERAL MANAGER

RESOLVED: (COUNCILLORS M OSBORNE/M KING)

Council adopts the instrument of delegation to the General Manager at Attachment B.
SUBJECT: CCL 5/07/11 - REVIEW OF COUNCIL’S DELEGATIONS TO LORD MAYOR

REPORT BY: ACTING GENERAL MANAGER
CONTACT: ROB NOBLE
TELEPHONE: 4974 2208

PURPOSE

To allow Council to review Council’s delegations to the Lord Mayor as part of Council’s delegations review project.

RECOMMENDATION

1 Council adopt the instrument of delegation to the Lord Mayor at Attachment B.

KEY ISSUES

2 Section 226 of the Local Government Act 1993 (NSW) (Act) provides that the role of the Lord Mayor is:
   (a) to exercise, in cases of necessity, the policy-making functions of the governing body
   (b) of the council between meetings of the council
   (c) to exercise such other functions of the council as the council determines
   (d) to preside at meetings of the council
   (e) to carry out the civic and ceremonial functions of the mayoral office.

3 In addition to the Lord Mayor’s role under the Act, Council has delegated functions to the Lord Mayor. These delegated functions are provided in Council’s current instrument of delegation to the Lord Mayor (Attachment A).

4 The current instrument of delegation to the Lord Mayor contains a number of delegations that are unnecessary or inconsistent with legislation. Comments on each individual delegation are set out below:

<table>
<thead>
<tr>
<th>Current delegation</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) To direct the General Manager, except as otherwise provided by the Local Government Act 1993 (NSW), in accordance with Council policies and decisions.</td>
<td>The Act sets out the roles of the Lord Mayor, Councillors and the General Manager. The General Manager’s role is to ensure the efficient and effective operation of Council’s organisation and the implementation, without undue delay, of decisions of Council. It would be inappropriate for the Lord Mayor to direct the General Manager about how to conduct the General Manager’s role. We note that the monitoring of the General Manager’s performance of the General</td>
</tr>
</tbody>
</table>
Manager’s role by the Lord Mayor and Councillors is governed by the General Manager’s contract of employment.

We have deleted this delegation from our recommended instrument.

(2) **To call and schedule extraordinary meetings of Council and Council Committees in accordance with the Local Government Act 1993 (NSW), the Local Government (General) Regulation 2005 (NSW), any other Act or Regulation and Council's Code of Meeting Practice.**

This delegation is unnecessary because this power is provided to the Lord Mayor by section 5.1 of Council's Code of Meeting Practice.

We have deleted this delegation from our recommended instrument.

(3) **To determine which Councillor should represent Council at Civic, Ceremonial and social functions, where the Lord Mayor or Deputy Lord Mayor is unable to attend and Council has not determined its representative(s). The Lord Mayor will ensure all Councillors are extended an invitation to all Civic functions.**

It is up to Council to determine the appropriateness of this delegation.

We have removed the last sentence of this delegation from our recommended instrument as it is not a delegation. Council may wish to consider passing this request as a separate resolution.

(4) **To determine applications for subsidised hall and venue hire that relate to civic and ceremonial functions.**

The determination of applications for subsidies for use of Council’s commercial assets is an operational matter and should be made by officers according to Council’s Subsidy Program.

We have deleted this delegation from our recommended instrument.

(5) **To approve expenditures from contingency funds, provided it is within the terms of the budget adopted by Council, after consultation with the General Manager.**

Contingency budgets for civic expenses no longer exist within Council’s budget. As such, this delegation is unnecessary and we have deleted this delegation from our recommended instrument.

(6) **To sign and seal documents covering matters approved by Council where the authority has not been specifically given.**

This delegation is inconsistent with clause 400 of the Local Government (General) Regulation 2005 (NSW), which provides that Council’s seal may only be affixed to a document pursuant to a specific resolution of Council.
If Council has authorised the affixing of the seal, the seal must only be affixed in presence of any two of the General Manager, Lord Mayor, and/or Councillors.

We have deleted this delegation from our recommended instrument.

<table>
<thead>
<tr>
<th>(7) To represent Council's visions to the community through the issue of press statements and publications on behalf of Council, unless Council determines otherwise on a specific issue.</th>
</tr>
</thead>
<tbody>
<tr>
<td>This issue is also addressed in clause 7 of Council’s Media Policy, which provides that the Lord Mayor is:</td>
</tr>
<tr>
<td>- Council’s official spokesperson on all policy matters; and</td>
</tr>
<tr>
<td>- authorised to sign letters to the editor on policy matters.</td>
</tr>
<tr>
<td>For consistency, we suggest that the wording of this delegation be amended to the wording used in the Media Policy.</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th>(8) To obtain access to all Council files and records except where such access would be contrary to the maintenance of the law.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Council must provide Councillors with access to documents in accordance with the access to information provisions in Council’s Code of Conduct, which include:</td>
</tr>
<tr>
<td>10.2 The General Manager must provide councillors and administrators with information sufficient to enable them to carry out their civic office functions.</td>
</tr>
<tr>
<td>10.3 Members of staff of council must provide full and timely information to councillors and administrators sufficient to enable them to carry out their civic office functions and in accordance with council procedures.</td>
</tr>
<tr>
<td>10.4 Members of staff of council who provide any information to a particular councillor in the performance of their civic duties must also make it available to any other councillor who requests it and in accordance with council procedures.</td>
</tr>
<tr>
<td>10.5 Councillors and administrators who have a private (as distinct from civic) interest in a document of council have the same rights of access as any member of the public.</td>
</tr>
<tr>
<td>As such, this delegation is unnecessary and</td>
</tr>
</tbody>
</table>
| (9) To have direct access to Council's internal audit function. | Council has constituted the Audit Committee and appointed two Councillors to the committee. The Constitution of the Audit Committee provides that all Councillors may attend Audit Committee meetings as observers.

The resolution adopting the Constitution of the Audit Committee with these provisions has effectively superseded this delegation to the Lord Mayor. As a result, the delegation should be removed.

We also note that the Constitution is consistent with the Division of Local Government’s Internal Audit Guidelines, which provide:

> Ideally the audit committee should consist of at least three and preferably no more than five members comprised of independent external members, who should be in the majority, and councilors other than the Mayor (or an Administrator).

We have deleted this delegation from our recommended instrument. |
| (10) To obtain direct legal advice relevant to Council function within budget. | This delegation should be limited to obtaining advice regarding the General Manager's conduct or employment.

Obtaining legal advice on matters other than the General Manager’s conduct or employment is an operational matter. In addition, Council has several highly qualified in-house solicitors who are available to provide advice.

We have amended this delegation in our recommended instrument accordingly. |
| (11) In respect of the Office of the Lord Mayor, to: | The General Manager’s functions under the Act include appointing, directing and dismissing staff in accordance with Council’s organisational structure and the resources approved by Council. This means that General Manager can delegate the function |
| - determine the structure of the unit |
| - determine the number and description of all staff positions |
be fully and formally consulted in respect of the appointment (or dismissal) of all staff
direct staff within the Unit and allocate tasks.
This delegation is subject to budgetary constraints imposed by Council.

of appointing, directing and dismissing staff, but Council cannot. This is consistent with the current structure in which the Lord Mayor’s personal assistant and administrative officer report to the General Manager’s Office.

We note that the Lord Mayor can allocate tasks to the Lord Mayor’s personal assistant and administrative officer in accordance with their position descriptions.

We have amended this delegation in our recommended instrument accordingly.

FINANCIAL IMPACT
4 N/A

IMPLEMENTATION PLAN/IMPLICATIONS
5 N/A

RISK ASSESSMENT AND MITIGATION
6 Council’s delegations to the Lord Mayor must comply with relevant legislation.

RELATED PREVIOUS DECISIONS

CONSIDERATION BY STRATEGIC ADVISORY COMMITTEE
8 N/A

OPTIONS
9 Option 1: Council adopts the recommendation.

9 Option 2: Council considers alternative delegations to the Lord Mayor.

10 Option 3: Council affirms its adoption of the current instrument of delegation to the Lord Mayor. This is not the recommended option because the current instrument contains a number of delegations that are unnecessary or inconsistent with legislation.

BACKGROUND
12 Council can delegate any function except those functions detailed in section 377 of the Local Government Act 1993 (NSW).
13 Council has delegated functions to:
   (a) the Lord Mayor;
   (b) committees (such as the Development Applications Committee);
   (c) other bodies (such as Newcastle Airport); and
   (d) the General Manager.

14 Council is currently undertaking a two stage delegations review project:
   (a) Stage One of the project was to review the delegations from the General Manager to Council Officers. This is now complete.
   (b) Stage 2 of the project is to review the delegations from Council to the:
       (i)   Lord Mayor;
       (ii)  General Manager; and
       (iii) Development Applications Committee

15 This report asks Council to consider the current instrument of delegation to the Lord Mayor in accordance with this project.

REFERENCES

ATTACHMENTS

Attachment A: Current instrument of delegation to Lord Mayor
Attachment B: Suggested instrument of delegation to Lord Mayor
NEWCASTLE CITY COUNCIL

INSTRUMENT OF DELEGATION TO THE LORD MAYOR

Under Section 226 of the Local Government Act 1993, the role of the mayor is defined as:

- To exercise, in cases of necessity, the policy making function of the governing body of the Council between meetings of the Council
- To exercise such other functions of the Council as the Council determines
- To preside at meetings of the Council
- To carry out the civic and ceremonial functions of the mayoral office

In relation to point two above, Council has the authority under Section 377 of the Local Government Act 1993 to delegate any of the functions of the Council other than those specifically identified in Section 377.

Accordingly, pursuant to Section 377 of the Act, Newcastle City Council delegates the following functions to the Lord Mayor. These delegations revoke all previous delegations of functions to the Lord Mayor.

1. To direct the General Manager, except as otherwise provided by the Local Government Act 1993, in accordance with Council policies and decisions.

2. To call and schedule extraordinary meetings of Council and Council Committees in accordance with the Local Government Act 1993, the Local Government (General) Regulations 2005, any other Act or Regulation and Council's Code of Meeting Practice.

3. To determine which Councillor should represent Council at Civic, Ceremonial and social functions, where the Lord Mayor or Deputy Lord Mayor is unable to attend and Council has not determined its representative(s). The Lord Mayor will ensure all Councillors are extended an invitation to all Civic functions.

4. To determine applications for subsidised hall and venue hire that relate to civic and ceremonial functions.

5. To approve expenditures from contingency funds, provided it is within the terms of the budget adopted by Council, after consultation with the General Manager.

6. To sign and seal documents covering matters approved by Council where the authority has not been specifically given.

7. To represent Council's visions to the community through the issue of press statements and publications on behalf of Council, unless Council determines otherwise on a specific issue.

8. To obtain access to all Council files and records except where such access would be contrary to the maintenance of the law.
9. To have direct access to Council's internal audit function.

10. To obtain direct legal advice relevant to Council function within budget.

11. In respect of the Office of the Lord Mayor, to:

   - Determine the structure of the unit
   - Determine the number and description of all staff positions
   - Be fully and formally consulted in respect of the appointment (or dismissal) of all staff
   - Direct staff within the Unit and allocate tasks

   This delegation is subject to budgetary constraints imposed by Council.

The delegations under this Instrument of Delegation must be exercised in a manner that is consistent with the policies and decisions of Council.

These delegations take effect from the date of this Instrument of Delegation as authorised by Council at its meeting on 30 September 2008.
INSTRUMENT OF DELEGATION TO THE LORD MAYOR

Pursuant to section 377 of the Local Government Act 1993 (NSW), the Council of the City of Newcastle delegates the following functions to the Lord Mayor:

1. To determine Council’s Councillor Representative at civic, ceremonial and social functions if:
   (a) the Lord Mayor and Deputy Lord Mayor are unable to attend; and
   (b) Council has not otherwise determined its Councillor Representative.

2. To act as Council’s official spokesperson on all policy related matters in accordance with Council's Media Policy.

3. To obtain external legal advice in relation to the appointment and conduct of the General Manager.

4. To determine the structure of the Office of the Lord Mayor and the description of the positions within the structure in consultation with the General Manager and in accordance with Council’s organisational structure and approved resources.

The Lord Mayor must exercise all delegations under this instrument in a manner that is consistent with legislation and the policies and decisions of Council.

