

Formation of Corporations and Entities (Section 358) Guideline

January 2022

Strengthening local government



Access to services

The Office of Local Government
located at:

Street Address:
Levels 1 & 2
5 O'Keefe Avenue
Nowra NSW 2541

Postal Address:
Locked Bag 3015
Nowra, NSW 2541

Phone: 02 4428 4100
Fax: 02 4428 4199
TTY: 02 4428 4209
Email: olg@olg.nsw.gov.au
Website: www.olg.nsw.gov.au

Office hours

Monday to Friday
9.00am to 5.00pm
(Special arrangements may be made
if these hours are unsuitable)
All offices are wheelchair accessible.

Alternative media publications

Special arrangements can be made for our publications to be provided in large print or an alternative media format. If you need this service, please contact us on 02 4428 4100.

Disclaimer

While every effort has been made to ensure the accuracy of the information in this publication, the Office of Local Government expressly disclaims any liability to any person in respect of anything done or not done as a result of the contents of the publication or the data provided.

© NSW Office of Local Government, Department of Planning, Industry and Environment Cluster 2021.

Produced by the Office of Local Government

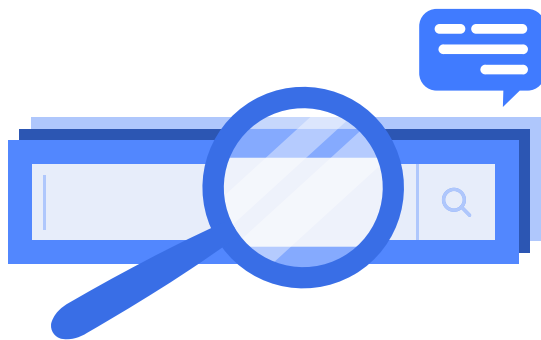
Illustrations by Storyset

Contents

PART A – OVERVIEW	5
1. How to use these Guidelines	5
1.1 Introduction: Purpose of Guidelines	5
2 Where to send applications	8
3 Glossary	9
3.1 Acronyms	9
3.2 Definitions	9
4 Legislative framework for corporations and entities under section 358	10
5 What is a Corporation or Entity?	11
6 Alternatives to section 358 entity or corporation	11
6.1 Direct management by council	12
6.2 Business Units	12
6.3 Operating through a council committee	12
6.4 Joint Organisation	13
7 Relationship with PPP Requirements	13
8 Integrated Planning and Reporting (IP&R)	14
9 Council Responsibilities	14
PART B – SECTION 358 APPLICATION PROCESS	16
10 Documents required for submission to OLG	16
10.1 Council Resolution and Council Self-Assessment Questionnaire (pre-EOI)	16
10.2 Justification Documents	17
10.3 Governance Arrangements	19
11 Assessment of Application	24
11.1 Review Timeframe	24
11.2 Fees	24
11.3 Withdrawing a Section 358 Application	25
11.4 No Appeal against Minister’s decision	25
PART C – SPECIFIC SCENARIOS	26
12 Treatment of Multi-Council Applications	26
13 Unsolicited Proposals	26
14 Financing and Borrowing approvals	26
PART D – APPENDICES	28
Form 1: Section 358 Application – Council Self-Assessment Questionnaire	28
Form 2: Required Documents Checklist – S.358 Application	29
References and Further Reading	30

Part A – Overview





1. How to use these Guidelines

These guidelines are issued pursuant to section 23A of the *Local Government Act 1993* (the Act). They form part of a suite of Office of Local Government (OLG) guideline documents available for use by council staff involved in the management of council projects. These guidelines set out procedures and processes to be followed when councils are considering making an application to the Minister for consent to the creation of or involvement in a separate entity outside of the council structure. These guidelines outline matters that councils will need to address when making an application to the Minister. The Minister will then determine whether to approve the application to form an entity under section 358 of the Act.

The Guideline is divided into four parts to aid the user in quickly finding the information required:

Part A provides a general overview and background information on the formation of corporations or other entities.

Part B outlines the review process for applications to form a corporation or other entity separate to the council including the documents required to be submitted to OLG.

Part C covers specific complex scenarios that might be encountered by the council during the Section 358 application process.

Part D provides templates and flowcharts detailing the process.

