Who'd want to be a GM in local government?

A Position Paper on the employment of general managers and senior staff in local government

This paper is prepared as part of the current debate on reforming local government and, in particular, to challenge and inform the deliberations of the General Managers' Contracts Working Party, the Local Government Acts Review and the Independent Local Government Panel.

This is the problem

The general manager of a Council is the only employee appointed by the Council, whose performance is managed by the Council and whose future is entirely in the hands of the Council.

This makes the position of general manager the most vulnerable employee in the Council. The current provisions in the Local Government Act requiring term contracts and excluding access to the Industrial Relations Commission; the Standard Contract for GMs allowing termination of employment regardless of their performance; the cyclical nature of four-year electoral terms for the Council and the challenge that provides threatens the long-standing Westminster tradition of public sector employees providing advice without fear or favour. This must change.

Some history

In 1991 the Minister the Local Government Gerry Peacocke issued a Discussion Paper "Reform of Local Government in New South Wales Proposals for Legislation". Its purpose was to raise issues for debate in reviewing the Local Government Act 1919.

This Paper focuses solely on the employment changes introduced as a result of this process.

The employment of senior staff at the time was regulated by the Local Government Senior Officers Award - an industrial instrument of the Industrial Relations Commission of New South Wales providing regulation and protection for those senior employees filling positions as town or shire

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clerks, chief engineers and health and building surveyors, planners and others. These employees were all permanent continuing employees.

The Award provided a 17 grade structure into which all councils were placed by agreement between the parties to the Award acting through a "grading committee" - predominantly influenced by budget as a guide to the size of the council and its functions but also by other relevant considerations to broaden evaluation beyond financial responsibilities.

In the late 1980s inspectors of the Department of Local Government in their reviews of councils began to impose a common solution on every Council they visited. They invariably recommended flatter structures and the employment of senior employees on term contracts and they did this independent of any consultation with the industry itself. At the same time, a discussion paper prepared by a self-important town clerk encouraged the introduction of term contracts as a way of distinguishing senior managers from the rabble.

And in that context we also published a discussion paper titled "Fixed Term Contracts and Local Government" in 1990. It makes interesting reading and concludes by saying this:

"If the best way local government can get people to perform is to have them fearful of being sacked, then something is wrong. Proper human resources management needs to tap into and understand why people come to work, why they like it, and why they don't, to develop a pride in work and its results, how to delegate authority and decision-making, how to make work useful and meaningful and how to encourage and foster job satisfaction.

Fixed term contracts are a distraction.

Until these questions are addressed, no one is serious about the reform and improved efficiency and effectiveness of local government."

That was 23 years ago and we are entitled to speculate about the seriousness of the current reform and its continued focus on term contracts.

The industry responded to the emerging debate and the challenge to the DLG rigidity, created a Working Party and cooperatively the LGSA, the four unions and the professional bodies (and even the Department of Local Government) spent a year developing Performance Development and Employment Contracts Guidelines. This document placed the issue of term contracts in its proper context by allocating the concept one page of the 120. The Working Party also developed a draft model contract to which everyone agreed, understanding that the employees who may be invited to sign up to such a contract did so retaining the protections provided by their award coverage and their access to the Industrial Relations Commission.

On that one page, the following agreed wording is found:

There have been moves in recent years in the Federal and State Public services as well as local government to introduce term contracts for senior officers, managers, and senior executive employees. It is believed by those who advocate the introduction of term contracts that they make employees more productive, accountable, and provide more flexible employment arrangements. There is no evidence to support these views and they are questioned. There is no common view in our industry as to whether employment contracts should be introduced. Employment contracts should not be mandatory, but each Council should be free to consider the type of employment arrangement most

suited to its needs and practices. Contracts should be a voluntary agreement between the employer and the employee.

The DLG representatives then found themselves constrained by government and departmental policy and withdrew their endorsement of the document but the remainder of the Working Party continued to support it.

This was the context into which Peacocke's Discussion Paper landed. It proposed at 7.2(3):

Councils will be required to appoint a general manager. The general manager will be appointed on a performance-based employment contract for a maximum period of five years. This contract may be renewed at the end of this period.

All other senior staff are to be appointed on performance-based employment contracts. The definition of "senior staff" and the term of each contract will be determined by the Council. All contracts are to have a five-year maximum term which may be renewed.

Guidelines will be provided to assist councils in the development of employment contract.