This instrument of delegation takes effect from [day month year] and revoke all previous delegations of Council functions to the Lord Mayor.
SUBJECT: CCL 5/07/11 - REVIEW OF COUNCIL’S DELEGATIONS TO LORD MAYOR

RESOLVED: (COUNCILLORS M OSBORNE/S CLAYDON)

Council adopt the instrument of delegation to the Lord Mayor at Attachment B.
ATTACHMENT F: Instrument of Delegation to the General Manager and Lord Mayor dated 30 September 2008
PRÉCIS

This report reviews the delegations to the General Manager and recommends the adoption of the Instrument of Delegations in Appendix A. Please note this delegation can be reviewed by Council at anytime in the future.

The General Manager’s current delegation does not acknowledge the specific authority for the General Manager to represent Council on external boards that require Council’s membership which facilitates Council’s business.

RECOMMENDATION

The delegations to the General Manager as outlined in Appendix A be adopted.

BACKGROUND

The functions of the General Manager are defined in Section 335 of the Local Government Act 1993 as:

(1) The general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of the council

(2) The general manager has the following particular functions:
   - The day to day management of the council
   - To exercise such of the functions of the council as are delegated by the council to the general manager
   - To appoint staff in accordance with an organisation structure and resources approved by the council
   - To direct and dismiss staff
   - To implement the council's equal employment opportunity management plan

(3) The general manager has such other functions as may be conferred or imposed on the general manager by or under this or any other Act.

In relation to Section 335(2) bullet point two, Council has the authority to delegate functions of the Council under Section 377 of the Local Government Act 1993, which states that:

A council may, by resolution, delegate to the general manager or any other person or body (not including another employee of the council) any of the functions of the council, other than the following:

- The appointment of a general manager
- The making of a rate
- A determination under Section 549 as to the levying of a rate
- The making of a charge
- The fixing of a fee
- The borrowing of money
- The voting of money for expenditure on its works, services or operations
- The compulsory acquisition, purchase, sale, exchange or surrender of any land or other property (but not including the sale of items of plant or equipment)
- The acceptance of tenders which are required under this Act to be invited by the council
- The adoption of a management plan under section 406
- The adoption of a financial statement included in an annual financial report
- A decision to classify or reclassify public land under Division 1 of Part 2 of Chapter 6
- The fixing of an amount or rate for the carrying out by the council of work on private land
- The decision to carry out work on private land for an amount that is less than the amount or rate fixed by the council for the carrying out of any such work
- The review of a determination made by the council, and not by a delegate of the council, of an application for approval or an application that may be reviewed under section 82A of the Environmental Planning and Assessment Act 1979
- The power of the council to authorise the use of reasonable force for the purpose of gaining entry to premises under section 194
- A decision under section 356 to contribute money or otherwise grant financial assistance to persons
- A decision under section 234 to grant leave of absence to the holder of a civic office
- The making of an application, or the giving of a notice, to the Governor or Minister
- This power of delegation
- Any function under this or any other Act that is expressly required to be exercised by resolution of council.

It is also a requirement of Section 380 of the Local Government Act 1993 that each council review all its delegations during the first 12 months of each term of office.

The delegations to the General Manager were last reviewed and approved by the previous Council on 29 June 2004.

The proposed amendment clearly identifies Council’s requirement for the General Manager to hold board positions on external organisations which are essential to the business of Council. For clarity this delegation does not include authority for the General Manager to hold positions on any board for personal benefit or reward.

**CONSULTATION - INTERNAL AND EXTERNAL**
Current delegations have been reviewed by Council's Governance & Legal Services Coordinator. There has been no opportunity for consultation with the new Council.

POLICY/PLANNING IMPLICATIONS

The adoption of the recommendation does not change the previous Instrument of Delegation to the General Manager.
FINANCIAL IMPACT

There are no financial implications relating to this matter.

SUSTAINABILITY

There are no sustainability implications relating to this matter.

IMPLEMENTATION CONSEQUENCES

The General Manager will continue to provide reports to Council on the external organisations that require Council representation and the consequent membership of the General Manager on those boards.

OPTIONS

1 Council could opt to defer consideration of the General Manager's delegations until no later than September 2009. This is not recommended as it's considered that it is appropriate to consider the delegations to the General Manager and Lord Mayor.
2 Council could adopt the recommendation as presented in this report.
3 Council could amend the Instrument of Delegation at Appendix A.

CONCLUSION

The delegation of authority to the General Manager is consistent with the provisions of the Local Government Act 1993 and efficient operating practice within Council.

Appendix A: Instrument of Delegation to the General Manager
The functions of the General Manager are defined in s335 of the Local Government Act 1993, as:

335  (1) (General responsibilities)
The general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of council.

(2) (Particular functions)
The general manager has the following particular functions:
  • the day to day management of the council
  • to exercise such of the functions of the council as are delegated by the council to the general manager
  • to appoint staff in accordance with an organisation structure and resources approved by the council
  • to direct and dismiss staff
  • to implement the council's equal employment opportunity management plan.

(3) (Further functions)
The general manager has such other functions as may be conferred or imposed on the general manager by or under this or any other Act.

In relation to point two in s335(2), Council has the authority to delegate any of the functions of Council other than those specifically identified in s377.

Accordingly, pursuant to s377 of the Act, Newcastle City Council delegates the following functions to the General Manager. These delegations revoke all previous delegations to the General Manager and recognise that certain functions are conferred on the General Manager by the Local Government Act 1993.

Newcastle City Council delegates to the person holding the position of General Manager;
A The representation of Council on external boards for organisations that require Council membership for the facilitation of Council business.
B its functions under the Local Government Act 1993 and any other legislation conferring functions on Council, except:

Powers otherwise dealt with

1 The functions which are required by or under the Local Government Act 1993 or by or under any Act or instrument to be performed by the governing body of the Council.
2 Functions delegated to the Development Applications Committee.
3 Functions delegated to the Strategic Policy Committee.
4 Functions delegated to the Lord Mayor.

Policy and procedure

5 Power to make or amend Council policy.
6 Witnessing the affixing of the Common Seal of the Council.
**Financial Matters**

7 The setting of Council's budget.

8 The setting of priorities for Council’s Major Projects and Major Asset Preservation Programs.

9 The allocation of revenue gains outside the budget.

10 Any variation of approved expenditure that goes beyond one service unit or beyond a specific program within the Major Projects and Major Asset Preservation Programs.

11 Determination of applications for grants and donations.

12 Writing off debts of a value $10,000 or over, in accordance with Clause 17 of the Local Government (Financial Management) Regulation 1999.

13 Writing off rates and charges of a value $10,000 or over, in accordance with Clause 14 of the Local Government (Rates and Charges) Regulation 1999.

**Organisational structure and personnel matters**

14 The approval of the organisation structure.

15 Entering into any enterprise agreement or altering personnel policies that would affect a class of employees and would have ongoing significant implications for Council in terms of cost or service delivery.

**Council operations and services**

16 Carrying out new or non-core services not already being undertaken at the date of this resolution of Council.

17 Significant variation of any existing Council service that would have ongoing implications for Council in terms of cost or service delivery.

**Property, land use and related matters**

18 Granting of leases or licenses and approving applications for use of public land, excluding:
   - leases on Council’s properties valued at less than $100,000 pa
   - those relating to a temporary use of public land (including parks and open spaces) not exceeding two weeks.

19 Release for public exhibition and comment of any plan or policy which is required by legislation to be exhibited.

20 Adoption of a plan of management for community land.

21 Matters relating to community land pending the adoption of a plan of management.

**Cultural**

22 Development of sister city relationships and formation of sister city committees.

23 The approval of civic and ceremonial events.

24 The granting of civic honours.

The delegations under this Instrument of Delegation must be exercised in a manner that is consistent with the policies and decisions of Council.

These delegations take effect from 1 January 2005.
RESOLVED: (The Lord Mayor/Councillor M Osborne)

The delegations to the General Manager as outlined in Appendix A be adopted with the following amendments:

Newcastle City Council delegates to the person holding the position of General Manager;

A. **The authority to bring to Council a recommendation for the General Manager to represent** Council on external boards for organisations that require Council membership for the facilitation of Council business.

B. A further report be provided should this provision be in conflict with the General Manager’s Contract.
PRÉCIS

This report reviews the delegations to the Lord Mayor and recommends the adoption of the Instrument of Delegation in Appendix A. Please note that this delegation can be reviewed by Council at anytime in the future. A minor amendment is recommended in relation to the invitation to all Councillors to attend all Civic functions.

RECOMMENDATION

The delegations to the Lord Mayor as outlined in Appendix A be reviewed and approved.

BACKGROUND

The role of the Lord Mayor is defined in Section 226 of the Local Government Act 1993 as:

- To exercise, in cases of necessity, the policy making functions of the governing body of the Council between meetings of the Council
- To exercise such other functions of the Council as the Council determines
- To preside at meetings of the Council
- To carry out the civic and ceremonial functions of the mayoral office

In relation to bullet point two above, Council has the authority under Section 377 of the Local Government Act 1993 to delegate any of the functions of the Council other than those specifically identified in Section 377(1) which states that:

A council may, by resolution, delegate to the general manager or any other person or body (not including another employee of the council) any of the functions of the council, other than the following:

- The appointment of a general manager
- The making of a rate
- A determination under section 549 as to the levying of a rate
- The making of a charge
- The fixing of a fee
- The borrowing of money
- The voting of money for expenditure on its works, services or operations
- The compulsory acquisition, purchase, sale, exchange or surrender of any land or other property (but not including the sale of items of plant or equipment)
• The acceptance of tenders which are required under this Act to be invited by the council
• The adoption of a management plan under section 406
• The adoption of a financial statement included in an annual financial report
• A decision to classify or reclassify public land under Division 1 of Part 2 of Chapter 6
• The fixing of an amount or rate for the carrying out by the council of work on private land
• The decision to carry out work on private land for an amount that is less than the amount or rate fixed by the council for the carrying out of any such work
• The review of a determination made by the council, and not by a delegate of the council, of an application for approval or an application that may be reviewed under section 82A of the Environmental Planning and Assessment Act 1979
• The power of the council to authorise the use of reasonable force for the purpose of gaining entry to premises under section 194
• A decision under section 356 to contribute money or otherwise grant financial assistance to persons
• A decision under section 234 to grant leave of absence to the holder of a civic office
• The making of an application, or the giving of a notice, to the Governor or Minister
• This power of delegation
• Any function under this or any other Act that is expressly required to be exercised by resolution of council.

It is also a requirement of Section 380 of the Local Government Act that each council must review all its delegations during the first 12 months of each term of office.

The delegations to the Lord Mayor were last reviewed and approved by the previous Council on 29 June 2004.

CONSULTATION - INTERNAL AND EXTERNAL

Current delegations have been reviewed by Council's Governance and Legal Services Coordinator. There has been no opportunity for consultation with the new Council.

POLICY/PLANNING IMPLICATIONS

The adoption of the recommendation changes the previous Instrument of Delegation to the Lord Mayor to ensure all Councillors are invited to attend all Civic functions.

FINANCIAL IMPACT

There will be a minor financial implication relating to this matter due to a possible increased attendance by Councillors to Civic functions.
SUSTAINABILITY

There are no sustainability implications relating to this matter.

IMPLEMENTATION CONSEQUENCES

There are no implementation consequences.

OPTIONS

1 Council could opt to defer consideration of the Lord Mayor's delegations until no later than September 2009. This is not recommended as it's considered that it is appropriate to consider the delegations to the Lord Mayor and General Manager.

2 Council could adopt the recommendation as presented in this report.

3 Council could amend the Instrument of Delegation at Appendix A.

CONCLUSION

The delegation of authority to the Lord Mayor is consistent with the provisions of the Local Government Act 1993 and efficient operating practice within Council.

Appendix A: Instrument of Delegation to the Lord Mayor
NEwcastle City Council

Instrument of Delegation to the Lord Mayor

Under Section 226 of the Local Government Act 1993, the role of the mayor is defined as:

- To exercise, in cases of necessity, the policy making function of the governing body of the Council between meetings of the Council
- To exercise such other functions of the Council as the Council determines
- To preside at meetings of the Council
- To carry out the civic and ceremonial functions of the mayoral office

In relation to point two above, Council has the authority under Section 377 of the Local Government Act 1993 to delegate any of the functions of the Council other than those specifically identified in Section 377.

Accordingly, pursuant to Section 377 of the Act, Newcastle City Council delegates the following functions to the Lord Mayor. These delegations revoke all previous delegations of functions to the Lord Mayor.

1. To direct the General Manager, except as otherwise provided by the Local Government Act 1993, in accordance with Council policies and decisions.