1.1 Introduction: Purpose of Guidelines

Section 358 was included in the Act as a means of clarifying the ways that a council may carry out trading or similar functions. However, the options available to councils were restricted so that councils could not be seen to be risking ratepayer's money and public assets in unrestricted business activities. In more recent years, experience in NSW and other states has confirmed that there are risks associated with the lack of oversight and transparency into entities which are not amenable to regulation under the Act.

Since 1993 the risks of allowing councils to operate through entities have become better understood. In more recent years, experience in this, and other states, has confirmed that the creation of separate entities outside the structures of the Act has risk. A particular risk is the lack of oversight and transparency into the workings and operations of separate entities which are not amenable to regulation under the Act. The entities are often 'gifted' council assets (including land) and these assets are then held and operate under a special purpose corporate vehicle (SPV). The oversight and operation of this SPV is then not subject to the usual oversight mechanisms which apply to councils and Joint Organisations (JOs).

This has relevance in the context of the council's decision to create an entity. In terms of oversight, directors of council entities are able to make decisions about the expenditure of funds at their own discretion. While the directors may be subject to obligations imposed by the Corporations Law or the Associations Incorporation Act 2009, the entity will not be subject to internal council procedures or typical local government oversight mechanisms, such as procurement processes and gifts and benefits registers.



Councils should always explore options to carry out their project within existing structures first before considering forming an entity outside of the local government framework

Under the Act, the role of the Governing Body (the elected representatives of the council) is to direct and control the affairs of the council in accordance with the Act (s. 223). Even though incorporated associations and corporations are subject to regulatory oversight by other agencies, that does not mean that council-created entities should not be accountable within the regulatory framework set out in the Act. For this reason, the Act imposes restrictions on the formation of entities which fall outside the normal council structure.

The central focus of section 358 of the Act is the public interest. Having regard to the Guiding Principles in Chapter 3 of the Act, the public interest is best served by encouraging councils to explore the use of available mechanisms within the Act before resorting to the creation of an entity, particularly one regulated outside the Act.

The Formation of Corporations and Entities (Section 358) Guidelines are part of a suite of Office of Local Government (OLG) guideline documents available for staff involved in the management of council projects and outline what councils must do to comply with the requirements of the Act in relation to the formation of corporations or other entities to manage projects and/or council related business.

Mere compliance with these guidelines is not the test for determining whether approval is 'in the public interest.' In making an application to the Minister the council needs to understand that it carries the onus to 'demonstrate, to the Minister's satisfaction' that the formation of the corporation "is in the public interest" (section 358(3)).

In determining whether the granting of consent is in the public interest the Minister may:

- take into account matters, other than the guidelines, which the Minister considers are relevant to the application.
- disregard any of the matters in the guidelines where the Minister considers there is good reason why they should not apply in the circumstances of that application.

The Minister has an unfettered discretion to consent to an application but in circumstances where the intent of a council can be achieved without the complexity or necessity to create a separate entity or it is open to the council to achieve the desired outcome by other available means, the council should anticipate it will be asked to first consider those alternative approaches and provide a cogent explanation as to why those alternative approaches are not in the public interest.

2. Where to send applications

All correspondence to and communications with the Coordinator General – Planning Delivery and Local Government and the Minister for Local Government in relation to a proposed Section 358 Application should be made through OLG’s Head Office in Nowra. Preferably, they should be in writing. No direct contact should be made with the Minister or the Minister’s staff.

The address of OLG’s Nowra Office is:

Director Legal – Office of Local Government
Level 2
5 O’Keefe Ave
Nowra NSW 2540

The postal address for OLG is:

Locked Bag 3015
Nowra NSW 2540

The telephone number is:

(02) 4428 4100

The facsimile number is:

(02) 4428 4199

Email:

olg@olg.nsw.gov.au

3. Glossary

3.1 Acronyms

The following acronyms are used throughout the document:

Act	The Local Government Act 1993
CE	Chief Executive
GM	General Manager
IPR	Integrated Planning and Reporting
OLG	Office of Local Government
PPP	Public Private Partnership
TCorp	Treasury Corporation

3.2 Definitions

The following definitions may assist in understanding the Guidelines:

Act

An **Act** is legislation passed by the Parliament. Acts, (not including Schedules to Acts) can only be amended by another Act of Parliament. Acts set out the broad legal/ policy principles.

Regulation

Regulations are commonly known as “subsidiary legislation” and require publishing in the Government Gazette to become legal. These are the guidelines that dictate how the provisions of the Act are applied. They may also contain pro forma official forms that are required under the Act. Regulations and schedules to Acts can only be amended by a notice published in the Government Gazette.

