

# Senior Staff Employment

Discussion Paper  
September 2022



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## Introduction

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In March 2021, ICAC published its report on an investigation into the conduct of councillors of the former Canterbury City Council (Operation Dasha). The report identified a potential corruption risk with the “no reason” termination provision in the standard contracts approved by the “departmental chief executive” of the Office of Local Government (OLG) under section 338 of the *Local Government Act 1993* (the Act) and recommended a review. Arising from this, the parties to the *Local Government (State) Award* (the Award), Local Government NSW (LGNSW) and the three local government unions, the United Services Union (USU), the Local Government Engineers Association (LGEA) and the Development and Environmental Professionals' Association (depa) have requested the Government to amend the Act to remove the ability for councils to determine positions in their organisation structure to be “senior staff positions”.

Under the current provisions of the Act, the holders of positions determined by councils to be “senior staff positions” must be employed using standard contracts of between 1–5 years duration. A council can only determine a position to be a senior staff position if the responsibilities, skills and accountabilities of the position are generally equivalent to those applicable to the Executive Band of the Award (executive level employees) and the total remuneration package is equal to or greater than the minimum remuneration package payable with respect to senior executives whose positions are graded Band 1 under the *Government Sector Employment Act 2013*.

Under the model proposed by the parties to the Award, only the general manager would be employed under a standard contract and all other employees, including senior executives, would be employed under the Award.

The purpose of this paper is to seek the views of the broader local government sector on the changes requested by the parties to the Award.

This feedback will be used to inform the Government’s position on this issue.

The paper sets out the arguments that have been put by the parties to the Award in support of the proposed changes and arguments that have been put by others who don’t support the changes. It also sets out information on how the provisions of the Award currently apply to executive level employees employed under the Award, what legislative changes would be required to give effect to the outcomes sought by the parties to the Award and the transitional arrangements that may apply were the Act to be amended as suggested.

Councils are invited to make submissions indicating whether they would support the making of the legislative amendments requested by the parties to the Award set out in this paper. Information on how to make a submission is set out at the end of this paper.

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## What are the current arrangements for the employment of council senior staff?

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Currently, the default position is that all council staff other than the general manager are employed under the Award unless the governing body of the council has determined their position to be a "senior staff position" under section 332 of the Act.

Councils may only determine a position to be a "senior staff position" if:

- the responsibilities, skills and accountabilities of the position are generally equivalent to those applicable to the Executive Band of the Award, and
- the total remuneration package payable with respect to the position is equal to or greater than the minimum remuneration package payable with respect to senior executives whose positions are graded Band 1 under the *Government Sector Employment Act 2013* (currently \$201,350).

The holders of identified senior staff positions are employed under a fixed term contract of 1-5 years based on the standard contract of employment for senior staff approved by the "departmental chief executive" of OLG.

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## What are the arguments for removing the ability for councils to determine positions to be "senior staff positions"?

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The parties to the Award argue that removing the ability for councils to determine positions to be senior staff positions will offer the following benefits:

- It will provide all council employees (other than the general manager) the security of being covered by the Award and subject to the jurisdiction of the Industrial Relations Commission of New South Wales (IRC) in the regulation of their employment.
- It will remove the insecurity in the employment of senior staff (other than the general manager) that makes them susceptible to improper pressure from councillors and others by providing them access to the 'unfair dismissal' jurisdiction of the IRC. As demonstrated by ICAC's report arising from Operation Dasha, this is particularly an issue for executive level employees who exercise planning and other regulatory functions. Future dismissals of executive level employees (other than the general manager) would need to be procedurally and substantively fair and for a 'valid reason'.
- It will ensure that all council employees (other than the general manager) have the same minimum terms and conditions of employment.
- It will assist with attracting and retaining executive level employees (other than the general manager) by giving councils flexibility to offer terms and conditions of employment that are not available under the

statutory contracts. Provided the award minimums are met, councils would be able to agree on terms and conditions of employment that they consider appropriate for the position.

- It will more readily promote the development of talented council staff to take on leadership roles. The lack of security of employment of senior staff operates as a significant disincentive for talented employees, particularly in regional areas, to take on more senior roles in councils.

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## What are the arguments against removing the ability for councils to determine positions to be “senior staff positions”?

