

2 November 2017

Chief Commissioner Kite  
Industrial Relations Commission of NSW  
Level 1, 47 Bridge Street  
Sydney NSW 2000  
By email: irc\_commissioner\_support@justice.nsw.gov.au

Dear Chief Commissioner,

**Industrial dispute 2017/00293289 - depa - LGNSW**

This letter concerns the industrial dispute before the Commission referenced 2017/00293289. A compulsory conference was held before you on 18 October 2017 and a further compulsory conference has been scheduled for tomorrow, 3 November 2017 at 2pm.

At the last compulsory conference, you directed depa, a party to the dispute, to extend an invitation to the proper officer of Local Government Super to attend the next conference for the purpose of providing assistance in the resolution of the dispute.

I am the Chief Executive Officer of Local Government Super, and I will attend tomorrow's conference, together with my Deputy CEO, Donna Heffernan. This letter provides some information in advance of the conference, with a view to assisting in the resolution of the dispute. I will provide a copy of this letter to each of the parties to the dispute.

**Background**

Local Government Super is a regulated superannuation fund governed by a trust deed. The trustee is LGSS Pty Limited. The trustee's board comprises 8 directors, 4 of whom have been appointed by Local Government NSW (a party to the dispute) and the other 4 of whom have been appointed by the three unions that are parties to the dispute (including depa).

The trustee and the fund are regulated by superannuation law, including the Superannuation Industry (Supervision) Act 1993. Part 9 of the SIS Act sets out the equal representation rules that apply to employer-sponsored superannuation funds. Those rules underlie the composition of the trustee's board as identified above. The relevant regulators are the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission.

Local Government Super comprises 3 accumulation benefit divisions and 3 defined benefit divisions, as follows:

Accumulation benefit divisions	Defined benefit divisions
Accumulation Scheme (Schedule 1)	Retirement Scheme (Schedule 2)
Account-Based Pension Plan (Schedule 6)	Non-Contributory Scheme (Schedule 3)
Public Offer Division (Schedule 7)	Defined Benefit Scheme (Schedule 4)

The main body of the trust deed applies to the fund in its entirety. As indicated in the table above, there are 6 separate schedules to the trust deed, governing the 6 different divisions (Schedule 5 governed a division which no longer exists). The trust deed and schedules are available on our website (<https://www.lgsuper.com.au/about-us/corporate-governance>). Some provisions of the trust deed and schedules that are relevant to the dispute are identified later in this letter.

As at 2 November 2017 there were 186 non-Public Offer employers participating in the fund. Of those, 162 were NSW local government councils, with the remainder including special purpose companies owned by councils.

### **Calculation of salary for superannuation purposes**

As set out in depa's notice of dispute dated 28 September 2017, the dispute concerns the calculation of salary for certain categories of fund members and the determination of superannuation contributions required and superannuation benefits payable. The potentially relevant individuals are employees who are employed under an award or industrial agreement and members of the Retirement Scheme or the Defined Benefit Scheme. The Non-Contributory Scheme is also relevant. However, the benefit under the Non-Contributory Scheme is only ever available in conjunction with Retirement Scheme benefits or Defined Benefit Scheme benefits; Non-Contributory Scheme benefits are not available on a stand-alone basis. This may be why the notice of dispute does not refer to the Non-Contributory Scheme.

The relevant definition of salary under the Retirement Scheme is (Schedule 2, rule 1.2.1):

*For the purposes of these Rules, Salary, in relation to a Contributor (other than an Executive Officer or a Contributor on an individual contract (including an individual on an award regulated contract)) who is a Contributor employed under an award or registered industrial agreement means the sum of:*

- (a) the monetary remuneration payable to the Contributor in the Contributor's capacity as Contributor, as reported to the Trustee from time to time by the Contributor's Employer (excluding any allowances or Leave Payments); plus*
- (b) the amount of any allowances (including shift allowances) actually paid during the 12 months immediately preceding the date on which the Salary is calculated and which are taken to be 'ordinary time earnings' for the purposes of the Superannuation Guarantee Charge Acts; plus*
- (c) the amount of any weekly workers' compensation payments which are to be taken as 'ordinary time earnings' for the purposes of the Superannuation Guarantee Charge Acts; plus*
- (d) **the value of the 'private use' component of a motor vehicle provided by the Contributor's Employer (if any); plus***
- (e) the value of any child care facilities provided by the Contributor's Employer; plus*
- (f) the amount of any voluntary employer (salary sacrifice) superannuation contributions; plus*
- (g) the value of any other salary sacrifice arrangements and any associated fringe benefits tax payable on such other arrangements.*

Rule 1.2.1(d) has been highlighted because it is the limb of the definition of salary that is the subject matter of the dispute. Rule 1.2.1 has been in these terms since 2003, before which time the private use of a motor vehicle was irrelevant to calculating salary for superannuation purposes.