The definitions in the Dictionary section of the Act are also applicable.

4. Legislative framework for corporations and entities under section 358

The formation of new corporations or entities separate from the council are regulated by two main sources of legislation, the *Local Government Act 1993* (the Act) and the *Local Government (General) Regulation 2005* (the Regulation).

Local Government Act 1993 (the Act), Chapter 12, Part 1, Section 358

The Act contains requirements for all councils in NSW, including county councils, to comply with when considering the formation of a corporation or other entity, or acquiring a controlling interest in a corporation or other entity.

The Act provides that the Departmental Chief Executive (CE) of OLG may from time to time prepare, adopt or vary guidelines relating to the exercise by a council of any of its functions. Pursuant to section 23A of the Act, a council must take any relevant guidelines issued under section 23A into consideration before exercising any of its functions. These Guidelines are issued under section 23A of the Act.

The Act also contains other relevant provisions that specify the overarching principles which it is expected councils will refer to when dealing with any project, regardless of the delivery mechanism, including:

- Section 8A, **Guiding principles for councils**, which sets out principles to follow in the exercise of functions generally, in decision making and in community consultation.
- Section 8B, **Principles of sound financial management**, which provides guidance for investment in responsible and sustainable infrastructure, sound policies and processes as well as funding decisions and risk management practices.
- Section 8C, **Integrated planning and reporting principles** that apply to councils.
- Section 55, **Tendering requirements**.
- Section 358, **Restrictions on the formation of corporations and other entities**.
- Part 12, **Loans**, which regulates council borrowing.

Councils should refer to OLG Publications for other relevant guidelines, circulars and publications www.olg.nsw.gov.au/publications.

Local Government (General) Regulation 2005, Part 13, Division 7, Clause 410

The Regulations outline entities which are excluded from the restrictions under section 358 of the Act.



The S358 guidelines are issued under section 23A of the act

5. What is a Corporation or Entity?

Section 358 of the Act 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.

For the purposes of section 358 of the Act ‘entity’ is defined broadly to mean 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 Regulation as not being within this definition.

Whether an entity is a ‘corporation’ will depend on the nature of the entity and whether it has been incorporated. Associations may be incorporated under the provisions of the Associations Incorporation Act 2009 (NSW), whilst companies may be incorporated under the provisions of the Corporations Act 2001 (Cth).

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.

6. Alternatives to section 358 entity or corporation

Prior to making an application under section 358 councils must give full consideration to and analyse options that are available under the Act to carry out the intended project. If a council proceeds with an application, it is a requirement that the council provide an analysis undertaken to demonstrate that it has given full consideration to other options, and the basis upon which it has determined those options are not suitable.

The following are some examples of alternatives that are available under the Act. Councils are not limited to these specific examples:

6.1 Direct management by council

Pursuant to section 355 of the Act a function of a council may be exercised by the council itself by means of the councillors or employees, or by its agents or contractors. In circumstances where a council has the funding and skills available to undertake a project or service delivery, direct management of the project by a council has the benefit of complete oversight and control by the council.



“Entity” means any partnership, trust, joint venture, syndicate or other body

6.2 Business Units

A council may establish a separate business unit within its existing structure in order to provide projects or services either to the council or the community. A business unit is distinguishable from the council structure as it is created for a defined purpose and in order to undertake a specific activity for commercial purposes. The services provided by a business unit are available on a commercial basis to both the council and potentially other organisations such as other councils, private businesses, government departments etc. A business unit operates with the council being the owner of the business, specifying the level and type of service provided by the business, whilst also being a customer of the business. The business unit itself is the service provider and the owner and manager of any assets used to provide those services. At all times the business unit operates within the local government legislative framework.

Some examples of successful business units operated by NSW councils include business units that provides waste services, airports, laboratory services, and certification services.

6.3 Operating through a council committee

Pursuant to section 355 of the Act, a council may exercise its functions by way of a committee of the council. In forming a committee, councils can determine the functions, powers, membership and voting rights of that committee. Membership is not restricted to councillors and therefore can incorporate other individuals or business representatives.

A committee can be delegated any decision-making powers other than those outlined in section 377 of the Act. However a committee can only exercise a council's regulatory function under chapter 7 of the Act if all members are councillors or council employees. At all times the committee and the activities carried out by the committee operate within the local government legislative framework.

