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CRITERIA FOR APPLICATIONS UNDER SECTION 358 OF THE LOCAL GOVERNMENT ACT 1993 – FORMATION OF CORPORATIONS OR OTHER ENTITIES

This circular is to replace Circular No. 56 of 2006. An additional fourth administrative criteria for assessing applications has now been adopted.

Section 358 of the *Local Government Act 1993* restricts councils in forming or participating in the formation of a corporation or other entity without first obtaining the consent of the Minister for Local Government. This restriction also extends to acquiring a controlling interest in a corporation or other entity.

An entity for the purposes of section 358 of the Act means any partnership, trust, joint venture, syndicate or other body (whether or not incorporated). It does not include any such entity that is of a class prescribed by the Local Government (General) Regulation 2005 as not being within this definition. To date, the Regulation has not prescribed such a class.

It should be noted that the restrictions on the formation of corporations and other entities does not prevent a council from being a member of a co-operative society or a company limited by guarantee and licensed not to use the word “Limited” in its name.

In applying for the Minister’s consent under section 358, the council must demonstrate that the formation of, or the acquisition of the controlling interest in, the corporation or entity is in the public interest. After assessing the application, the Department will make a recommendation to the Minister on the council’s proposal.

As part of the Department’s assessment of a council’s application, we will have regard to the following:

1. *Is the proposal consistent with the functions of the council or an existing service that the council provides?*

This requirement is drawn from the power of a council to “provide goods, services and facilities and carry out activities appropriate to the current and future needs within its local community and of the wider public” that is contained in section 24 of the Act. This requirement is also consistent with council’s general charter in section 8 of the Act.

To establish that a proposal is consistent with council's functions or services, the following should be provided in support of the application:

- Demonstration of the link between the proposal and community or public needs
- Detail on the general appropriateness of the council's involvement in the corporation or other entity
- Explanation as to how corporatisation or involvement in the entity would improve the economic performance and ability of the council to carry out its responsibilities
- Explanation of what measures will be employed to ensure that the activities of the corporation or entity will be accountable.

2. Will the proposed entity be legally separated from the council?

Applications must demonstrate that the initial capital and working capital of the corporation/entity can be identified and separated from the council. The application must also indicate how the council (both as a corporate body and its members personally) are protected from any liability that might arise as a result of the activities of the corporation/entity (including the activities of other partners).

To demonstrate adequate legal separation, council should address three main areas or activities of the proposed corporation or entity. These are:

- Legal structure (including liability of the council, councillors and council staff)
- Financial separation (confirmation that the accounting for the corporation or other entity is separate to the council's accounts)
- Management separation (details of the management structure of the corporation or other entity).

3. Is the council currently financially viable?

An assessment of the council's overall financial viability will be made on the basis of data that the council is routinely required to supply to the Department. However, council should also provide details about the costs expected to be incurred, and revenues expected to be received, by the council as a result of being involved in the corporation or other entity.

4. What is the impact of the proposal on existing council staff?

Will the proposal result in existing council staff being transferred to the employment of the corporation and if so, will the staff be employed on terms and conditions consistent with their previous employment with the council. Will the corporation guarantee the

continued employment of transferred staff for a period of at least 3 years. Will the corporation adopt an agreement to refer any industrial disputes to the NSW Industrial Relations Tribunal. Will the proposal result in existing council staff being made redundant.

Any council considering making an application under section 358 of the Act as part of a Public Private Partnership should, as well as referring to all four administrative criteria, also ensure that it follows the requirements outlined in Circular 05-51 "Public Private Partnerships Legislation and Guidelines".

In all other situations, it is recommended that councils refer to all four administrative criteria in making an application for the Minister's consent under section 358 of the Act.



Garry Payne AM
Director General