An important point is that the value of the private use component of a motor vehicle provided by an employer is determined in accordance with rule 1.2.6, which says that, in rule 1.2:

***value or amount** means the amount or value specified by the Employer as forming part of the Contributor's total remuneration package, and if not specified by the Employer in the case of a benefit that requires a value, the value of the arrangement or contribution referred to for fringe benefits tax purposes*

This definition of 'value' in rule 1.2.6 involves two elements: flexibility for the employer (and employee), combined with a default valuation approach. To elaborate, the employer can specify a value of the private use component of a motor vehicle as forming part of the employee's total remuneration package. If the employer does so, the employer would appear to be free to select (subject to the employee's agreement) an appropriate method for arriving at that value. It may even be possible for the employer and employee to agree to the specification of a nil value. However, if the employer does not specify a value of the private use component of a motor vehicle as forming part of the employee's total remuneration package, the default valuation approach applies. The default valuation approach is the FBT approach (although it is acknowledged that the FBT rules may, themselves, leave scope for choice between different methods of valuation).

Consequently, the trustee respectfully suggests that a key question in the dispute is whether any given employer has, or has not, in the case of any given employee, specified a value of the private use component of a motor vehicle as forming part of the employee's total remuneration package. This is a question of fact, known to the employer, and presumably to the employee, but not to the trustee.

The trustee also notes that, in the circumstances of any particular case, it may be unclear whether:

- the employer has positively specified a nil value; or
- the employer has not specified any value, with the consequence that a positive value must be included under the FBT approach.

It may be that the employer, on the one hand, and the union and/or the employee, on the other, could legitimately contend for these competing characterisations of the same set of facts.

To the trustee's knowledge, it may also be that the differing approaches of the former Kogarah council and the former Hurstville council (prior to their amalgamation) reflects nothing more than legitimately different approaches to the specification (or otherwise) of the value of the private use component of a motor vehicle as part of their employees' total remuneration packages.

The counterparts to rules 1.2.1(d) and 1.2.6 of the Retirement Scheme are:

- rules 1.2.1(d) and 1.2.6 of the Non-Contributory Scheme; and
- rules 1.3.1(d) and 1.3.3 of the Defined Benefit Scheme.

The notice of dispute also refers to the Accumulation Scheme. However, the trustee is currently unaware of how any private use component of a motor vehicle provided by an employer could be relevant to the Accumulation Scheme. The last row of the table on page 13 of the copy of the employer guide that was attached to the notice of dispute was incorrect and has since been removed.

### **Other potentially relevant provisions**

In addition to the rules identified above (concerning salary and valuation), the following provisions of the trust deed are also potentially relevant to the subject matter of the dispute.

Paragraph (a) of clause 6.8 (Superannuation Law) provides:

*The Trustee may do all things considered by it as necessary or convenient to comply with any provision of Superannuation Law and without limitation the Trustee may:*

- (a) *require Employers, Beneficiaries, dependants of Beneficiaries or other persons entitled to a Benefit or making Contributions to the Fund to provide such information as the Trustee may require in order to satisfy it that any provision of Superannuation Law or this Fund is complied with, to determine whether any Tax is payable or to calculate any Benefit; ...*

Clause 7.2 (Provision of information) provides:

*Subject to sub-clause 7.7, the Trustee shall provide Employers and Beneficiaries with such information in relation to the Fund as is required by Superannuation Law or as the Trustee otherwise determines.*

Clause 7.7 (Confidentiality) provides:

*Subject to this Deed, the Trustee shall not be required to disclose to any person other than the Minister or Employer any information relating to a present or former Employer or Beneficiary unless that disclosure:*

- (a) is reasonably necessary or convenient for the purpose of obtaining advice by the Trustee in relation to any matter pertaining to the Fund or is required by an insurer for the purpose of effecting or maintaining any insurance policy;*
- (b) is required by law;*
- (c) is authorised by the person in respect of whom the information relates;*
- (d) is to a Beneficiary or a person who has an interest in a Member's entitlement in a Division and is of information relating to that Division of the Fund of which the person is a Beneficiary or under which the Beneficiary is or was a Beneficiary so long as the information does not include information relating to Benefits of other Beneficiaries or personal information pertaining to other Beneficiaries of the Fund.*

*Before disclosing any information, the Trustee may require that the consent of persons about whom the information relates is obtained and that the person to whom the information is provided gives such undertakings as to the use of the information or confidentiality of the information as the Trustee may require.*

Clause 9.5 (Information provided to Trustee) provides:

*The Trustee shall be entitled to rely upon information provided to it by an Employer or Beneficiary or any other person acting at the request of or on behalf of an Employer or Beneficiary. The Trustee shall be indemnified by the Employer or Beneficiary who provided the information or at whose request or on whose behalf the information was provided in relation to any loss, damage or expense incurred by the Trustee arising as a result of any such information proving to be incorrect or misleading.*

Clause 11.3 (Late Contributions) provides:

*The Trustee may charge collection costs and interest at a reasonable rate as determined from time to time by the Trustee on any amount not paid by an Employer on or before the Due Date.*

Finally, clause 1.1 (Definitions) provides:

***Due Date*** means any date for payment of contributions agreed to between the Trustee and the Employer and otherwise fourteen days after the end of the month in which salary or wages the subject of contributions to the Fund were paid to the Employee;

This does not purport to be an exhaustive listing of all of the potentially relevant provisions. However, they are provisions which, based on the trustee's understanding of the dispute, may be, or become, potentially relevant.