6.4 Joint Organisation

Pursuant to section 355 of the Act, a council may exercise its functions jointly with other council/s, that is by way of a joint organisation. A joint organisation operates as a way for councils, state agencies and other interested groups to collaborate on short and long term projects, by pooling resources and focusing on the strengths that each member organisation can bring to the project. Joint organisations are particularly beneficial for the delivery of infrastructure and investment that will service a region as opposed to one individual council area. More information about joint organisations can be found on OLG's website – www.olg.nsw.gov.au/joint-organisations-strengthen-regional-nsw.

7. Relationship with PPP Requirements

In the event that the Minister's approval is obtained under section 358 and a new corporation or entity is formed for the purpose of carrying out a Public Private Partnership (PPP) Project, councils must also adhere to OLG's PPP Guidelines in respect of the PPP. These guidelines are available on OLG's website www.olg.nsw.gov.au/publications.

8. Integrated Planning and Reporting (IP&R)

The Act provides that Integrated Planning and Reporting (IP&R) must be at the centre of all council plans, activities, resourcing decisions and improvement strategies. As such, any project or works considered by a council as having potential to be undertaken by a corporation or other entity must have undergone a clear planning process that links it to the council's Local Strategic Planning Statement made under section 3.9 of the *Environmental Planning and Assessment Act 1979*, Community Strategic Plan, the Delivery Program and the Operational Plan which are powered by the *Resourcing Strategy (Integrated Planning and Reporting Guidelines for Local Government in NSW, 2018)*.



Integrated Planning and reporting must be at the centre of all council plans and activities

Fundamentally, the identification of a project which requires, for its viability, the quarantining of a significant council asset (especially land) is a policy decision that will have an on-going impact. The principles of sound financial management require that such decisions should be made after careful consideration with an eye to financial effects on future generations. The starting point is the incorporation of the IP&R principles into council's decision-making so that council can readily demonstrate that it has consulted with its community and identified strategic goals to meet those expressed needs and aspirations in a fashion that enables the council to deliver them within council resources.

9. Council Responsibilities

Having regard to provisions of the Act, in particular the Guiding Principles set out in Chapter 3 of the Act, councils have responsibilities that go beyond the responsibilities of a private sector entity or corporation. For example, land owned and controlled by a council is a public asset which is required to be held, administered and used for the benefit of the public and to assist the council in providing the services and facilities it is

charged to provide for the community. Similarly, all rates, charges and fees paid to and collected by a council are public assets. Separate corporations or entities do not fall within the control of the Act and as such may evolve to serve a more business-oriented purpose that ultimately is not in the best interest of the public.

A project undertaken by a separate corporation or entity may entail the provision or contribution by the council of public land or funds to initialise works. Once transferred however, financial and governance information may not be easily visible to the council, OLG and the public, and as such processes may not be as transparent to the public as they would be under traditional council arrangements.

It is the primary role and responsibility of council to ensure that a rigorous assessment of all available options in accordance with these guidelines and giving consideration to the Guiding Principles is undertaken before an application is submitted to the Minister or arrangements are otherwise entered.



Council's responsibilities to act in the best interest of the public go far beyond those of a private sector entity

Part B – Section 358 Application Process

B

10. Documents required for submission to OLG

In order to comply with the requirements under the Act, a council must submit any proposal to form a corporation or entity to the Minister for approval prior to forming an entity

A checklist of documents required for submission to OLG and/or the Minister for assessment can be found in Part D, Form 2.

The following provides more detailed information on each of the required items.

10.1 Council Resolution and Council Self-Assessment Questionnaire (pre-EOI)

Council must pass a resolution to make the necessary application to the Minister for approval to create the entity. This step signals the council's intention to deliver a project or service via a separate entity. It is vital at this early stage that the council determines what it expects delivery of the project via this mechanism will deliver to the community in terms of the public interest. It is expected that at this step council will have before it the material it is intending to submit to the Minister via OLG for assessment under these guidelines and that a resolution is passed on the basis of that material.

A copy of the minutes showing that the council resolved to make an application to the Minister for approval pursuant to section 358 and a copy of the relevant council reports is required.

Council should also complete the self-assessment questionnaire (see Part D, Form 1). The questionnaire aims to draw attention to certain characteristics of an application that may require further attention.

The completed questionnaire is to be submitted to OLG together with the required documents for the initial assessment.