The proposal to introduce term contracts consistent with "reforms" in the State public sector reflected the view of the State that there were no features distinguishing senior employment as an employee of the Crown from senior employment in local government. This was a fundamental and dangerous misunderstanding of what are clearly evident differences between State and local government employment. A misunderstanding which continues to this day.

This proposal was immediately rejected by the four unions party to the Local Government Senior Offices Award - the Federated Municipal and Shire Council Employees Union, the Local Government Engineers Association, the Health and Building Surveyors' Association and, significantly, the Local Government Clerks Association and the professional body to which they belonged, the Institute of Municipal Management (IMM).

In a subsequent submission to the Legislative Review Unit of the DLG in October 1991, the IMM argued:

The Institute is concerned about the potential threat to professionalism and integrity that could arise if fixed term contracts of employment are adopted. Staff might then be pressured by councils either to provide advice of a certain type or to assess the performance of an employee in a certain manner, under threat of non-renewal of a contract. This is one reason why the Institute recommends that fixed term contracts be not required.

There is significant concern among members regarding the proposal that appointment of general managers - " and all other senior staff" - be on performance-based employment contracts for a maximum period of five years. Participants at the Institute's workshops were seriously concerned about the likely politicisation of appointments of general managers and senior staff, a development which could severely impair the efficiency, effectiveness and credibility of local government.

The temptation for staff to not give "full and frank advice" as the time from renewal of a contract draws near is a further source of concern. So too is the likely excessive mobility of senior officers, which will reduce the continuity of advice to councils. And for these questionable benefits, councils will have to pay more in compensation for the loss of tenure in senior staff appointments.

The Institute is therefore firmly of the view that performance-based employment agreements are to be preferred to fix term performance-based employment contracts. Such agreements would still yield the desired benefits in improved performance, but without the cost of excessive mobility, loss of loyalty to the employer, and potential pressures on senior staff at the end of the term. Councils should, the Institute believes, have the option to choose the type of employment agreement based prefer.

Similar concerns, reflecting the opposition to term contracts by the four unions and all professional bodies to which employees may belong were expressed to the Legislative Committee.

What are the differences between senior employment with the state and local government?

The long-standing Westminster tradition of public servants providing impartial advice to government protects the integrity of government and its decision-making processes. There is a public expectation that advice provided is professional and independent and that the politicisation of the bureaucracy is unacceptable. The removal of a permanent head by an incoming government is regarded with suspicion by the community and occurs rarely, although sadly, increasingly.

Permanent heads and other SES employees enjoy an anonymity which allows them to live normal lives outside their employment. Their recommendations to Government are not public and the community is invariably unable to identify them or recognise them.

In local government, things could not be more different. A general manager living in their own local government area (invariably the case outside the city metropolitan area and often the case within it) is identifiable with the Council every day and in all private activities conducted in the area.

All aspects of the general manager's life, whether that's shopping, going to the kids' school if it's local, eating out, coffees, the pub, recreation generally or simply getting about, provide daily opportunities for ratepayers and residents to engage with them to express a view about Council decisions of activities. And they do. Nowhere is safe.

This is a level of access and vulnerability unimagined by members of the SES.

And while governments may come and go, rarely do they come and go with the frequency of changes in elected councils and never with an incoming elected representative intent on "getting the GM". The Director General of the Division of Local Government Ross Woodward, for example, could walk down the street anywhere and enjoy a level of anonymity never available to a local government general manager. Why does the State not recognise this?

And this access also applies to employees of the Council who provide reports bearing their name which can be published in local media, discussed in an open Council or community meeting, and which invite observations or complaints outside of work and at any time. Directors of Planning and Environment at Councils can never rely on not being approached in their private time by a disgruntled applicant or a disgruntled objector. Most applications have one or another and sometimes many.

General managers traditionally move through a career path that sees them uprooting their family from their social networks and educational institutions to take up positions which may be hundreds of kilometres from home. There is a significant social and family cost in these moves - kids and partners moving away from friends, recreational and sporting interests and out of schooling - and

before 1993 employees moved understanding this significant risk but that they would have the protection available to permanent employees of the Council.

Term contracts and the ability for them to be severed "for any other reason" other than performance penalises employees taking general managers positions who uproot their families and find themselves employed at the whim of a Council. This is unacceptable – it's unfair, it reduces the field of candidates for positions, compromises the capacity of the Council to appoint the best candidate for the job and erodes confidence in public administration. It is a situation without parallel in the SES.

Local Government Act 1993

It is now a matter of history that the Government resolved to implement term contracts in the industry for senior staff and, after a couple of years of confusion and industrial disputes, a further amendment to the Act (for which depa takes responsibility) restricted the designation of Senior Staff to employees on a TRP above the minimum level of the NSW PS SES.