2. To call and schedule extraordinary meetings of Council and Council Committees in accordance with the Local Government Act 1993, the Local Government (General) Regulations 2005, any other Act or Regulation and Council's Code of Meeting Practice.

3. To determine who should represent Council at Civic, Ceremonial and social functions, where the Lord Mayor is unable to attend and Council has not determined its representative(s). The Lord Mayor will ensure all Councillors are extended an invitation to all Civic functions.

4. To determine applications for subsidised hall and venue hire that relate to civic and ceremonial functions.

5. To approve expenditures from contingency funds, provided it is within the terms of the budget adopted by Council, after consultation with the General Manager.

6. To sign and seal documents covering matters approved by Council where the authority has not been specifically given.

7. To represent Council's visions to the community through the issue of press statements and publications on behalf of Council, unless Council determines otherwise on a specific issue.
8. To obtain access to all Council files and records except where such access would be contrary to the maintenance of the law.

9. To have direct access to Council's internal audit function.

10. To obtain direct legal advice relevant to Council function within budget.

11. In respect of the Office of the Lord Mayor, to:

   • Determine the structure of the unit
   • Determine the number and description of all staff positions
   • Be fully and formally consulted in respect of the appointment (or dismissal) of all staff
   • Direct staff within the Unit and allocate tasks

   This delegation is subject to budgetary constraints imposed by Council.

The delegations under this Instrument of Delegation must be exercised in a manner that is consistent with the policies and decisions of Council.

These delegations take effect from the date of this Instrument of Delegation as authorised by Council at its meeting on 30 September 2008.
Agenda Report

ACTION ITEM

EXTRAORDINARY COUNCIL MEETING
Tuesday, 30 September 2008

SUBJECT: GM 30/09/08 - DELEGATIONS TO THE LORD MAYOR

RESOLVED: (The Lord Mayor/Councillor M Osborne)

The delegations to the Lord Mayor as outlined in Appendix A be reviewed and approved point 3 of the Instrument of Delegation to the Lord Mayor be amended as follows:

3 To determine which Councillor should represent Council at Civic, Ceremonial and Social Functions, where the Lord Mayor or the Deputy Lord Mayor is unable to attend and Council has not determined its representative(s). The Lord Mayor will ensure all Councillors are extended an invitation to all Civic functions.
ATTACHMENT G:  Port Stephens Council Organisation Structure Chart
ATTACHMENT H: Judgement of NCAT in Holman v Warringah Council
New South Wales

Medium Neutral Citation: Holman v Warringah Council [2015] NSWCATAD 215


Decision date: 19 October 2015

Jurisdiction: Administrative and Equal Opportunity Division

Before: G Walker Senior Member

Decision: Decision under review varied.

Catchwords: GOVERNMENT INFORMATION – access application - client legal privilege


Category: Principal judgment

Parties: John Holman (Applicant)
         Warringah Council (Respondent)

Representation: Counsel:
                J Reid (Respondent)

Solicitors:
Schmidt-Liermann Lawyers (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 1510120

Publication restriction: Paragraphs 30 to 64 are not for publication to the public and applicant.
JUDGMENT

1 On 25 February 2015 the applicant Mr John Holman applied to this tribunal for a review of a decision taken by Warringah Council on 18 February 2015 to refuse access under the Government Information (Public Access) Act 2009 (GIPA Act) to certain documents held by the council in connection with a stormwater drainage problem affecting his property at [address].

2 Previously, on 1 July 2014, Mr Holman had applied to the council under the GIPA Act for access to "All correspondence and reports done by Council or any consultants for the storm issue at [address]" (a chronology is given in the statement of Mr John Warburton, deputy general manager of the Council, in exhibit R6).

3 On 6 August 2014, the council gave Mr Holman notice of its decision to provide partial access to the information requested (exhibit A1). The applicant then requested an internal review of the council’s decision "To apply a status of 'legal professional privilege' to so many documents". On 16 September 2014, the council affirmed its decision to refuse access to the information sought on the basis of an overriding public interest against disclosure derived from cl 5 of schedule 1 to the GIPA Act, relating to client legal privilege (legal professional privilege) (exhibit A2).

4 The applicant then on 24 September 2014 sought a review by the Information Commissioner of the council’s decision to withhold documents. The commissioner’s review report of 28 January 2015 (exhibit A3) concluded that the council’s decision was not justified under the GIPA Act. It stated that the council had not adequately supported its findings on client privilege, had not contemplated whether it would be appropriate to waive the privilege before refusing to provide access on the basis of client privilege, had apparently not considered personal factors affecting the applicant under s 55(2) and had not correctly set out its notice of decision in accordance with s 61 of the GIPA Act.

5 Pursuant to the Information Commissioner’s recommendation, the respondent on 4 February 2015 informed the applicant and the Information Commissioner of its intention to conduct another internal review. The council issued its decision on this second internal review on 18 February 2015 (exhibit A4), again refusing access on the basis of client privilege. This second internal review decision is the subject of Mr Holman’s application to this tribunal.

6 The issue in these proceedings is thus whether the decision to refuse access on the ground of client privilege is the correct and preferable one within the meaning of s 63 of the Administrative Decisions Review Act 1997.

Applicable legislation

7 The GIPA Act establishes a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure (s 5).

8 A person who makes an access application for government information has a legally enforceable right to be provided with access to the information unless there is an overriding public interest against disclosure of the information (GIPA Act, s 9(1)).
By s 14(1) of the GIPA Act, it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1 to that Act. Clause 5(1) of Schedule 1 provides:

It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.

In these proceedings, the burden of establishing that the decision to refuse access to the information is justified lies on the respondent (GIPA Act, s 105(1)).

Also relevant are s 118 and 119 of the Evidence Act 1995:

118 Legal advice
Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication made between the client and a lawyer, or

(b) a confidential communication made between 2 or more lawyers acting for the client, or

(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person,

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

119 Litigation
Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or

(b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

No oral evidence was adduced by either party.

Respondent's submissions

By way of written submissions, the respondent relied in part on the reasons for decision in the second internal review determination of 18 February 2015. Those reasons inter alia noted the presumption in favour of disclosing government information contained in s 5 of the GIPA Act. As Montgomery JM had stated in Nature Conservation Council of New South Wales v Department of Trade and Investment, Regional Infrastructure and Services [2012] NSWADT 195, [25], that presumption can be rebutted only by proving that there is a "conclusive presumption of an overriding public interest against disclosure" or an "overriding public interest consideration against disclosure". In making a determination, agencies must apply the public interest test under s 13 of the Act,
which requires balancing public interest considerations in favour of disclosure and those against disclosure. There will be a public interest against disclosure only when, on balance, the latter outweigh the former.

14 Shortly after council officers received notice of Mr Holman’s concerns about overland stormwater flow on his property, they sought legal advice from the council’s in-house lawyers, who in turn notified the council’s insurer and its solicitors for the purpose of obtaining legal advice. All of the documents excluded were created for the dominant purpose either of obtaining legal advice, or of obtaining information to assist in the provision of legal advice. Both of the council’s in-house lawyers hold current practising certificates. Neither had any personal knowledge of, or other relevant interest in, the subject of the applicant’s complaint to the council. The general manager insists on the professional independence of the in-house lawyers, the most senior of whom reports directly to him.

15 The council noted the public interest considerations in favour of disclosure and also the applicant’s personal factors under s 55(2) centering on the long-standing problem he has had with stormwater at his home address. The relevant public interest consideration against disclosure was client privilege, which is conclusively presumed by cl 5 of schedule 1 of the Act to be an overriding public interest against disclosure of information. The council did not consider that it would be appropriate to waive that privilege.

16 Client privilege required three elements:

The existence of a client and lawyer relationship;

The confidential nature of the communication or document; and

the communication or document was brought into existence for the dominant purpose either of

enabling the client to obtain, or the lawyer to give, legal advice or provide legal services (Evidence Act s 118), or

for use in existing or anticipated legislation (Evidence Act s 119).

17 The council had received information concerning the stormwater issue on the applicant’s property. Council officers referred the issue to the council’s in-house lawyers, who in turn retained the services of external lawyers and relevant experts as part of the council’s normal investigative process. All the documents listed were therefore the subject of client privilege as they were created for the dominant purpose of obtaining legal advice.

18 Client privilege falls within schedule 1 and is therefore a conclusive presumption against disclosure. The council intentionally created those documents with privileged status. While noting that there are factors in favour of disclosure, both of a general nature and others specific to the applicant’s personal situation, the respondent argued that those factors do not outweigh the significance of maintaining client privilege, both in this particular case and more generally where similar instances occur.
In further written submissions filed on 5 June 2015 (exhibit R5), the applicant argued inter alia that if there is a public interest against disclosure of the kind found in schedule 1, then no further balancing is required. Where an agency such as the respondent in the present proceedings forms the view that there is an overriding public interest against disclosure, the agency then has no discretion to release the documents sought. That applies to documents identified in schedule 1, such as client privilege. The proper approach to s 14 (apart from conclusive presumption cases) was set out in Commissioner of Police, New South Wales Police Force v Camilleri [2012] NSWADTAP 18, [24] – [26].

Documents over which commercial-in-confidence is claimed need only contain elements of the factors in (a) to (e) of the definition of “commercial-in-confidence” of a contract: Nature Conservation Council at [151]. Further, the test is that there need only be a possibility of commercial disadvantage, and if that possibility is found to exist, then the scales tilt against public disclosure: at [158].

The Evidence Act applies to claims of client legal privilege (legal professional privilege) concerning overriding public interest claims against disclosure; the common law principles do not apply: Starr v Superannuation Administration Corporation [2015] NSWCATAD 76. The use of the words “client legal privilege” in schedule 1, cl 5 of the GIPA Act adopts the language of the Evidence Act tests in relation to the existence of client legal privilege and waiver of that privilege: Larsson v Office of Environment and Heritage [2014] NSWCATAD 136, [25] (and other cases cited). Consequently, if documents are captured by ss 118 or 119 of the Evidence Act, there is a conclusive presumption of an overriding public interest against disclosure. That, the council argued, was the case in this instance.

The applicant had presented no evidence that the privilege had been waived in relation to documents accidentally sent to the applicant by the respondent. The accidental sending of material to an applicant does not entail a waiver of client legal privilege: Charteris v Leichhardt Municipal Council [2000] NSWADT 81, [2001] NSWADTAP 12.

In oral submissions at the hearing, Ms Reid said inter alia that the applicant contacted the council in May 2008 reporting the existence of a stormwater problem on his property and his belief that correcting it was the council’s responsibility. Correspondence was also exchanged concerning damage to motor vehicles caused by large potholes created by the stormwater flow (exhibit R4). These approaches triggered the council’s seeking of legal advice, its notification of the insurer and its obtaining of outside legal assistance. As the dominant purpose for the creation of the documents was the obtaining of legal advice or the factual background to it, they were covered by legal profession privilege.

The council’s legal officers, Mr Eskil Julliard and Ms Vivienne Ingram, both held current practising certificates and their contracts of employment dated 23 March 2012 and 30 August 2012 respectively made clear their independence as legal advisers. In each case clause 4.5 acknowledged the “need for independence of the Employee due to the
Employee’s role as Corporate Lawyer” and "that, when acting as Legal Practitioner, the Employee’s obligations as a legal practitioner, including to the court, are paramount and prevail over the Employee’s duties to the Council...."

25 The applicant’s 2008 emails (exhibit R4), while polite, made it clear that there was damage and that the applicant held the council liable for it. They triggered the council’s seeking of legal advice. His letter of 17 August 2014 (exhibit R2) queried the council’s invoking of legal professional privilege and expressed the view that “Warringah Council has something to hide”. The 29 June 2012 letter from the applicant’s solicitor (exhibit R3) also maintained the firm view that the council was responsible. In the circumstances, balancing the need for transparency against legal professional privilege considerations, the council decided that no waiver was appropriate and that the documents should not be disclosed.

26 The council agreed that the definition of client legal privilege in ss 118 and 119 of the Evidence Act applied, as well as the definitions of “client” and “lawyer” in s 117. Both the in-house lawyers and the external lawyers advising the council fell within the definitions, as did other persons providing information relevant to the giving of advice. After 29 June 2012, s 119 was brought to bear because of the existence of potential litigation.

27 On the respondent’s application, a part of the council’s submissions was made in private session pursuant to s 49 of the Civil and Administrative Tribunal Act 2013 (CAT Act).