The General Manager(s) of the council(s) involved must certify that the self-assessment and other documents have been prepared in accordance with these Guidelines. This will need to be attached to each submission made to OLG.

10.2 Justification Documents

10.2.1 Clear statement of proposed function or service deliverables for the proposed new entity

Council must provide a clear statement of proposed service deliverables including easily measured key performance indicators for the new entity.

Council must satisfy itself that undertaking delivery of the proposed functions and service delivery will be appropriate having regard to the broad range of council functions expressed in the Act. The council already has power under the Act *to deliver the provision of goods, services and facilities and [to carry out] activities that are appropriate to the current and future needs within its local community and of the wider public, subject to the Act, the regulations and the law generally.*



A Self-Assessment Questionnaire and accompanying documents must be submitted to OLG as part of an application for approval to form a new Corporation

10.2.2 Statement of how the proposed function or service deliverables fit with Council's Strategic Planning Documents

The proposal must have an overall positive effect regarding public or community interest. Council can demonstrate this by providing evidence on how the proposal meets the requirements of the integrated planning and reporting framework. OLG's IP&R guidelines include requirements for councils to prepare a community strategic plan, a resourcing strategy, delivery program and operational plan. Council must comply with all appropriate and relevant steps and provisions in those guidelines and show how the proposed formation of a new entity fits with the above plans. Council is advised to provide relevant excerpts from the plans and to demonstrate how the project relates to each of them.

10.2.3 Statement of how the proposal is consistent with the functions of the council or an existing service that the council provides.

To demonstrate that provision of a service and/or facility is in the public interest the following should be provided in support of the application:

- Evidence supporting the need for the creation of the proposed entity and the delivery of community or public needs
- Detail on the general appropriateness of the council's involvement in the corporation (or other entity) especially if other options are available
- An explanation as to how corporatisation or involvement in the entity would improve the council's economic performance and the ability of the council to carry out its responsibilities
- An explanation of what measures will be employed to ensure that the activities of the corporation or entity will be fully accountable to the community in a manner similar to the requirements imposed on the council under the Act.

10.2.4 Clear analysis of all available options to deliver the proposed functions or services.

The report considered by council prior to passing a resolution to make a section 358 application to the Minister should detail all possible delivery vehicles considered for the proposed functions or services. The report must outline pros and cons of each option and must include an analysis of options to keep the functions within existing council arrangements under the Act.

In making an application, the council is required to identify which alternative options were considered by the council and, in respect to each alternative option, analyse those options and address why that alternative solution would not be in the public interest. If the council has received separate and independent advice on the options it would be beneficial to an application to include that information.

10.2.5 Justification of why the intent/purpose of the proposed new entity cannot be achieved within the existing Local Government Structure

The council needs to demonstrate why the intent/purpose of the entity cannot be attained within the existing local government structure and why an external entity is required. This should be addressed and explained in the application by also making reference to the analysis made under item 9.2.4 and commentary as to why an option within existing arrangements is not available. It is not sufficient to simply state, for example, that the proposed option is more tax effective or that it is for the purpose of obtaining Deductible Gift Recipient (DGR) status from the Tax Office.

10.3 Governance Arrangements

10.3.1 Outline of the proposed governance arrangement for the new entity and how it will be separated from council

Different projects or service delivery ventures present different challenges and require individually tailored management and governance structures. While the most appropriate governance structure will ultimately be the subject of negotiation between the parties, it is appropriate that councils decide, at an early stage, why a section 358 entity is the preferred management structure for the proposal and what the eventual governance and legal structure should look like.

Applications must also demonstrate that the provision of initial capital (including working capital) of the corporation/entity can be funded without impacting the council's current program. Where the creation of the entity is necessary to protect council from legal risk, the application must indicate how the council (both as a corporate body and its members personally) will be protected from any liability that might arise as a result of the activities of the corporation/entity (including the activities of other partners). Any profit or loss sharing arrangements must be fully explained so that the risk to the council can be understood.

Where the creation of the entity is necessary to provide legal separation, the application 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).

The appropriate structures and processes will depend on (among other things) the type and complexity of the project and the stakeholders involved.