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The following arguments have been put against the changes proposed by the parties to the Award:

- It will remove the current flexibility councils have to determine whether executive level employees are employed under the Award or a statutory contract.
- It will diminish accountability by senior staff for their performance (rather than dismissing poor performing executive level employees for “no reason” or by not renewing their contract, councils would be expected to performance manage the employees, afford them procedural and substantive fairness, and have a ‘valid reason’ for their dismissal).
- It will reduce the current flexibility that allows general managers to “build” senior management teams.
- It will limit the ability of councils to attract talented executive level employees by offering attractive and competitive remuneration packages (though this could be addressed by offering remuneration and other benefits that are above the award minimums).

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## How does the Award currently apply to executive level employees?

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It should be noted that many councils have chosen not to determine the positions held by their executive level employees to be senior staff positions under section 332 and the holders of those positions are employed under the Award and not on statutory contracts.

Councils that operate under these arrangements have indicated that they do not impede their flexibility or limit their ability to ensure that executive level employees are accountable for their performance.

Common misconceptions about the Award include the following:

### **The Award diminishes the accountability of executive level employees for their performance and the delivery of outcomes**

Clause 10 of the Award expressly recognises that it is the intention of the parties to the Award to create a flexible award in which employers can increase the overall efficiency and effectiveness of local government services.

The Award encourages councils to consider developing enterprise key performance indicators which are specific to local needs and to use these to develop performance targets for teams or individual employees.

Councils can have performance agreements with Award employees setting out agreed performance criteria. Such performance agreements may be implemented as contractual conditions when offering employment to new employees, or may be implemented with existing employees in response to specific circumstances (e.g. performance improvement plans may be implemented as a form of disciplinary action). Even if there is no performance agreement, at common law, employees have a duty to obey their employer's lawful and reasonable directions and to exercise reasonable care and skill in performing their duties.

### **Councils cannot reward high performance under the Award**

The Award is a minimum rates award (except for trainees) which sets the minimum terms and conditions of employment at the *industry level*. The Award requires councils to have a 'salary system' with a structure that complements the entry level rates of pay and skill descriptors in the Award by identifying grades. A council's salary system therefore represents the minimum Award rates at the *workplace level*.

Salary system rates of pay are only one component of the 'total reward' that councils provide to employees for their labour. Other components of the 'total reward' include, for example, allowances, statutory benefits (e.g. superannuation), and above-award payments and benefits (e.g. higher salary, performance bonuses, additional leave, etc). Provided the Award minimums and relevant statutory requirements are met, councils have flexibility to offer above-Award payments and other benefits to reward high performance.

### **Councils cannot restructure senior management teams under the Award**

Councils are free to restructure their operations under the Award subject to complying with minimum notification and consultation requirements.

Subject to complying with the workplace change provisions of the Award, where the restructuring of the council's operations results in staff becoming redundant, councils may terminate their employment with appropriate notice (or payment in lieu of notice) and a severance payment. The entitlement under the Award for a redundant employee with 10 years or more service is 39 weeks comprising of 5 weeks' notice (or payment in lieu of notice) and 34 weeks' severance. This is one week more than the maximum termination payment available under the current approved standard contract of employment for senior staff.

### **The Award diminishes councils' ability to take disciplinary action against executive level employees**

The Award allows councils to undertake disciplinary action where an employee's work performance or conduct is considered unsatisfactory (including summary dismissal in the case of serious misconduct). Penalties for unsatisfactory work performance or conduct include (but are not limited to):

- demotion to a lower paid position or a lower salary point/step
- suspension without pay
- termination of employment.

### **Councils may be exposed to an increased risk of unfair dismissal proceedings**

While it is correct that executive level employees covered by the Award can access the IRC for relief from alleged unfair dismissal, it should also be noted that:

- Only 5% of unfair dismissal proceedings before the IRC result in reinstatement.
- The maximum monetary compensation that can be awarded by the IRC for unfair dismissal is 26 weeks (compared to 38 weeks under the current approved standard contract of employment for senior staff).
- The IRC is a cost-effective and efficient mechanism for the resolution of disputes involving the termination of employment of executive level employees compared to other available mechanisms:
  - All employees (including senior staff and Award employees) have access to remedies for unlawful termination of employment - see for example section 772 of the *Fair Work Act 2009* (Cth), sections 241 and 248 of the *Workers Compensation Act 1987* (NSW) and NSW and federal anti-discrimination legislation. These

legislative remedies have a reverse onus of proof, meaning the employer must disprove the employee's alleged reason for dismissal (usually by proving that the employer had a valid and lawful reason for the dismissal).