28 Ms Reid directed the tribunal’s attention to the documents for which privilege against disclosure is claimed and which form part of the file of conclusive presumption documents provided in confidence on 28 April 2015, making up confidential exhibit CR8, starting with page 13 (the numbers refer to the page numbers of exhibit CR8), which is a chronology of events relating to the stormwater problem at 16 Wyatt Avenue. As the chronology showed, there had been an ongoing issue between the parties which had led to an earlier payment of $7822.82 to Mr Holman for stormwater damage. The proposed new easement had not yet been granted, on legal advice.
The respondent submitted that all the documents were confidential communications between experts and lawyers for the dominant purpose of obtaining legal advice concerning possible liability, understanding the applicant's offers and the council's legal responsibility. The documents involved clearly legal functions relating to legal advice from the in-house and external lawyers, as well as liaison with the council's insurer. They arose out of the lawyer-client relationship and the experts understood that their communications and the sending of copies were confidential and occurred in the context of the claim for stormwater damage. There had been no waiver of client legal privilege. After 29 June 2012, s 119 of the Evidence Act became the relevant provision instead of s 118. Client legal privilege therefore attached to the documents and should not be treated as having been waived in the circumstances of the case.

At 3:55 pm the confidential hearing concluded and it became apparent that the matter would need to be adjourned part heard. The matter was stood over to 28 September 2015 at 10:00 am. On the adjourned date, following the applicant's submissions, the respondent submitted in reply that the subject information had been withheld from early
in the exchanges with Mr Holman because they were the subject of client privilege. The applicant's suspicions did not entitle him to access, as they did not constitute a reason for obtaining access.

66 The respondent's decision had not changed over time although it had been reviewed several times. The Information Commissioner did not decide that client privilege did not apply, but simply criticized the reasons given by the applicant. The report had pointed out that s 61 provided no rationale for refusing access but provided for what should be included in an agency's notice of decision to refuse access. In its review decision following the Information Commissioner's recommendations, the respondent had given as much detail about its reasons as it could, without waiving client privilege.

67 It was important to bear in mind that the personal factors referred to in s 55 could not be weighed against client privilege. To do so would be an error. Nor does the presumption in favour of disclosure override the privilege. The respondent had taken account of the personal factors in relation to its decision on the question of waiver, which was not a reviewable decision.

68 In relation to the question of whether the in-house lawyers were independent, Ms Reid pointed out that while Ms Ingram was acting as director of corporate affairs, Mr Juillard had the carriage of the matter. Each document thus had the dominant purpose of giving or seeking legal advice or in relation to the provision of professional legal services relating to potential litigation. Here the documents are communications with lawyers, and in some instances communications where lawyers were seeking to be properly informed so that they could advise the client.

69 Southland Coal sets out in para 14 the factors to be applied in relation to client privilege. It describes at two-stage process in which the decision-maker first satisfies itself that the communication or contents, disclosure or which is sought to be prevented, satisfies the requirements set out in ss 118 or 119 or both. The second stage is to ask whether the production of the information would disclose a confidential communication. Dominant purpose is a question of fact, and in this case it is clear that the documents had the requisite dominant purpose. They were not created in the ordinary course of business but pursuant to legal advice. The proper administration of the council requires that it be able to obtain confidential advice in relation to its activities.

Applicant's submissions

70 On behalf of the applicant Mr Schmidt-Liermann submitted that the crux of the matter was that the early on in the history of the controversy the applicant became concerned that the respondent was not being as forthright as it could be, partly because the reasons it gave for its position changed over time. By the time the applicant wrote his letter to the council dated 17 August 2014 (exhibit R2), he had reached a conclusion, as he said in the letter, that "from the GIPA response [he concluded that] Warringah Council has something to hide". He had seen the Worley Parsons report, which did not appear to be privileged and had now been released. The suspicions thus aroused had the effect of tainting all the other withheld documents with the same concerns.
Following the internal review report of 16 September 2014 (exhibit A2) the applicant had sought a review by the Information and Privacy Commission. In her report of 28 January 2015, the Information Commissioner had concluded in para 36 that the council’s decision was not justified and recommended in para 37 that the council make a new decision by way of internal review, following the guidance of the report. The council’s internal review decision pursuant to that recommendation, dated 18 February 2015 (exhibit A4) decided to refuse access to the information (para 5.1). In para 5.2.4.2 the reviewing officer concluded that all of the documents listed were the subject of legal professional privilege as they were created for the dominant purpose of obtaining legal advice.

Under s 9 of the GIPA Act the applicant has a right to government information unless there is an overriding public interest against disclosure, following the application of the balancing test: s 5. The presumption is in favour of the release of information. It was not disputed that the material in question constituted government information. The internal review had, however, overlooked the personal factors of the application under s 55 of the Act, as the Information Commissioner had pointed out in her report, paras 17 and 18. The personal circumstances in this case included the applicant’s endeavours to resolve the stormwater issue and find a workable solution. That also appeared to be the intent of the Worley Parsons report and the site meeting of 4 July 2013. There would have been a report prepared following that meeting, and it was likely to be found in pages 91 to 149 in exhibit CR8.

The council’s review decision of 18 February 2014 at page 7 had said that the personal factors did not outweigh the significance of maintaining client privilege, although that could not be reconciled with the goals of the GIPA Act as set out in s 15. The Council decision not to waive client privilege had not adequately considered the personal factors. The Information Commissioner had said in para 28 of her report that there was nothing in the notice of decision to indicate that the agency had contemplated whether it would be appropriate to waive privilege before refusing to provide access. The report went on to say in para 29 that in dealing with future GIPA applications for which client privilege was claimed, the council should comply with the requirements of cl 5(2), schedule 1 to the GIPA Act. While the council had stated that no further balancing was required when client privilege was claimed, the Information Commissioner had said that the council should have considered waiver before refusing access.

In a review by the Information Commissioner, the onus of establishing that the decision is justified lies on the agency: s 97. The same applies in review proceedings in the tribunal: s 105. The Information Commissioner had formed the view (para 23) that some of the documents reviewed might meet the criteria for client privilege, but was not satisfied that the council had justified its decision to refuse access in relation to all the documents. But the council’s response in para 5.2.1 of its 18 February 2015 decision was the full extent of its reasoning in reply to the Information Commissioner’s criticisms.

The council in its initial review decision had said at para 4.1 that there was an overriding public interest against disclosure of the information in accordance with s 61 of the GIPA Act. "This statement appears misleading," the Information Commissioner
said, "as section 61 is not in itself a rationale for finding an overriding public interest against disclosure of government information", but provided for "what should be included in an agency’s notice of decision to refuse to provide access...". The council’s notice of decision itself did not meet the requirements of s 61 in that it did not contain reasons for the decision to refuse access, or refer to sources of information on which its finding of legal professional privilege is based: paras 30 to 33.

76 There was no dispute about the application of the dominant purpose test. In this case, though the lawyers involved were said to be independent, the nature of the communications needed to be examined, as they could be several purposes at work in the creation of the document. If other purposes were subsidiary only, there would be no loss of client privilege, but the situation would be different if the information would have been prepared even if there had been no dominant of providing legal advice. The question in this case was whether the correspondence was prepared for the purposes of legal advice, or as part of a search for a solution. In this case the dominant purpose was not the seeking of legal advice or the conduct of litigation.

77 In applying the dominant purpose test, the tribunal should have regard to Austin J’s formulation of the uncontested principles of client privilege in *In the matter of Southland Coal Pty Ltd (receivers and managers appointed) (In Liq)* [2008] NSWSC 899 at [14]. In *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47, the Court of Appeal had pointed out that “An in-house solicitor is, by reason of his or her position, more likely to act for purposes unrelated to legal proceedings than an external solicitor who, in the normal course, has no relevant function other than that involving legal proceedings and/or legal advice. In in-house solicitor may very well have other functions” (at [24]). In the present case Ms Ingram was for a time acting as the council’s director of corporate services, from 18 February 2008 to 21 July 2008 and from 18 February 2009 to 11 December 2009. During those periods Mr Julliard acted in Ms Ingram’s position (see email, part exhibit R1). It was possible that some communications during that period might not have been subject to client privilege because they were made in another capacity.

**Consideration**

78 The tribunal’s function on review under s 63 of the *Administrative Decisions Review Act 1997* is to make the correct and preferable decision having regard to the material before it and any applicable "written or unwritten law" (meaning legislation or common law). It is well established that in considering an application for review the tribunal is not confined to the material that was before the deciding agency, but may have regard to any relevant material before it at the time of the review: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409.
The objects of the GIPA Act as set out in s 3(1) are to advance the system of responsible and representative democratic government by authorizing and encouraging public release of government information by agencies, giving the public an enforceable right of access to government information and providing that such access is restricted only when there is an overriding public interest against disclosure.

80 The Act adopts a structured approach that requires decision-makers to:

(i) identify relevant public interest considerations in favour of disclosure,
(ii) identify relevant public interest considerations against disclosure,
(iii) attribute weight to each consideration for and against disclosure, and
(iv) determine whether the balance of the public interest lies in favour of or against disclosure of the government information: Nature Conservation Council of New South Wales v Department of Trade and Investment [2012] NSWADT 195, [29]).

81 The term "government information" is given a wide meaning by s 4, being defined as "information contained in a record held by an agency". It is not disputed that Warringah Council is within the definition of "agency" and is therefore an agency to which the legislation applies, or that the information sought is "government information".

82 The Act establishes a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure: s 5. Applicants for access to government information have a legally enforceable right to be provided with access to it, unless there is an overriding public interest against disclosure: s 9. The GIPA Act overrides other statutory provisions that prohibit disclosure, apart from the "overriding secrecy laws" set out in schedule 1. Section 14 provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in schedule 1. There is consequently no balancing test for the determination of applications for government information falling into any of the categories in schedule 1.

83 One class of information that is subject to the conclusive presumption in s 14 is information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege. An agency seeking to rely on that presumption is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on that basis: schedule 1, cl 5. The council has decided that it would not be appropriate to waive the privilege in relation to any of the documents remaining in the schedule of documents (part exhibit A2).

84 It is common ground that the question whether the information in issue falls within client legal privilege depends on the application of ss 117 to 119 of the Evidence Act 1995. The common law principles relating to client privilege do not apply: Starr v Superannuation Administration Corporation [2015] NSWCA 76. The respondent contends that the material falls within the privilege because it is information prepared.
for the dominant purpose of the lawyer providing legal advice to the respondent (s 118) or because it is information prepared for the dominant purpose of the council being provided with professional legal services relating to an "anticipated" proceeding to which the council may be a party (s 119).

85 Austin J in Southland Coal explained that assessing a claim for privilege under s 118 or s 119 is a two-stage process, the first being to be satisfied that the communication meets the requirements set out in ss 118 or 119 or both, and the second being for the decision-maker to be satisfied that production of the document would result in the disclosure of a confidential communication or the confidential contents of a document (at [14]).

86 The "legal advice" referred to in s 118 is a broad concept understood in a pragmatic sense. It is not confined to a lawyer's telling the client the law, while acting in a professional capacity; it must also include advice as to what should prudently and sensibly be done in the relevant legal context (ibid). The dominant purpose of the communication must be determined objectively, having regard to all the circumstances in which the communication was made, and its nature. If the document or information would have been prepared irrespective of the intention to obtain professional legal services, it will not satisfy the test laid down in Grant v Downs (1978) 135 CLR 674, 688. The existence of an ancillary purpose is not fatal to a claim for privilege, but if there are two purposes of equal weight, it is unlikely that one would dominate the other: Southland Coal at [14]. A claim for privilege will not succeed if it appears that the document is a commercial document or was brought into existence in the ordinary course of business (ibid.).

87 In this case, the event that led to the giving of legal advice within the meaning of s 118 during the relevant period was the applicant's letter of 29 May 2008 (part exhibit R4). Although expressed in conciliatory terms, the letter made it clear that the applicant regarded the respondent as responsible for, and liable in respect of, the stormwater flooding and damage on his land.

88 The matter had a prior history dating back to 2003, when the applicant had raised the problem of stormwater drainage with the council for the first time. Following a lengthy exchange of communications, Ms Katrina Brown, the council's Team Leader Catchment, in February 2007 informed the applicant that the council's legal advice had been that the stormwater difficulties were the council's problem and that it should pay for the damage caused. Subsequently, in November 2007, the council paid the applicant $7882.82 for the necessary repair work.