10.3.2 Mandated provisions for governance documents of new entity

Council should provide a copy of the proposed governance documents for the entity (Eg. constitution for a company, trust deed for a Trust) including mandated provisions requiring directors of the new entity to remain subject to internal council procedures. The governance documents must include clauses which replicate local government oversight mechanisms which would otherwise apply to a council operating under the Act. This includes, but is not limited to:

- Provision that the governance document may not be amended without first obtaining the consent of the Minister for Local Government
- Provision that the company or entity may not become a member of another corporation
- Provision clearly specifying the objects of the entity, which must be consistent with both the functions of council and any existing service that council provides
- In the instance of a company, provision that the company has the powers set out in the *Corporations Act 2001 (Cwlth)* only to the extent conducive or incidental to carrying out the company's objects
- Provision that council and OLG will have access to the accounting records and all other documents of the entity at all reasonable times
- Provision that the entity will take adequate insurance policies to minimise the risks in the areas of property, public liability, workers compensation, professional indemnity and directors and officer's insurance
- Provision that the entity will be required to appoint an auditor and to publish and submit to council an annual report incorporating audited annual financial reports on the business operations of the entity.
- Provision that separate accounts will be kept meeting the requirements of both the Local Government Act and the Corporations Act (where relevant)
- Provision that the entity and its officers will be subject to local government oversight mechanisms including procurement processes and the gifts and benefits register.



Beware of potential loss of assets and land through the S.358 Process!

In order to retain full transparency of financial and non-financial reporting in relation to activities undertaken by the new entity, council must provide a proposed reporting framework to be mandated in the governance documents of the new entity.

As the governance documents must include an express provision that any changes to the governance documents are subject to the Minister's consent prior to further approval, a separate section 358 application will have to be submitted to the Minister together with the necessary resolution and all supporting documents, as applicable, under these guidelines justifying the amendments sought.

10.3.3 Clear outline of any provision of public assets and council funds to the new corporation or entity

A detailed breakdown of contributions by council to the new entity must be provided. This must include the value of all cash, labour, staff time, materials, assets and land.

Careful thought should be given to requirements that the council could put in place to reduce the risk of losing assets and/or land through the process of forming a new entity (see 9.3.4).

10.3.4 Risk Assessment and Risk Management Plan as per the relevant AS/NZS

It is essential that, at an early stage in the evolution of a proposed formation of a new entity, council develops and puts into operation an appropriate risk management plan for the proposal.

One major consideration in the formation of a separate entity is the potential transfer of risk from the new entity onto the council. This is highly undesirable, and any such risk transfer must be carefully analysed by the council. This analysis should take the form of a Risk Allocation Table or a similar risk analysis tool which identifies risks including actual and preferred risk allocation.

Before risk can be appropriately treated, all potential risks must be identified and analysed. For this purpose, a council should identify, and appropriately document, all actual or potential risk elements associated, or likely to be associated, with the project in accordance with the relevant Australian Standard.

The allocation of any identified risk to the council related parties (such as directors, elected officials, chief executive officers, senior executives, line managers and staff) as well as any mitigation strategies (such as treatment and control options) should also be included. The risk assessment should include sensitivity testing to identify best and worst-case scenarios.



Beware of potential risk transfers from the new entity onto Council!

Depending on the nature of the proposed new entity and its proposed purpose, a number of risk categories may need to be included in the risk matrix or allocation table. More general guidance for the preparation of a risk management plan appropriate to the nature and size of the proposal can be obtained from the relevant Australian Standard.

The following provides example risk elements to consider (other elements may need to be considered depending on the situation):

Financial risks: such risks would include the availability of funds, chances of missing out on required grant funding, the conditions attaching to any loans and/or debt, prospects for re-financing the new entity project should it become necessary, taxation matters and interest rates.

Operational risks: matters for consideration in this context would be issues such as the possible escalation in input costs, projected maintenance/refurbishment costs, failure (financial or technical) of subcontractors, and products/services remaining contemporary/competitive in terms of technology and cost to the public.

Market risks: such risks would include general economic downturn, the effects of competition or downturn in any market segment the project relies on in any way, demographic issues and their effect on demand for services/facilities to be provided by the project and any inflationary consequences.

Network/interface risks: such issues would include the effect of withdrawal or varying (either in provision or price) of a complementary or support network/service, and the interaction between any core service of council/government and contracted services under the agreement.

Industrial relations risk: the possible effects on the project of strikes or other forms of industrial action.

Legislative/government or sovereign risk: this should include any risks associated with exposure to changes in law or regulations that may affect the delivery of works and services by the new entity.