The Five Year Review of the Act

When the 1993 Act was made it was made with the understanding that it would be reviewed in five years to make sure that the changes from the 1919 Act were achieving what they were intended to achieve.

depa had been successful in 1995 with an Amendment Act restricting councils to determining positions as Senior Staff only if their remuneration package was over the minimum entry level for the SES - thereby restoring Award coverage and access to the Industrial Relations Commission for a good percentage of our members. We lobbied hard during that period and made a submission to the Five Year Review and in October 1998 Minister for Local Government Ernie Page announced the outcomes of the review.

The Minister recommended to Cabinet *"that senior staff should continue to be employed on contract, but that the nature of those contracts should be open-ended rather than fixed. Continuation of employment should be perpetually based upon a condition of meeting performance indicators - that is, through a performance-based employment contract"*

The Minister's letter of 6 October cited a range of unintended consequences from term contracts, acknowledged that they were not serving the industry well and proposed to remove them is a requirement under the Act. Nice one, Ernie.

But sadly, the dead hand of the Cabinet Office convinced Cabinet that such an action would have blowback implications to the Government's own SES (absolute arrant nonsense!), failed to acknowledge the differences between senior staff employment in local government and the State that might support different arrangements and rejected the finding of the Five View Review.

In the Minister's letter to us he said that the Department would assist the industry better manage the performance of senior staff and the Department would prepare guidelines *"which will assist councils in better addressing the strategic importance of management planning and its essential role in the accountability process. The MEU, LG&SA, IMM and HABSA will be consulted in the preparation of these guidelines."*

What a different industry we would be dealing with now had the recommendations of the Review not been thwarted by a Cabinet Office ignorant of the reality of local government. Sometime later the DLG began fall in line with the dead hand of the Cabinet Office: an attitude which continues to this day.

How did it all work for senior staff from 1993 to 2012?

Much of the focus of the Standard Contracts Working Party and the Local Government Acts Review is on whether or not the changes in the 1993 Act delivered what they were meant to deliver. All that can really be said authoritatively is that all that has been delivered is consistency with the Crown.

Excluding Senior Staff from "industrial arbitration" has not been delivered. The Industrial Relations Commission either by consent of the parties or by misadventure (on one occasion where the Council didn't realise a dispute involving a senior staff employee was being conducted outside the Commission's jurisdiction) has dealt with disputes affecting Senior Staff. It remained open for the parties to a dispute to agree to use the expertise resident in the IRC to resolve problems for employees classified as Senior Staff.

And in 2005 the Commission (Haylen J) irretrievable damaged section 340 of the Local Government Act 1993 further by finding the Commission had power to make orders under section 106 of the Industrial Relations Act 1996 if a contract was "unfair, harsh and unconscionable".

In doing so the Commission ordered "payment in lieu of an additional nine months notice and a bonus payment of $4000 taking into account his performance in rectifying the negative financial position of the Council" – a total payout of $143 000.

One other application under section 106 has been made and settled confidentially and the authority of the Haylen J decision has assisted, at least on one occasion, resolution of a dispute at one Council by encouraging a process under this dispute resolution clause of the Standard Contract.

It remains in the background as a cautionary lesson to councils and remains an avenue of opportunity for Senior Staff. We have received advice that the orders capable of being made by the Commission are not restrained and could include orders for a renewed or extended term, amongst other opportunities.

Section 340 has failed to exclude access to the Commission, hasn't achieved what was anticipated and needs to be removed from any future Act.

What's wrong with the Standard Contract?

The Standard Contract was developed in 2005 and 2006 in a process convened by the Department of Local Government and restricted to the employers' organisation, the Local Government and Shires Association and the Local Government Managers' Association.

The DLG intended that the unions would be excluded, notwithstanding that the unions had for years provided advice to members about contractual arrangements arising from the 1993 Act. This was a short-sighted decision by a Department which traditionally has refused to accept that the unions are "stakeholders" in the industry or worthy of participating in a process like this.

Kerry Hickey in his brief period as Minister for Local Government would regularly instruct the Department to consult with the unions on employment-related issues.

The absence of the unions in these discussions made it easier for the DLG to bluff the LGMA that the Industrial Relations Act prevented the payment for untaken sick leave and because of that prohibition, the Standard Contract was not capable of incorporating provisions allowing it. The DLG and the LGSA were keen to discourage the minority of councils which did provide some arrangement to pay for untaken sick leave on resignation or retirement and happily embraced a Standard Contract that did not allow for an employee to continue an existing entitlement if appointed to a Senior Staff position. The LGMA lacked the expertise to reject the bluff.