89 After the formal without prejudice letter of demand from the applicant's solicitor to the respondent dated 29 June 2012 (exhibit R3), s 119 became the relevant provision as legal proceedings could be regarded as "anticipated" (if we accept the authority of the Oxford English Dictionary, the Legislature has used the wrong word here, and should have said "expected", "likely", or "possible").
As s 14(1) provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in schedule 1, the balancing test laid down in s 13 does not apply to client privilege as covered by schedule 1, cl 5. Further, the personal factors referred to in s 55, while they may be taken into account in considering whether client privilege should be waived (cl 5 (2)), are not relevant to the application of the privilege.

Most of the legal communications in the schedule of documents that the respondent seeks to withhold are to, or from, the respondent’s in-house lawyers. It is well established that in in-house lawyer is entitled to claim privilege on behalf of his or her employer as a client. That proposition is confirmed by the fact that the word “client” in ss 118 and 119 is defined in s 117 to include “an employer (not being a lawyer) of a lawyer”: Sydney Airports Corporation at [18]. The Court of Appeal in that case added the caveat that an in-house lawyer, by reason of being in that position, is more likely to act for purposes unrelated to legal proceedings than an external lawyer who, in the normal course, has no relevant function other than that involving legal proceedings or legal advice or both. An in-house lawyer may very well have other functions: at [24].

There are four legally qualified persons whose names appear in the documents in issue. One is Ms Samantha Kelly, a partner in DLA Piper (formerly Phillips Fox), of whose status as a “lawyer” for the purposes of the relevant sections there can be no doubt. Eskil Julliardi and Vivienne Ingram are employed by the respondent as in-house lawyers. Their current legal practising certificates are in evidence (part exhibit R1), as are their contracts of employment, dated 23 March 2012 and 30 August 2012 respectively. In each of the contracts the council acknowledges in cl 4.5 the independence of the employee’s role as corporate lawyer, that his or her obligations as a legal practitioner, including to the court, are paramount and prevail over duties to the council, and undertakes to take practicable steps to implement protocols to achieve the requisite independence. Neither lawyer had any prior personal knowledge or other interest in the subject matter of the dispute.

The applicant did not dispute that Ms Ingram and Mr Julliardi were generally qualified to claim client privilege on behalf of the council, but raised a question about whether information created by Ms Ingram during the periods when she was acting as the council’s director of corporate services could be privileged. Ms Ingram was acting in that capacity between 18 February 2008 and 21 July 2008, and between 18 February 2009 and 11 December 2009. The respondent’s human resources manager stated that during those periods Mr Julliardi acted in Ms Ingram’s position (part exhibit R1). That statement is corroborated by the documents created during those time intervals. Documents Nos. 2 to 9 were created between 18 February and 21 July 2008, and all are expressed to come from, or be sent to, Mr Julliardi. Ms Ingram played no part in them. During the period 18 February to 11 December 2009 when Ms Ingram was again acting in a different capacity, no relevant documents appear to have been brought into existence.
A fourth lawyer named in the schedule of documents is Elizabeth Caruso. There is no practising certificate, employment contract or other document evidencing her status as a legal adviser to the respondent. Her status is relevant to only one document, however, No 33.

The 32 documents in issue (as Nos. 1, 10 and 12 have been released) in this case are reproduced in confidential exhibit CR8. I have examined them all. There are three classes of documents:

1. Communications between lawyers, or between a lawyer and the client

Documents Nos. 5, 6, 27, 28, 29 and 34 are communications (including attachments) passing between the respondent’s in-house lawyers and the council’s external lawyer, Ms Kelly. That fact alone gives rise to a prima facie inference that they were created for the purpose of giving legal advice. Ms Kelly became involved at an early stage because from the outset the applicant had taken the view that the council was liable for the damage to his property and the council therefore took the step of notifying its insurers.

Similarly, the in-house lawyers became involved in their professional capacities from the outset because Mr Holman’s opening communication had asserted that the council had incurred liability for the stormwater damage. The matter had a history going back to 2003 that had led to the council’s paying the applicant $7882.82 by way of compensation and there was every reason to think that a further claim for compensation would be forthcoming. That was a powerful reason why their communications with Ms Kelly and the council’s engineering staff should be seen as having come into existence for the dominant purpose, indeed the sole purpose, of providing legal advice to the council.

A large proportion of the other documents consists of communications passing between one or more of the in-house lawyers (or copied to them in their legal capacities) and officers of the respondent council with responsibilities relevant to matters of stormwater drainage or damage or both. The officers and the titles of their respective positions are as follows:

- Robert Barbuto, Team Leader, Stormwater Assets and Development Engineering
- Todd Dickinson, Acting Team Leader, Catchment Management
- Debbi Millener, Floodplain Engineer.

The documents passing between one of the in-house lawyers and any one or more of the above council officers are Nos. 2, 3, 4, 7, 8, 11, 13, 14, 15, 16, 17, 18, 19, 20 to 26, 31, 32, 33 and 35. All the communications involve the council officers in their respective engineering and management roles. All of them relate to the legal advice given, or to be given, to the council, in relation to the applicant’s claim or to seeking instructions in relation to such advice. Specifically, they embody the preparation of technical advice to enable the lawyers to give legal advice to the council. Several are marked “confidential” or “privileged” or both.
In the case of documents Nos. 20 to 26, Mr Michael Shaw of Civil Certification is also a party to one or more of them. As regards document 33 and its attachments, see the comment below.

(2) Communications between an in-house or external lawyer and third parties in connection with expert non-legal advice

101 Into this category fall documents Nos. 18 and 30. As was noted above, some of the documents in the series numbered 20 to 26 include Mr Michael Shaw of Civil Certification as a party. All the communications involved were plainly brought into existence for the purpose of providing expert information to assist in the provision of legal advice to the respondent or in connection with potential litigation to which it might be a party.

(3) Communications between non-lawyers in connection with the preparation of confidential information for the purpose of legal advice or litigation

102 Document 17 is an exchange between Steve Watson, Road Assets Manager, and the Group Manager, Roads, Traffic and Waste, dated 9 August 2012. It is expressed to concern the “Stormwater Issue – Wyatt Ave, Belrose – John Holman”. It plainly relates to the applicant’s claim against the respondent in so far as it impinges on Mr Watson’s area of responsibility.

103 None of the above documents was prepared in the ordinary course of the council’s business; they would not have come into existence but for the applicant’s claim that the respondent was liable for stormwater damage caused to his Belrose property, a claim that he first advanced as early as 29 May 2008 in his letter that is in evidence as exhibit R4. No other purpose or reason appears in any of them. All were prepared on a confidential basis.

104 It was submitted that the search for an agreed resolution was, or might have been, the reason for a number of the communications, but exploring the possibility of settlement has always formed an integral part of the adversarial litigation process. It is not a separate purpose.

105 I find that all the documents remaining in the schedule, except for document 33, are confidential communications, or confidential documents, prepared for the dominant purpose of providing legal advice to the respondent or for the provision of professional legal services relating to possible legal proceedings. They therefore satisfy the requirements in s 118 or s 119 or both. There is no evidence that client privilege in relation to any of them has been waived. Waiver was in any event improbable as it was clear that the applicant held the respondent responsible for the stormwater damage to his property.

106 Document 33 is an email dated 2 July 2012 (exhibit CR 8, p 283) from Elizabeth Caruso, who is described as being from “Legal Services” at Warringah Council. In the evidence there is no practising certificate, employment contract or other evidence of position or independence relating to Ms Caruso. Consequently it is not possible to find that the communication satisfies the requirements of s 118.
As regards all the other documents, however, I am satisfied that release of the information would result in the disclosure of a confidential communication or the confidential contents of a document. They were prepared on a confidential basis in light of years of experience with drainage problems in Wyatt Avenue in the knowledge that a formal legal claim would probably be forthcoming and, later, that litigation was likely to ensue. Proper administration requires that the council should be able to obtain confidential advice about the legal implications of its activities, and it was seeking to do so in this case.

I therefore make the following orders:

(1) Document number 33 (exhibit CR 8, p 283) is to be released.
(2) In all other respects the decision under review is affirmed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 19 October 2015
ATTACHMENT I: City of Sydney Council Organisation Structure Chart
ATTACHMENT J: Contracts Management Procedure
Contracts Management Procedure
### Contracts Management

<table>
<thead>
<tr>
<th>Procedure Title</th>
<th>Contracts Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedure owner</td>
<td>Manager – Projects and Contracts</td>
</tr>
<tr>
<td>Associated Policy Title</td>
<td>Procurement Policy</td>
</tr>
<tr>
<td>Policy owner</td>
<td>Manager – Projects and Contracts</td>
</tr>
<tr>
<td>Prepared by</td>
<td>Contracts Management Unit</td>
</tr>
<tr>
<td>Approved by</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>Date approved</td>
<td>5 November 2015</td>
</tr>
<tr>
<td>Commencement Date</td>
<td>5 November 2015</td>
</tr>
<tr>
<td>Version</td>
<td>2</td>
</tr>
<tr>
<td>Category</td>
<td>Governance</td>
</tr>
<tr>
<td>Keywords</td>
<td>Procurement, Purchasing, Contracts, Tendering, Supply</td>
</tr>
<tr>
<td>Revision date</td>
<td>November 2018</td>
</tr>
<tr>
<td>List superseded procedures</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CAG002 - Procurement Procedures (ECM # 2381372)</td>
</tr>
<tr>
<td></td>
<td>CAG003 - Preparing Tender Documents (ECM # 5012691)</td>
</tr>
<tr>
<td></td>
<td>CAG004 - Assessment of Tenders (ECM # 2381374)</td>
</tr>
<tr>
<td></td>
<td>CAG005 - Contract Establishment (ECM # 2381375)</td>
</tr>
<tr>
<td></td>
<td>CAG006 - Council Tender Reports (ECM # 4999981)</td>
</tr>
<tr>
<td>Relevant legislation/codes</td>
<td>Local Government Act 1993</td>
</tr>
<tr>
<td></td>
<td>Local Government (General) Regulations 2005</td>
</tr>
<tr>
<td></td>
<td>State Records Act 1998</td>
</tr>
<tr>
<td></td>
<td>Tendering Guidelines for NSW Local Government (DLG)</td>
</tr>
<tr>
<td></td>
<td>Capital Expenditure Guidelines (DLG)</td>
</tr>
<tr>
<td></td>
<td>Code of Conduct (NCC)</td>
</tr>
<tr>
<td>Related forms/appendices</td>
<td>Refer to appendices</td>
</tr>
</tbody>
</table>

Attachment J
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1. Scope

This document defines the contract management procedures, responsibilities and supporting checklists, forms and guidelines for procuring goods, works and services over $50,000 and for all Consultant service contracts.

The structure of this document is as follows:

<table>
<thead>
<tr>
<th>Part</th>
<th>Section</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part A:</td>
<td>1: Scope</td>
<td>Overview of procedure intent and structure</td>
</tr>
<tr>
<td>Preliminary</td>
<td>2: Roles and Responsibilities</td>
<td>Broad description of key roles and responsibilities</td>
</tr>
<tr>
<td></td>
<td>3: Definitions</td>
<td>Summary of key definitions used in this procedure</td>
</tr>
<tr>
<td>Part B:</td>
<td>4: Contracts &lt;$50,000</td>
<td>Description of the steps required to implement this procedure within the specified financial limits.</td>
</tr>
<tr>
<td>Contract</td>
<td>5: Contracts Between $50,000</td>
<td>Description of the steps required to vary the financial value of an existing contract.</td>
</tr>
<tr>
<td>Categories</td>
<td>and $125,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>6: Contracts &gt;$125,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>7: Contracts with Consultants</td>
<td></td>
</tr>
<tr>
<td></td>
<td>8: Approved Agency Contracts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>9: Variations to Contracts</td>
<td></td>
</tr>
<tr>
<td>Part C:</td>
<td>A: Guides</td>
<td>Standard forms, checklists, templates and guides that support procedures.</td>
</tr>
<tr>
<td>Appendices</td>
<td></td>
<td>To be used as documentary evidence for procedure implementation.</td>
</tr>
<tr>
<td></td>
<td>B: Forms, Checklists and Templates</td>
<td>Provide detailed support information/discussion on key contract management processes.</td>
</tr>
<tr>
<td></td>
<td>C: Standard Documents</td>
<td></td>
</tr>
</tbody>
</table>
## 2. Roles and Responsibilities

Broad definitions of roles and responsibilities as they relate to this procedure are as follows.