Risks associated with asset ownership: Considerations must include the risk of losing land and/or public assets by providing such assets to the new entity without adequate contractual protection to ensure council will receive back its fair share of land or stratum entitlements via appropriate channels.

Force majeure: the risk that the inability to meet contracted outcomes is caused by major external events either pre or post completion.

Political risk: this should include considerations of the political climate and whether or not the proposal will cause significant political upheaval.

Compensation claims risk: this should provide insights into any potential for compensation claims to council due directly or indirectly to the proposal.

10.3.5 Statement of impacts on existing council staff

Council should undertake an analysis of potential impacts on existing staff and must provide that analysis together with strategies to mitigate negative impacts. Council must address the following:

- Will the proposal result in existing council staff being transferred to the employment of the entity and if so, will the staff be employed on terms and conditions consistent with their previous employment with the council?
- Will the entity guarantee the continued employment of transferred staff for a period of at least 3 years?

Will the entity 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?



There is no fee for the assessment of a section 358 application

10.3.6 Statement of impacts on council's financial position

A careful analysis of potential impacts of the proposal on the council's short-term and long-term financial position must be undertaken. It will be at the Minister's discretion whether the scale of impacts will be acceptable. 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 OLG. However, the 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.

10.3.7 Other

OLG may request other independent specialist consultant reports on certain aspects of the proposal, which will need to be funded and commissioned by council.

11. Assessment of Application

Following assessment of the application, OLG will make a recommendation to the Minister on the council's proposal. As part of OLG's assessment of a council's application, we will have regard to the information provided in accordance with Part B section 9.

Advice will be issued as to whether the council can proceed with the formation of the proposed corporation or entity and if approved, whether conditions are attached to the approval.

The Minister has discretion to consent to an application. Councils should note that compliance with these guidelines does not guarantee that an application will be approved.

11.1 Review Timeframe

The time it takes OLG and the Minister to assess a section 358 application will depend on the nature of the proposal and the clarity of the material provided. Council should ensure that generous assessment timeframes are built into critical project timelines where necessary.

11.2 Fees

Whilst there is no fee charged for the review of section 358 applications, OLG and/or the Minister may request the council to provide additional independent specialist or consultant reports on contentious issues in relation to the proposed arrangements, such as financial management, governance issues, risk management or similar. Any fees for such specialist advice are to be borne by the council.

11.3 Withdrawing a Section 358 Application

Council may withdraw a section 358 application at any time. This must be done in writing to OLG. Withdrawing a section 358 application does not preclude the council from re-submitting the application for assessment at a future point in time.

11.4 No Appeal against Minister's decision

The sole purpose of the requirement to gain the Minister's approval for the formation of a corporation or entity that is separate to council is to protect the public interest and the need for financial transparency for the use of public money. There is no appeal to the Minister against the Minister's decision. However there is no limit to the number of times an application can be re-submitted to the Minister.



Part C – Specific Scenarios





Additional Approvals from the Minister may be required for loans or special rates variations

12. Treatment of Multi-Council Applications

If a section 358 application involves multiple councils, a combined application must be submitted to OLG. However all required documents, certifications and council resolutions must be provided for each council involved.

13. Unsolicited Proposals

Many councils receive unsolicited proposals from the private sector concerning developments. Such proposals can provide great opportunity for council to bring forward developments that may otherwise not have been considered. Unsolicited proposals still need to be market tested to ensure they achieve value for money. Any potential project evolving from an unsolicited proposal must also undergo rigorous testing against the councils strategic planning documents to ensure consistency with the council's and the community's long-term strategic direction.

14. Financing and Borrowing approvals

Where some of the funds to finance the project are to be borrowed, the council will need to establish an appropriate case for such borrowings, given the need for the council to comply with the provisions of Part 12 of Chapter 15 (see section 621 and following sections) of the Act. The intention to borrow must also be outlined in the council's draft Operational Plan.

The approval of the Minister may be needed under sections 622 and 624 of the Act. The council should have regard to any relevant OLG publications, available on OLG's website www.olg.nsw.gov.au/publications.

Section 410(3) of the Act will also need to be complied with, and appropriate approvals obtained from the Minister for Local Government, in respect to a proposal to access any internal loans, that is, the movement of moneys out of a restricted fund, such as a water or sewerage fund.

Where some of the council sourced funds are to be raised by way of increased rates or charges over and above those allowed under the rate pegging provisions of the Act, approval from the Minister for a special rate variation will also be needed pursuant to Part 2 of Chapter 15 of the Act.