- All employees (including senior staff and Award employees) have access to remedies for breach of contract. Claims for breach of contract usually go before the Supreme Court of New South Wales and the Court has broad discretion to award damages to remedy a breach.
- The IRC's power to award costs against a party in unfair dismissal proceedings is confined to where, in the opinion of the IRC, a party unreasonably failed to agree to a settlement of the claim or where the applicant's claim is frivolous or vexatious. This can be contrast with proceedings for unlawful termination of employment and breach of contract where legal costs usually follow the event and are payable by the unsuccessful party.

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## What legislative changes are required to give effect to the outcomes sought by the parties to the Award?

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Legislative amendments are required to give effect to the outcomes sought by the parties to the Award. The required amendments are quite complex and wide ranging and are set out in detail below so that councils can have full visibility of their likely impact.

Some of these amendments may need to be subject to transitional arrangements to reflect the fact that some council staff may continue to be employed under existing senior staff contracts after the relevant provisions have been repealed.

### **Section 332 - Determination of the organisation structure**

Section 332 requires the governing bodies of councils, after consulting with the general manager, to determine the senior staff positions within the organisation structure of the council, the roles and reporting lines (for other senior staff) of holders of senior staff positions, and the resources to be allocated towards the employment of staff. It also sets the criteria for identifying a position to be a "senior staff position".

Section 332 would need to be substantially amended to remove the option of determining senior staff positions and to remove subsections (2) and (3) which set out the criteria for identifying a position to be a senior staff position.

One option may be to amend section 332 so that it simply provides as follows:

- The council must, after consulting the general manager, determine the resources to be allocated towards the employment of staff.
- The general manager must, after consulting the council, determine the

positions within the organisation structure of the council.

- The positions within the organisation structure of the council are to be determined so as to give effect to the priorities set out in the strategic plans (including the community strategic plan) and delivery program of the council.

### **Section 223(1)(j) – Role of the governing body in determining senior staff positions**

Section 223(1)(j) provides that it is the role of the governing body to determine the senior staff positions within the organisation structure of the council. This provision will become redundant if councils no longer have the option of determining senior staff positions under section 332 and would need to be repealed. The governing body would still be responsible for determining the resources to be allocated towards the employment of staff.

### **Section 337 – Consultation with councillors on the appointment and termination of senior staff**

Section 337 provides that the general manager may appoint or dismiss senior staff only after consultation with the council. The removal of the ability for councils to determine senior staff positions will make this provision redundant, and it will need to be repealed.

### **Section 338 - Nature of contracts for senior staff**

Section 338 requires general managers and the holders of senior staff positions to be employed under fixed term contracts of between 1–5 years based on the standard contracts approved by the "departmental chief executive" of OLG.

Section 338 would need to be amended to omit any references to "senior staff" so that it applied only to general managers' contracts of employment.



### **Section 340 –NSW Industrial Relations Commission’s jurisdiction in relation to senior staff**

Section 340 of the Act provides that the employment of the general manager or another senior staff member, or any matter, question or dispute relating to any such employment, is not an “industrial matter” for the purposes of the *Industrial Relations Act 1996* and therefore cannot be considered by the IRC.

Section 340 would need to be amended to exclude references to “senior staff” and to limit its operation to general managers. This would, in effect extend the jurisdiction of the IRC to the employment of all council staff other than general managers.

#### **Employment protection provisions**

Amendments would be required to the provisions of the Act that protect the employment of staff affected by amalgamations to remove the current exclusions for senior staff. General managers would continue to be excluded from the application of the relevant provisions. In practical terms, this would extend the employment protections under the Act to all staff other than general managers.

The following provisions will need to be amended to remove references to “senior staff”:

- Section 218CA – Maintenance of staff numbers in rural centres (This currently excludes senior staff from the definition of “regular staff” for the purpose of calculating the number of staff employed at a “rural centre” prior to an amalgamation for the purposes of that section)
- Section 354C – No forced redundancy of affected staff members during proposal period
- Section 354D – Preservation of entitlements of staff members

- Section 354F – No forced redundancy of non-senior staff members for 3 years after transfer
- Section 354G – Lateral transfer of non-senior staff members
- Section 354H – External advertising not required in certain circumstances
- Section 354I – Limitations on transfer of work base of non-senior staff

The following provisions of the *Local Government (General) Regulation 2021* (the Regulation) would also need to be repealed:

- Section 406C - Entitlements of senior staff on transfer following amalgamation or boundary alteration
- Section 406D - Entitlements of senior staff not transferred on boundary alterations.