<table>
<thead>
<tr>
<th>Role</th>
<th>Key Responsibilities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Council</strong></td>
<td>Respond to community need to deliver services to the community through good government. Council decides on procurements &gt;$150,000. Approve or reject tender report recommendations. If rejected, provide direction on how to proceed.</td>
</tr>
<tr>
<td><strong>Executive Management Team</strong></td>
<td>Make budgetary recommendations to the elected Council on projects through Council’s Operational Plan. Ensure appropriate action is taken in response to reported instances of non-compliance.</td>
</tr>
<tr>
<td><strong>Director</strong></td>
<td>Ensure procurements and contracts under the responsibility of the Directorate/Director are managed in accordance with the Procurement Policy and these Contracts Management Procedures.</td>
</tr>
<tr>
<td><strong>Business Unit Manager</strong></td>
<td>Nominate a suitably qualified and trained Project Officer. Ensure that Contracts have allocated budget and approve calling for Tenders. Approve tender specifications. Execute Contract documentation. Identify and remove any source of conflict of interest or other issues surrounding probity or trade practices or non-compliance with the Local Government (General) Regulation (2005). Ensure that the appropriate level of financial authority exists for the acceptance of tenders and quotes.</td>
</tr>
<tr>
<td><strong>Contracts Management Unit</strong></td>
<td>Manage a centralised contracts management register and maintain a contractor performance reporting system. Provide direction and advice on contract documentation to ensure compliance with legislative, policy and procedural requirements. Determine the procurement method to be used, in circumstances where the Contracts Management Unit believes that better probity and value-for-money outcomes can be achieved. Approve Tender documents prior to their issue. Support the Project Officer and the Business Unit Manager in the development and execution of contract documentation. Manage contract disputes. Provide advice to Project Officer on managing contracts. Conduct audits to confirm compliance with the Contracts Management Procedure and report findings to the Executive Management Team.</td>
</tr>
<tr>
<td><strong>Project Officer</strong></td>
<td>Implement the Contracts Management procedures including retaining complete and comprehensive records. Establish essential contract requirements including budget. Assess and implement WHS requirements. Comply with Council policies and legislative requirements.</td>
</tr>
<tr>
<td><strong>Contract Management</strong></td>
<td><strong>Responsibility</strong></td>
</tr>
<tr>
<td>-------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td><strong>Administer contracts.</strong></td>
<td>Project Officer must have the appropriate skills and training prior to implementing Contract Management procedures.</td>
</tr>
<tr>
<td><strong>Legal Services</strong></td>
<td>Provide legal oversight and reviews of contract documentation.</td>
</tr>
</tbody>
</table>
3. Definitions

**Approved Agency Contracts** means that Council staff may procure goods, works and services from these agencies, without having to go through a competitive tendering process.

**Council** means Newcastle City Council.

**Consultant** means a person or entity engaged to provide advice and or designs where Council relies on the advice or designs in its decision making and where Council might incur a loss if the advice or design contains errors or omissions or where the consultant is otherwise negligent. (For example, this may include provision of services by engineers, architects, quantity surveyors, teachers/trainers, environmental specialists, surveyors, planners, lawyers, doctors, auditors, IT software programmers, graphic designers, photographers, accountants, property valuers, project managers and artists.)

**CMPGxx** means supporting contract procedure guide.

**Contract** means a legally binding agreement between Council and parties to provide agreed goods, works or services.

**Financial Authorisation** means the relevant financial authority limits delegated to each staff member as detailed in Council’s Register of Financial Authorisations.

**Formal Quote** means a detailed offer received via formal process to provide goods, works or services for or on behalf Council up to a value of $125,000 (including GST).

**Informal Quote** means an offer received via email or fax to provide goods, works or services for or on behalf of Council in response to a verbal or written request from Council up to a value of $50,000 (including GST).

**NCCxxx** means a standard form, template or checklist used in these Procedures.

**OneCouncil (ECM)** means Council’s financial and records management software system. All financial aspects of this Procedure must be generated and maintained in this system. All documentation must be stored in this system.

**Specialist Services** means a person or organisation engaged to provide a specific service that does not require professional advice. For example this includes: advertising agencies, tour guides, art, stage performers, bands, QA testing labs, cleaners, caterers, security guards, debt collectors, facilitators, and tradesmen.

**Tender** means a formal offer received via tender process to provide goods, works or services for or on behalf of Council in response to a Council Request For Tender (RFT) for values >$125,000 (including GST).

**TenderLink** means Council’s online web portal system for tendering/quotations.

**Value-for-money** means a basis of considering all the factors which are relevant to a particular purpose (e.g. experience, quality, reliability, timeliness and service, initial and ongoing costs). Value-for-money does not automatically mean the “lowest price”.

**WHS Management System** means Councils' Work Health Safety management system (including all its policies, operational procedures and forms).
Part B  Contract Categories

4. Contracts <$50,000

4.1 Scope

This Contracts Management Procedure does not apply to contracts for goods, works or services with a value less than $50,000 (including GST).

Note:
- The scope of this section excludes the procurement of Consultant services which are specifically addressed in Section 7 of this document.

4.2 Procedure

For goods, works and services:
- <$1,000 a quote or tender is not required.
- Between $1,000 and $10,000 two Informal Quotes are required.
- Between $10,000 and $50,000, three Informal Quotes are required.

Please refer to the Purchasing Procedure for details on the process to be followed.
5. Contracts between $50,000 and $125,000

5.1 Scope

The scope of this procedure is for the procurement of goods, works or services from any external supplier via a Contract with a value of between $50,000 and $125,000, excluding Consultants. (For engaging Consultants refer to Section 7.)

(Note: in relation to contracts that have an estimated value near the $125,000 threshold, the Project Officer should take a risk-based approach to determining which method of procurement to use. Please see Section 3.1 of the Tendering Guidelines for NSW Local Government for further information.)

5.2 Procedure

<table>
<thead>
<tr>
<th>Action</th>
<th>Detail</th>
<th>Supporting forms, guidelines, checklists etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confirm Decision to obtain Formal Quotation</td>
<td>The Project Officer must determine if a risk assessment needs to be undertaken, or any other WHS requirements that need to be undertaken, prior to seeking Formal Quotes. The Project Officer must advise their Business Unit Manager that they are seeking Formal Quotes based on estimated Contract value. The Project Officer is to then email the Contracts Management Unit who will issue a contract number to the Project Officer.</td>
<td>See WHS Management System (specifically OP 3.6.26 Procurement of Goods or OP 3.6.27 Procurement of Services) (for requirements for projects see Project Management Procedure.) CMPG05 Record Keeping Requirements</td>
</tr>
</tbody>
</table>
| Prepare Quotation Documentation | Project Officer to prepare quotation documentation which, as a minimum, shall include:
- WHS specification (see FM 3.6.27.1 WHS Contract Specification for Services in the WHS Management System);
- Detailed scope of work or requirements for the requested goods/work/services;
- Evaluation criteria and weightings.
(The Contracts Management Unit will assist in the above task.) Quotation documentation shall be finalised and approved by the Contracts Management Unit before proceeding to seeking quotes. | NCC201 Request for Tender (AS4000) NCC 202 Request for Tender (services) NCC204 Request for Tender (supply only) NCC207 Tender schedules (<$125k) NCC209 EOI Schedules NCC210, NCC211, NCC212, NCC213 or NCC214 Aust. Standards Annexures NCC103 Checklist for Quotes CMPG03 Documentation Matrix for Works and Services CMPG13 Tender Documentation |
| Select or Advertise Quotation | Contracts Management Unit to advise the Project Officer on options available for receiving Formal Quotations (ie. select or advertised).
If select Quotation:
- Project Officer to nominate at least 3 companies and record in writing the companies selected
- Contracts Management Unit to issue quotation documents via TenderLink. As a guide, the response time to be in the order of 10 working days.

If advertised Quotation:
- Contracts Management Unit to advertise quotation on TenderLink using approved template. As a guide, the response time to be in the order of 10 working days. | NCC219 Tender Advert Template |
<table>
<thead>
<tr>
<th>Action</th>
<th>Detail</th>
<th>Supporting forms, guidelines, checklists etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Should only one quotation be</td>
<td>Should only one quotation be sought (or received), form NCC115 must be completed by the <strong>Project Officer</strong> and approved by the <strong>Business Unit Manager</strong>.</td>
<td>NCC115 Acceptance of Single Quote</td>
</tr>
<tr>
<td>quoted (or received), form</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NCC115 must be completed by the</td>
<td>NCC104 Probity Checklist</td>
<td></td>
</tr>
<tr>
<td><strong>Project Officer</strong> and</td>
<td>CPMG12 Tendering (see section D2.3)</td>
<td></td>
</tr>
<tr>
<td>approved by the **Business</td>
<td>CPMG10 TenderLink Forum Questions</td>
<td></td>
</tr>
<tr>
<td>Unit Manager.</td>
<td>CPMG05 Record Keeping Requirements</td>
<td></td>
</tr>
<tr>
<td><strong>Manage Quotation</strong></td>
<td>The <strong>Project Officer</strong> is responsible for managing the probity and integrity of the quotation process and quotation responses.</td>
<td></td>
</tr>
<tr>
<td>Responses</td>
<td>All correspondence and instructions to responders must be in writing and sent by the <strong>Project Officer</strong> only. This includes any clarifications and variations to quotation documentation.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The <strong>Project Officer</strong> must inform all responders at the same time of any clarifications and variations to quotation documentation.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Extending or shortening the quotation period is at the discretion of the <strong>Project Officer</strong>. Reasons for any decision to change the quotation period must be documented in OneCouncil (ECM)</td>
<td></td>
</tr>
<tr>
<td>**Quotation Evaluation and</td>
<td><strong>Contracts Management Unit</strong> to receive and record all quotes submitted via the tender box or TenderLink.</td>
<td>NCC111 Tender Opening list</td>
</tr>
<tr>
<td>Assessment**</td>
<td><strong>Contracts Management Unit</strong> forwards received quotations to the <strong>Project Officer</strong> through OneCouncil (ECM).</td>
<td></td>
</tr>
<tr>
<td></td>
<td>It is at the <strong>Project Officer’s</strong> discretion whether an assessment panel is required.</td>
<td>NCC110 Tender Assessment matrix</td>
</tr>
<tr>
<td></td>
<td><strong>Project Officer</strong> assesses quotes using assessment/evaluation forms and checklists, recommending a preferred supplier for <strong>Business Unit Manager</strong> approval. (Further details on the assessment process is described in section F2 of CMPG14).</td>
<td>CPMG07 Worked Tender Assessment Example</td>
</tr>
<tr>
<td></td>
<td><strong>Project Officer</strong> must upload all quotation and assessment documentation (including responders’ insurance certificates) to the OneCouncil (ECM) and linked to the Contract Number.</td>
<td>CPMG14 Tender Assessment (see section F2)</td>
</tr>
<tr>
<td><strong>Raise a Purchase Requisition</strong></td>
<td>Should contract documents require variation to the standard/mandatory insurance requirements, form NCC113 must be completed and approved prior to proceeding.</td>
<td>NCC113 Application to Vary PI Cover</td>
</tr>
<tr>
<td></td>
<td>All necessary documents (as listed in CPMG05) need to be in OneCouncil (ECM) prior to raising a purchase requisition.</td>
<td>CPMG09 Information on Required Insurances</td>
</tr>
<tr>
<td></td>
<td>A purchase requisition cannot be raised until the preferred supplier recommendation is approved by the <strong>Business Unit Manager</strong>.</td>
<td>CPMG05 Record Keeping Requirements</td>
</tr>
<tr>
<td></td>
<td>Upon approval, the <strong>Project Officer</strong> raises a purchase requisition via OneCouncil (ECM).</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Upon the generation of a purchase order, the <strong>Contracts Management Unit</strong> prepares and sends to the <strong>Project Officer</strong> a draft Letter of Agreement.</td>
<td>NCC232 Letter of Agreement</td>
</tr>
<tr>
<td></td>
<td>(Note: For procurement of goods only, CMU may determine that a formal Letter of Agreement is not required and simply issue only the purchase order to the supplier.)</td>
<td></td>
</tr>
<tr>
<td><strong>Contract Establishment</strong></td>
<td>Upon receipt of the draft Letter of Agreement, the <strong>Project Officer</strong> finalises the document with assistance from the <strong>Contracts Management Unit</strong>.</td>
<td>CPMG15 Contract Establishment (see section G1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action</td>
<td>Detail</td>
<td>Supporting forms, guidelines, checklists etc.</td>
</tr>
<tr>
<td>--------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------</td>
</tr>
<tr>
<td>As a minimum, the Letter of Agreement must include/reference:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- General conditions of contract/standard terms of contract as included in tender documents;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Relevant special conditions;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Detailed scope of work or requirements for the requested goods/work/services;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Performance expectations/timeframes;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Insurance requirements;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Payment requirements.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Contracts $&gt;100,000</strong></td>
<td>Contract documentation $&gt;100,000 must undergo a legal review prior to approval. The <strong>Project Officer</strong> is to lodge a request for legal services at <a href="http://Intranet/Support-Services/Legal">http://Intranet/Support-Services/Legal</a> Upon successful completion of the legal review, the Letter of Agreement must be executed by the <strong>Business Unit Manager</strong>, or <strong>Director</strong>.</td>
<td></td>
</tr>
<tr>
<td><strong>Contract Management</strong></td>
<td>The <strong>Project Officer</strong> must oversee the management of the contract, including:</td>
<td></td>
</tr>
<tr>
<td>- Monitoring key contract dates;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Ensuring appropriate and timely payment;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Monitoring performance in accordance with the Contract.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The <strong>Contracts Management Unit</strong> can provide advice and assistance to the <strong>Project Officer</strong> in the management a contract.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The <strong>Project Officer</strong> is to refer to Section 9 of this document if any variation to a Contract arises.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>At the completion of the Contract a Contractor Performance Report (form NCC114) shall be completed and all contract documentation must be placed in OneCouncil (ECM)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
6. Contracts >$125,000

6.1 Scope

The scope of this procedure is for the procurement of goods, works or services from any external supplier with a value greater than $125,000 (including GST).