Unsolicited proposals must still undergo rigorous testing against IP&R

Part D – Appendices



Form 1: Section 358 Application – Council Self-Assessment Questionnaire

Council Name:

Proposed new corporation or entity:

Purpose of the proposed new corporation or entity: (1 paragraph)

QUESTION	YES	NO
Is there a viable option to provide the proposed functions or services without the need for a separate entity or corporation?		
Is council intending to provide land or another asset to the new corporation or entity?		
Is there likely to be a risk of council losing money or asset/ land value if the corporation/entity fails to deliver the proposed services?		
Is there likely to be a transfer of risk from the newly formed entity to council?		
Is the proposed service/function of the new entity consistent with council's community responsibilities?		
Has the delivery of the service/function/project via a new corporation or entity been planned for as per council's IPR documentation?		
Is the application to form a new entity related to a Public Private Partnership (PPP) proposal?		
Does the formation of the new entity involve other agencies or councils?		
Is the success of the new entity reliant on external grant funding?		
Does the delivery of services or functions via the new entity require borrowings (please specify whether TCorp or bank borrowings will be used)?		
Will council ensure that the new entity conforms to the same reporting and governance mechanisms that councils are subject to under the Local Government Act?		
Will existing council staff be negatively impacted by the proposal?		

✓ Please note: If any of your answers fall within the red, your proposal may involve significant risk and become unviable.

✓ Please note: If any of your answers fall into the blue, OLG may request further information.

Form 2: Required Documents Checklist – S.358 Application

	Text Section	Required Documentation	Provided?	OLG check
1	Form 1 and section 9.1	S.358 Application Council Self-Assessment Questionnaire		
2	9.1	GM Certification that the information provided to OLG is correct		
3	9.1	Council Resolution to make a Section 358 Application to Minister and submit material to OLG for assessment		
4	9.2.1	Clear statement of proposed function or service deliverables for the proposed new entity		
5	9.2.2	Statement of how the proposed function or service deliverables fit with Council's Strategic Planning Documents		
6	9.2.3	Statement of how the proposal is consistent with the functions of the council or an existing service the council provides		
7	9.2.4	Clear analysis of all available options to deliver the proposed functions or services. This must include options to keep the functions within existing council arrangements under the Local Government Act		
8	9.2.5	Justification of why the intent/purpose of the proposed new entity cannot be achieved within the existing Local Government Structure		
9	9.3.1	Outline of the proposed Governance Arrangements for the new entity and how it will be separated from council		
10	9.3.2	Proposed governance documents including mandated provisions for directors of the new entity to remain subject to internal council procedures and typical local government oversight mechanisms		
11	9.3.2	Proposed financial and non-financial reporting framework for the new entity		
12	9.3.3	Clear outline of any provision of public assets and council funds to the new corporation or entity		
13	9.3.3	Proposed structure of profit/loss sharing between council and the new entity		
14	9.3.4	Risk Assessment and Risk Management Plan as per the relevant AS/NZS		
15	9.3.5	Statement of impacts on existing council staff		
16	9.3.6	Statement of impacts on council's financial position		
17	9.3.7	In some cases, OLG may request independent specialist consultant reports on certain issues, which will need to be funded and commissioned by council.	OLG will notify council of any need of special reports if and when required	
18		Notification to OLG of any major variation in the proposed arrangements.	OLG and/or the Minister may request updated versions of any of the above documents	

References and Further Reading

ANZSOG Institute for Governance at the University of Canberra. (n.d.). *Arm's length Entities in Local Government*.

Department of Treasury and Finance, Tasmania. (2008). *Guidelines for Tasmanian Government Businesses, Subsidiary Companies and Joint Ventures*.

ICAC. (2018). *Direct Negotiations: Guideline for Managing Risk*.

NSW Government. (n.d.). *NSW Government Procurement Policy*.

NSW Government Website. (2014). *Guide for Submission and Assessment of Unsolicited Proposals*.

NSW Legislation. (1993). *Local Government Act No 30*.

NSW Legislation. (2005). *Local Government (General) Regulation*.

Office of Local Government. (2018). *Integrated Planning and Reporting Guidelines for Local Government in NSW. Edition 2 – Planning for a sustainable future*.

Queensland Government Treasury. (2009). *Corporate Governance Guidelines for Government Owned Corporations*.