#### **Section 354A - Ministerial approval for termination payments**

Section 354A requires ministerial approval to be given for termination payments to be made to general managers and senior staff unless exempted by the Regulation. Section 405 of the Regulation in turn exempts from the requirement for ministerial approval, termination payments that do not exceed the value of the general manager’s or senior staff member’s total remuneration package over the 12 months preceding the termination of their employment.

Amendments would be required to both section 354A of the Act and section 405 of the Regulation to remove references to “senior staff,” limiting their application to general managers.

Section 405 of the Regulation would also need to be amended to incorporate the current provisions of section 332(3)(a)–(d) of the Act. These set out what comprises the total remuneration package. Because section 332(b) of the Act will need to be repealed (see above), its provisions will need to be incorporated into section 405 for the purposes of calculating the

value of a termination payment under that section.

**Section 217(1)(c) of the Regulation – Annual reporting of senior staff remuneration**

Section 217(1)(c) of the Regulation would need to be repealed.

This currently requires councils to publish a statement in their annual reports of the total remuneration comprised in the remuneration packages of all senior staff members (other than the general manager) employed during the year, expressed as the total remuneration of all the senior staff members concerned (not of the individual senior staff members) and including totals of each of the following:

- the total of the values of the salary components of their packages
- the total amount of any bonus payments, performance payments or other payments made to them that do not form part of the salary components of their packages
- the total amount payable by the council by way of the employer's contribution or salary sacrifice to any superannuation scheme to which any of them may be a contributor
- the total value of any non-cash benefits for which any of them may elect under the package
- the total amount payable by the council by way of fringe benefits tax for any such non-cash benefits.

**Section 217(1)(d) of the Regulation – Annual reporting of labour statistics**

Councils are required to publish labour statistics in their annual reports including in relation to the number of persons employed by the council as senior staff members. The requirement for councils to report on the number of persons employed as senior staff members would need to be repealed.

**Other consequential repeals**

The following provisions of the Act would also need to be repealed:

- The Dictionary definition of "senior staff".
- Section 334(2) – This provides that the position of general manager is a "senior staff position".

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## Senior executive remuneration under the Award

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The minimum annual salary under the Award for executive level employees ranges from \$100,480 (Band 4 / Level 1) to \$187,569 (Band 4 / Level 4). The Band 4 / Level 4 rate is less than the current minimum permissible remuneration for holders of senior staff positions which is \$201,350.

It should be noted that the minimum remuneration for holders of senior staff positions is inclusive of salary, compulsory employer superannuation contributions and other benefits including any fringe benefits tax payable on such benefits. Also, senior staff do not receive some of the benefits that Award-covered employees may be entitled to (e.g. allowances, overtime, portability of sick leave, protection from unfair dismissal, etc).

The Award requires councils to have a 'salary system' with a structure that complements the entry level rates of pay and skill descriptors in the Award by identifying grades. If the Act were to be amended to remove the option for councils to determine positions to be senior staff positions, some councils may need to review their salary system structures to ensure that they have appropriate minimum rates at the workplace level to attract and retain executive level employees.

Attraction and retention issues could also be addressed by offering additional remuneration (e.g. market allowances) and other above-Award benefits as part of the 'total reward' that councils provide to employees for their labour.

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## Transitional arrangements

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If the Act were to be amended to remove the option for councils to determine positions to be senior staff positions, it would be necessary to put in place transitional arrangements for the current holders of senior staff positions employed under the standard contracts.

Possible transitional arrangements may include giving current occupants of senior staff positions who are employed under the standard contracts the option to either:

- transition immediately to the Award, or
- remain employed under their current employment contract until it expires.

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## Submissions

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### Have your say

We now want to hear from you.

### Key questions to consider:

- Do you agree that all council staff other than the general manager should be employed under an award such as the *Local Government (State) Award*?
- Would you support amendments being made to the *Local Government Act 1993* to remove the option for councils to determine “senior staff positions” and to employ the holders of those positions under statutory contracts?
- Do you have any comments on the amendments to give effect to this outcome that are set out in this paper?
- If the Act were to be amended as has been suggested, what transitional arrangements should apply to current holders of senior staff positions?

### How to make a submission

Submissions may be made in writing to the following addresses:

By email: [olg@olg.nsw.gov.au](mailto:olg@olg.nsw.gov.au)

By post: Locked Bag 3015  
NOWRA NSW 2541

Submissions should be labelled “senior staff employment” and marked to the attention of OLG’s Council Governance Team.

### Closing date

Close of business, 15 November 2022.

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- your email address
- the name of your organisation (if provided)

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### Further information

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