(This procedure is in accordance with Part 7 of the Local Government (General) Regulations 2005 and the Tendering Guidelines for NSW Local Government.)

6.2 Procedure

<table>
<thead>
<tr>
<th>Action</th>
<th>Detail</th>
<th>Supporting forms, guidelines, checklists etc</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tender or EOI</td>
<td>There are circumstances where it may be more appropriate to call for Expressions of Interest (EOI), in lieu of calling for tenders. This is usually done in where the scope of work (or specification) for providing the goods, works or services is not certain. This can arise in situations where the Project Officer is unsure on how best to deliver a service or what exactly is available in the market place. In these situations, an EOI would be called to seek ideas from the marketplace on achieving an objective or delivering an outcome. This differs from a tender, which normally is very prescriptive in setting milestones and deliverables. The Contracts Management Unit can provide advice on whether to call for EOI's or tenders.</td>
<td>CMPG12 EOI &amp; Tender Processes</td>
</tr>
<tr>
<td>Confirm Decision to Tender</td>
<td>The Project Officer must determine if a risk assessment needs to be undertaken, or any other WHS requirements that need to be undertaken, prior to calling tenders. In relation to procurement for a project, the Project Officer must ensure that all relevant project management documentation has been completed. The Project Officer must obtain written approval (eg via email), from their Business Unit Manager, to call tenders. The approval from the Business Unit Manager must provide evidence that there is sufficient approved budget funding for the tender. <strong>Note: If budget approval is not in place, procurement cannot proceed.</strong> If approval is received, the Project Officer is to email the approval to the Contracts Management Unit and they will issue a contract number to the Project Officer.</td>
<td>See WHS Management System (specifically OP 3.6.26 Procurement of Goods or OP 3.6.27 Procurement of Services); For projects, see Project Management Procedure</td>
</tr>
<tr>
<td>Probit Advisor</td>
<td>For Contracts over $5 million (or where the outcome has significant public interest) the appointment of a probity advisor is required. For Contracts between $1 million and $5 million a person from the Contracts Management Unit will provide probity oversight of the tender evaluation process.</td>
<td>NCC104 Probit Checklist</td>
</tr>
<tr>
<td>Prepare Tender Documentation</td>
<td>Project Officer to prepare tender documentation which, as a minimum, shall include: - WHS specification (see FM 3.6.27.1 WHS Contract Specification for Services in the WHS Management System);</td>
<td>NCC205 Request for EOI; NCC209 EOI Schedules; NCC201 Request for Tender (AS4000); NCC 202 Request for Tender (services)</td>
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<td>Action</td>
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<td><strong>Action Detail</strong></td>
<td><strong>Supporting forms, guidelines, checklists etc</strong></td>
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<tr>
<td>- Detailed scope of work or requirements for the requested goods/work/services; - Evaluation criteria and weightings.</td>
<td>NCC204 Request for Tender (supply only) NCC206 Tender schedules (&gt;$125k) NCC210, NCC211, NCC212, NCC213 or NCC214 Aust. Standards Annexures NCC103 Tenders Checklist CMPG03 Documentation Matrix for Works and Services CMPG12 EOI &amp; Tender Processes CMPG13 Tender Documentation</td>
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</tr>
<tr>
<td>The Contracts Management Unit will assist in the above task.</td>
<td>Tender documentation shall be approved by the Contracts Management Unit before proceeding to tender. The Business Unit Manager is to approve that the tender specification meets the procurement requirements. Tender documents for contracts &gt;$125K must undergo a legal review. Project Officer is to lodge a request for legal services at <a href="http://Intranet/Support-Services/Legal">http://Intranet/Support-Services/Legal</a></td>
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<tr>
<td>Advertise Tender</td>
<td>All procurement &gt;$125,000 must be an advertised/open tender. The Contracts Management Unit to advertise tender in the Newcastle Herald, Sydney Morning Herald and TenderLink using approved template. Tender response time to be in the order of at least 21 days.</td>
<td>NCC219 Tender Advert CMPG13 (see section E4.3) NCC119 Register of Tender Document Requests</td>
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<tr>
<td>Manage Tender Responses</td>
<td>The Project Officer is responsible for managing the probity and integrity of the tender process and tender responses. All correspondence and instructions to tenderers must be in writing and sent by the Project Officer only. This includes any clarifications and variations to tender documentation. The Project Officer must inform all tenderers at the same time of any clarifications and variations to tender documentation. (See section D2.3 in CMPG12) Extending or shortening the tender period is at the discretion of the Project Officer. (See section D2.4 in CMPG12) Reasons for any decision to change the tender period must be documented in OneCouncil (ECM).</td>
<td>NCC104 Probity Checklist CMPG10 TenderLink Forum Questions CMPG12 Tendering (see section D2.3) CMPG12 Tendering (see section D2.4) CMPG05 Record Keeping Requirements</td>
</tr>
<tr>
<td>Tender Evaluation and Assessment</td>
<td>Contracts Management Unit to receive and record tenders received via the tender box or TenderLink. Contracts Management Unit forwards received tenders to the Project Officer through OneCouncil (ECM). Tender evaluation and assessment must be completed by a Tender Assessment Panel. The Panel must consist of at least 3 members (including the Project Officer). With assistance from the Tender Assessment Panel, the Project Officer assesses tenders using assessment forms and checklists. (Further details on the assessment process is described in section F2 of CMPG14). The recommendation of the Tender Assessment Panel must be approved by the Business Unit Manager.</td>
<td>NCC111 Tender Opening list NCC110 Tender Assessment matrix CMPG07 Worked Tender Assessment Example CMPG14 Tender Assessment (see section F2)</td>
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<tr>
<td>Action</td>
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<td>Supporting forms, guidelines, checklists etc</td>
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</table>
| **For Contracts >$150,000** | For Contracts that are likely to be >$150,000 the **Project Officer** is to recommend the preferred supplier, via a Council Report, that must endorsed by the **Business Unit Manager** and **Director** and submitted to Council for approval. If the tender recommendation is not approved, Council to define the course of action.  
If the tender recommendation is approved by Council, the Project Officer is to send a Letter of Tender Acceptance (form NCC221) to the successful tenderer. | NCC221 Letter of Tender Acceptance  
CMPG08 Council Report Workflow |

| Project Officer must upload all tender and assessment documentation (including tenderers insurance certificates) in to OneCouncil (ECM) and linked to the Contract Number. | CMPG05 Record Keeping Requirements |

| Raise a Purchase Requisition | Should contract documents require variation to the standard/mandatory insurance requirements, form NCC113 must be completed and approved prior to proceeding.  
A purchase requisition cannot be raised until the preferred supplier recommendation is approved by Council.  
Upon Council approval, the **Project Officer** raises a purchase requisition via OneCouncil.  
**Contracts Management Unit** prepares or assists the **Project Officer** in the preparation of Contract agreement documentation. | NCC113 Application to Vary PI Cover  
CMPG09 Information on Required Insurances |

| Contract Establishment | As a minimum, contract documents must include/reference:  
- General conditions of contract/standard terms of contract as included in tender documents;  
- Relevant special conditions;  
- Detailed scope of work or requirements for the requested goods/work/services;  
- Performance expectations/timeframes;  
- Insurance requirements;  
- Payment requirements.  
Contract documentation must undergo a legal review prior to execution. **Project Officer** is to lodge a request for legal services at http://Intranet/Support-Services/Legal  
Upon successful completion of the legal review, all Contract documentation must be executed by the **Business Unit Manager** or **Director**. (**Project Officer** to complete form NCC116.)  
Upon approval, the **Project Officer** send the Contract agreement to the successful supplier, and notifies (in writing) unsuccessful tenderers (using NCC222). (Note that the **Project Officer** does not have authority to execute procurement Contracts. Only the relevant **Business Unit Manager** or **Director** can be a signatory to a Contract.)  
If the contract involves dealing with matters of a confidential nature the Project Officer shall get the successful tender to sign a confidentiality agreement (using NCC230). | CMPG15 Contract Establishment  
NCC116 Contract Execution Authority  
NCC222 Letter to Unsuccessful Tenderers  
NCC230 Confidentiality Deed |
<table>
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<tr>
<th>Action</th>
<th>Detail</th>
<th>Supporting forms, guidelines, checklists etc</th>
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</table>
| Contract Management | The **Project Officer** must oversee the management of the Contract, including:  
- Monitoring key contract dates;  
- Ensuring appropriate and timely payment;  
- Monitoring performance in accordance with the Contract.  
The **Contracts Management Unit** can provide advice and assistance to the **Project Officer** in the management of a Contract.  
The **Project Officer** is to refer to Section 9 of this document if any variation to a Contract arises.  
At the completion of the Contract a Contractor Performance Report (form NCC114) shall be completed and all contract documentation must be placed in OneCouncil (ECM). | CMPG16 Contract Administration  
NCC105 Key Dates for Contracts  
NCC112 Subcontractors Statement  
NCC114 Contractor performance Report  
CMPG05 Record Keeping Requirements |
7. Contracts with Consultants

7.1 Scope

The scope of this procedure is for the procurement of services from any external Consultant which must be undertaken via a Contract.

For Consultant service engagements:
- <$10,000 one Formal Quote is required;
- Between $10,000 and $125,000 three Formal Quotes are required; or
- >$125,000 the “Contracts>$125,000” procedure will apply (refer to Section 6).

(Note: in relation to contracts that have an estimated value near the $125,000 threshold, the Project Officer should take a risk-based approach to determining which method of procurement to use. Please see Section 3.1 of the Tendering Guidelines for NSW Local Government for further information.)