(Note: the Industrial Relations Act does not prohibit employers reaching agreement with employees or establishing conditions of employment that allow for the payment of untaken sick leave. The Act prohibits industrial instruments made by the IRC from incorporating this arrangement but does not intrude into common law entitlements where an employee is offered and accepts this arrangement as a condition of their employment.)

This became a running sore for a number of years and while there were discussions in 2008 or so to try and resolve the matter, no resolution was found. During this time at least one GM worked for a number of years without signing a contract and one or more others retained it with a wink and nod, notwithstanding its prohibition in the Standard Contract. Some councils acted on advice when they did have an employee with this as a condition of employment, to pay it out before moving to a Senior Staff position - a decision and payment both beyond the policy that created an entitlement available only at resignation or retirement. Uh oh.

While the issue of term employment is beyond the consideration of the Standard Contracts Working Party, it does fall within the jurisdiction of the Working Party to make changes to the 38 weeks notice provision. There have been too many good, performing general managers removed for political reasons at the whim of a new Mayor and/or Council and this must stop.

The removal of a good employee with 38 weeks pay because of “the relationship” is unacceptable. The employment relationship between an employer and employee should never be severable without reasons - or with insufficient payment. No one should excuse unfair dismissal under the guise of it being an acceptable resolution to a “relationship issue”.

The Working Party should consider the provisions that once applied in the Local Government (State) Award at clause 29 Term Contracts which required a Council to provide a clause in a term contract “that a further term contract for the position shall be offered to the employee if the employee’s performance remains at a satisfactory level during the term of the contract and the position continues to exist at the end of the term of the contract”. This was agreed to be inserted in the Award by the employers and the unions to protect employees against being “let go” when their performance ordinarily would be rewarded with a further term.

The GM’s Standard Contract Working Party has been told by the Division of Local Government that the DLG is not looking at doing away with contracts but reviewing what does not work and what could be done better and that any recommendations will be aligned with the recommendations of the independent panel and the Acts Review. While these restrictions are acknowledged, the broader context of review encourages abandoning those restrictions.

Recommendations for the consideration of the Standard Contract Working Party

1 Things that can be fixed recognising the DLG's restrictions:

1. Step back from the mandatory obligation of the Standard Contract and allow it to be discretionary to allow a Council and a GM to reach agreement on employment conditions.

2. Acknowledge that the ability to terminate the contract for reasons other than performance with 38 weeks' notice or payment in lieu thereof maybe unfair, harsh and unconscionable and increase any payment to 52 weeks.

3. Acknowledge that no contract should be terminated for reasons other than poor performance without mandatory dispute resolution.

4. Introduce a provision consistent with that which operated by agreement between the employer and employee organisations in the Local Government (State) Award "that a further term contract for the position shall be offered to the employee if the employee's performance remains at a satisfactory level during the term of the contract and the position continues to exist at the end of the term of the contract."

5. Introduce discretion in the dispute resolution clause to allow the Council and the employee to reach agreement on a mediator at the time the contract is signed.

6. Introduce discretion to allow a Council and the employee to agree to a member of the Industrial Relations Commission, with local government experience, to be agreed to conduct any dispute resolution pursuant to the contract.

7. Introduce discretion to provide an annual cash performance bonus to provide a proper performance reward rather than paying out any bonus arrangement each week for the next performance year.

8. Introduce discretion to continue an entitlement to payment for untaken sick leave for any existing employee of the Council moving into a Senior Staff position.

2 Things that can be fixed by someone else:

1. Acknowledge the failure of the intention of section 340 and delete it in any future legislation as part of the reform agenda.

2. Accept the jurisdiction of the Industrial Relations Commission as providing an acceptable safety net and process for Senior Staff, including general managers.

3. Accept the undeniable difference between employment in local government and the Crown and the validity of different arrangements for executive staff between the tiers of government by providing broader discretion to local government. That is, have the State and the DLG butt out. This will become a more significant issue in larger, amalgamated councils.

4. Provide better protection for Council employees against attacks by councillors and/or nutcases in the community.

5. Encourage the Independent Review Panel in its examination of the appropriateness of the relationship between the State and local government to recommend greater autonomy for local government to make this a more mature relationship and less regulation and oversight in employment by the Division of Local Government.

I'm happy to speak to this with anyone.

Ian Robertson
Secretary
24 January 2013