7.2 Procedure

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<tr>
<td>Confirm Decision to obtain Quotation</td>
<td>The Project Officer must determine if a risk assessment needs to be undertaken, or any other WHS requirements that need to be undertaken, prior to obtaining formal quotes. The Project Officer must advise their Business Unit Manager that they are seeking quotations. Obtain Contract Number from the Contracts Management Unit.</td>
<td>See WHS Management System (specifically OP 3.6.26 Procurement of Goods or OP 3.6.27 Procurement of Services) (for requirements for projects see Project Management Procedure.) CMPG05 Record Keeping Requirements</td>
</tr>
<tr>
<td>Prepare Quotation Documentation</td>
<td>Project Officer to prepare quotation documentation which, as a minimum, shall include:  - WHS specification (see FM 3.6.27.1 WHS Contract Specification for Services in the WHS Management System);  - Detailed scope of work or requirements for the requested goods/work/services;  - Evaluation criteria and weightings.  (The Contracts Management Unit will assist in the above task.) Quotation documentation shall be finalised and approved by the Contracts Management Unit.</td>
<td>NCC203 Request for Tender (Consultants) NCC208 Tender Schedules (consultants) NCC102 Engaging Consultants checklist CMPG04 Documentation Matrix for Consultants CMPG13 Tender Documentation</td>
</tr>
<tr>
<td>Select Quotation</td>
<td>Only one Formal Quote is required for consultancy services &lt;$10,000. The Project Officer is to send quotation documents to consultant(s) for pricing. Quotation response times are at the discretion of the Project Officer. Three Formal Quotes are required for consultancy services between $10,000 and $125,000. Quotation documents shall be issued to the consultants by the Contracts Management Unit, via TenderLink. If a single Formal Quote is only requested (or received), the Project Officer must complete form NCC115.</td>
<td>NCC115 Acceptance of Single Quote</td>
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<tr>
<td>Manage Quotation Responses</td>
<td>The <strong>Project Officer</strong> is responsible for managing the probity and integrity of the quotation process and quotation responses. All correspondence and instructions to respondents must be in writing and sent by the <strong>Project Officer</strong> only. This includes any clarifications and variations to tender documentation. The <strong>Project Officer</strong> must inform all respondents at the same time of any clarifications and variations to the quotation documentation. (See section D2.3 in CMPG12) Extending or shortening the quotation period is at the discretion of the <strong>Project Officer</strong>. (See section D2.4 in CMPG12) Reasons for any decision to change the quotation period must be documented in OneCouncil (ECM).</td>
<td>NCC104 Probity Checklist</td>
</tr>
<tr>
<td>Quotation Evaluation and Assessment</td>
<td><strong>Contracts Management Unit</strong> to receive and record all quotes submitted via the tender box or TenderLink. <strong>Contracts Management Unit</strong> forwards received quotations to the <strong>Project Officer</strong> through OneCouncil (ECM). It is at the <strong>Project Officer</strong>’s discretion whether an assessment panel is required. <strong>Project Officer</strong> assesses quotes using assessment/evaluation forms and checklists recommending a preferred supplier for <strong>Business Unit Manager</strong> approval. (Further details on the assessment process is described in section F2 of CMPG14). <strong>Project Officer</strong> must upload all quotation and assessment documentation (including responders’ insurance certificates) to the OneCouncil (ECM) and linked to the Contract Number.</td>
<td>NCC111 Tender Opening List</td>
</tr>
<tr>
<td>Raise a Purchase Requisition</td>
<td>Should contract documents require variation to the standard/mandatory insurance requirements, form NCC113 must be completed and approved prior to proceeding. All necessary documents (as listed in CMPG05) need to be in OneCouncil (ECM) prior to raising a purchase requisition. A purchase requisition cannot be raised until the preferred consultant recommendation is approved by the person with sufficient Financial Authorisation. Upon approval, the <strong>Project Officer</strong> raises a purchase requisition via OneCouncil. Upon the generation of a purchase order, the <strong>Contracts Management Unit</strong> prepares and sends to the <strong>Project Officer</strong> a standard Letter of Agreement.</td>
<td>NCC113 Application to Vary PI Cover</td>
</tr>
<tr>
<td>Contract Establishment</td>
<td>Upon receipt, the <strong>Project Officer</strong> finalises the Letter of Agreement with assistance from the <strong>Contracts Management Unit</strong>. As a minimum, the Letter of Agreement must include/reference: - Terms of Engagement for Consultants (as included in quotation documents); - Relevant special conditions; - Detailed scope of work or consultant brief for the requested service; - Performance expectations/timeframes; - Insurance requirements; - Payment requirements.</td>
<td>CMPG15 Contract Establishment (see section G1)</td>
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<td>Attachment J</td>
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<tr>
<td>Contracts &gt;$100,000</td>
<td>Contract documentation &gt;$100,000 must undergo a legal review prior to approval. <strong>Project Officer</strong> is to lodge a request for legal services at <a href="http://Intranet/Support-Services/Legal">http://Intranet/Support-Services/Legal</a> Upon successful completion of the legal review, the Letter of Agreement must be executed by the <strong>Business Unit Manager</strong>, or <strong>Director</strong>. (Note that the <strong>Project Officer</strong> does not have authority to execute procurement Contracts. Only the relevant <strong>Business Unit Manager</strong> or <strong>Director</strong> can be a signatory to a Contract.) If the consultancy involves dealing with matters of a confidential nature the <strong>Project Officer</strong> shall get the consultant to sign a confidentiality agreement (using NCC230).</td>
<td>NCC116 Contract Execution Authority</td>
</tr>
<tr>
<td>Contract Management</td>
<td>The <strong>Project Officer</strong> must oversee the management of the Contract, including: - Monitoring key contract dates; - Ensuring appropriate and timely payment; - Monitoring performance in accordance with the Contract. The <strong>Contracts Management Unit</strong> can provide advice and assistance to the <strong>Project Officer</strong> in the management of a Contract. The <strong>Project Officer</strong> is to refer to Section 9 of this document if any variation to a Contract arises. At the completion of the Contract a Contractor Performance Report (form NCC114) shall be completed and all contract documentation must be placed in OneCouncil (ECM).</td>
<td>CMPG16 Contract Administration NCC105 Key Dates for Contracts NCC112 Subcontractors Statement NCC114 Contractor performance Report CMPG05 Record Keeping Requirements</td>
</tr>
</tbody>
</table>
8. Approved Agency Contracts

8.1 Scope

NSW Procurement, Procurement Australia and Local Government Procurement (LGP) are prescribed/approved agencies under the Local Government Act (1993). This means that Council staff may procure goods, works and services from these agencies, without having to go through a competitive tendering process. Therefore, the Project Officer may purchase from an Approved Agency Contract, provided that:

- They select a supplier from the Approved Agency Contract;
- The goods, works or services being procured are covered by the relevant Approved Agency Contract;
- The prices to be paid are no more than the prices prescribed under the Approved Agency Contract (see note below); and;
- Procurement under the Approved Agency Contract provides best value for money for council.

8.2 Procedure

The Project Officer should review the Approved Agency Contracts available at the following approved agencies:

- NSW Procurement (www.procurepoint.nsw.gov.au)
- LGP Procurement (www.lpg.org.au/councils/current-contracts)
- Procurement Australia (www.procurementaustralia.com.au/current-contracts)

If the Project Officer believes that an Approved Agency contract can apply, the Project Officer shall seek advice from the Contracts Management Unit. The Contracts Management Unit shall advise the Project Officer the steps required to order from an Approved Agency.

Note the following:

- Some Approved Agency Contracts provide for a maximum price to be paid. In these circumstances, the Project Officer may request to get quotations from one or more approved suppliers for prices below the published agency contract rates before procuring the goods, works or services.
- Procurement under an approved agency contract is to be under the agency contract terms and conditions. The Project Officer shall consult with the Contracts Management Unit to determine if any additional contract terms or conditions are required, especially where on-site works are included in the deliverable.
- Hunter Councils’ Regional Procurement is not an approved agency under the Local Government Act (1993).
9. Variations to Contracts

9.1 Scope

The scope of this procedure is to vary the financial value of any Contract.

9.2 Procedure

<table>
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<tr>
<th>Action</th>
<th>Detail</th>
<th>Supporting forms, guidelines, checklists etc</th>
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</table>
| Monitor and Control Contract Variations | Should the requirements of the goods/works/services change after the execution of the Contract agreement, which impacts on the value of the Contract, the Project Officer must:  
- Actively manage changes to keep Contract variations within acceptable limits;  
- Obtain written approval (use form NCC117) from the person with sufficient Financial Authorisation prior to requesting a variation;  
- Request a variation price from the supplier in writing via a written change request. | NCC117 Variation Request Form |
| If a change to a Contract is initiated by the supplier, the Project Officer shall:  
- Determine if the change is valid against the agreed conditions of Contract;  
- If the change is valid, obtain written approval (via form NCC117) from the person with sufficient Financial Authorisation prior to responding;  
- Request a written variation from the supplier;  
- If the variation is not valid/approved, reject in writing. |  |
| All changes specific to each Contract must be tracked and monitored via a contract-specific Variation Register (NCC118). | NCC118 Variation Register |
| Obtain approval of variations | Where the financial value of a Contract requires to be increased, the following approvals shall apply:  
- If the cumulative total of variations to the contract exceeds $200,000 or 20% (whichever is greater), General Manager must approve; or  
- If the cumulative total of variations to the contract exceeds $50,000 or 10% (whichever is greater), a Director must approve; or  
- In all other circumstances the Business Unit Manager shall approve the variation. | NCC117 Variation Request Form |
| Approval of variations must be obtained prior to commencing any additional goods/works/services. |  |
| Manage Variations | Upon receipt of approval the Project Officer must vary the original purchase order by the approved amount and issue a variation letter to the supplier/contractor/consultant. | NCC231 Variation Letter (general)  
NCC254 Variation Letter (AS4000) |
Note that:

- Sufficient budget must be available prior to seeking variation approval. If budget is not available, refer to the "Budget Approval Process".

- Existing Contracts must not be varied to avoid tendering for separate goods/works/services.

- Contracts must not be varied where the variation is outside the original intent of the contracted works/goods/services.

- Where cumulative variations exceed $100,000 or 10% (whichever is greater) Council must be informed via the Executive Performance Report.

9.3 Notices

The Project Officer must seek advice from the Contracts Management Unit before:

- Issuing a show-cause notice, breach of contract notice or termination notice;

- Commencing a formal dispute resolution process.
## Appendix A – Guides & Checklists

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<tr>
<td>CMPG03</td>
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<td>Documentation Matrix for Works &amp; Services</td>
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<td>CMPG04</td>
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<td>WHS Contract Specification for Services</td>
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Appendix B – Forms and Templates

NCC110  Form  Tender Assessment Matrix
NCC111  Form  Tender Opening List
NCC112  Form  Subcontractor’s Statement (Security of Payments Act)
NCC113  Form  Application to Vary PI Insurance Cover
NCC114  Form  Contractor Performance Report
NCC115  Form  Acceptance of Single Quotation
NCC116  Form  Contract Execution Authority
NCC117  Form  Variation Request Form
NCC118  Form  Variation Register
NCC119  Form  Register of Tender Document Requests

NCC201  Template  Request for Tender (AS4000 Construction)
NCC202  Template  Request for Tender (Construction/Services <$125,000)
NCC203  Template  Request for Tender (Consultants)
NCC204  Template  Request for Tender (Supply only)
NCC205  Template  Request for Expression of Interest
NCC206  Template  Tender Schedules (Tenders over$125,000)
NCC207  Template  Tender Schedules (Tenders under $125,000)
NCC208  Template  Tender Schedules (Consultants)
NCC209  Template  Expression of Interest (EOI) Schedules
NCC210  Template  AS4000 Annexure Parts A & B
NCC211  Template  AS4000 Part A Separable Portion
NCC212  Template  AS4902 Annexure Parts A & E
NCC213  Template  AS4122 Annexure Parts A & B
NCC214  Template  AS4915 Annexure Parts B, C & D
NCC215  Template  Tender Advert
NCC216  Template  Tender Addendum
NCC220  Template  Council Tender Report
NCC221  Template  Letter of Tender Acceptance
NCC222  Template  Letter to Unsuccessful Tenders

NCC230  Template  Confidentiality Deed
NCC231  Template  Contract Variation Letter (General)
NCC232  Template  Letter of Agreement (standard HROC)
NCC233  Template  Letter of Agreement (consultants)
NCC234  Template  Customer Contract (LGP Hired Persons)
NCC235  Template  Official Order Form (Contingent Workforce 0007)
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## Appendix C – Standard Documents

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<tr>
<td>NCC302</td>
<td>Document</td>
<td>EOI Conditions of Registration</td>
</tr>
<tr>
<td>NCC303</td>
<td>Document</td>
<td>General Conditions of Contract</td>
</tr>
<tr>
<td>NCC304</td>
<td>Document</td>
<td>Terms of Engagement for Consultants</td>
</tr>
<tr>
<td>NCC305</td>
<td>Document</td>
<td>Contract Special Conditions SC-2 (Contractor Declaration)</td>
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<td>NCC306</td>
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<td>Contract Special Conditions SC-3N (WHS Non-Principal)</td>
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<td>Contract Special Conditions SC-3P (WHS Principal)</td>
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<td>Contract Special Conditions SC-4 (Dispute Resolution)</td>
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<td>Contract Special Conditions SC-5 (Environmental Requirements)</td>
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<td>NCC310</td>
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<td>Contract Special Conditions SC-6 (Building &amp; Construction)</td>
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<td>NCC311</td>
<td>Document</td>
<td>Contract Special Conditions SC-7 (GIPAA Requirements)</td>
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<tr>
<td>NCC312</td>
<td>Document</td>
<td>Contract Special Conditions SC-8 (Information Technology)</td>
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<tr>
<td>NCC313</td>
<td>Document</td>
<td>Statement of Business Ethics</td>
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