The trustee acknowledges its power under clause 6.8(a) to require a participating employer to provide information in order to satisfy the trustee that the trust deed and schedules are complied with or to calculate any benefit. The trustee does not say anything at this stage about the practical considerations associated with enforcing this power, should one or more employers not comply with their obligation under the clause (following any formal information request that may be made by the trustee in reliance on the power), other than to note that:

- practical considerations would exist; and
- the Commission may have more extensive powers to require the provision of potentially relevant information.

### **Potentially relevant employers and employees**

The schedule to this letter contains a list of:

- the participating employers with employees who are employed under an award or industrial agreement and members of the Retirement Scheme or the Defined Benefit Scheme; and
- the number of employees of that kind employed by each participating employer.

The list is based on information reported by participating employers and, on that basis, is considered to be up-to-date as at 6 October 2017.

In addition, the trustee has recently made some informal enquiries of participating employers with a view to gaining a better understanding of the potentially relevant employers and employees. This is because the list in the schedule does not exclude employees who are not relevant, such as:

- employees who are provided with a motor vehicle but the motor vehicle is not provided by the employer but rather under a novated lease arrangement;
- employees who are not provided with a motor vehicle at all;
- employees who are provided with a motor vehicle by the employer but who do not engage in any personal use of the vehicle.

While a substantial majority of the employers have responded to the trustee's informal enquiries, a not insignificant minority have yet to do so. The trustee's work in this regard is ongoing. The trustee also notes that employers do not provide the trustee with salary information which is broken down by reference to the various limbs of the definition of salary set out earlier. Instead, employers report a single, all-in salary figure.

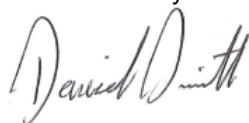
### **Next steps**

At a trustee board meeting held yesterday, 1 November 2017, the board instructed management to write, as a priority, to all of the employers listed in the schedule to this letter reminding them of the rules and clauses identified earlier in this letter, of their obligation to provide correct information and correct contributions to the trustee and of their exposure to liability should they fail to do so. Management will also continue working on the informal enquiries referred to earlier and will consider whether, and when, to formally request information on the basis of clause 6.8(a) and, if so, the employers to whom any such request should be directed. The trustee aims to investigate the matter in a considered and thorough fashion, taking into account new information as it comes to light and revising and refining its plans accordingly. In a practical sense, the level of co-operation provided by the potentially relevant employers will be relevant to how the trustee's work proceeds.

### **Representation**

The trustee has engaged Allens to provide advice in relation to the subject matter of the dispute and to represent it in relation to the dispute. I have asked Michael Mathieson, a superannuation lawyer, and Peter Arthur, an industrial relations lawyer, to join me and the Deputy CEO at tomorrow's conference. I have taken this step in part to maximise the assistance that can be provided in the resolution of the dispute and in part because the trustee and its officers are unfamiliar with the Commission and its jurisdiction.

Yours sincerely



David Smith  
**Chief Executive Officer**  
Local Government Super  
Email: dsmith@lgsuper.com.au

## Schedule

List of employers and number of relevant employees

Count of Curr Employer Row Labels	Column Labels		Grand Total
	Div B	Div D	
Albury City Council	54		54
Armidale-Dumaresq City Council	29		29
Ashfield Municipal Council	13		13
Auburn Municipal Council	21		21
Ballina Shire Council	33		33
Balranald Shire Council	6		6
Bankstown City Council	92		92
Bathurst Regional Council	42		42
Bega Valley Shire Council	27		27
Bellingen Shire Council	9		9
Berrigan Shire Council	10		10
Blacktown City Council	136	2	138
Bland Shire Council	14		14
Blayney Shire Council	7		7
Blue Mountains City Council	41		41
Bogan Shire Council	5		5
Bombala Shire Council	1		1
Boorowa Shire Council	11		11
Botany Bay City Council	23		23
Bourke Shire Council	5		5
Brewarrina Shire Council	5		5
Broken Hill City Council	18		18
Burwood Municipal Council	13	1	14
Byron Shire Council	19		19
Calonne Shire Council	22		22
Camden Municipal Council	27		27
Campbelltown City Council	42		42
Canterbury City Council	56		56
Carathool Shire Council	9		9
Central Darling Shire Council	4		4
Cessnock City Council	52		52
City Of Canada Bay Council	19		19
Clarence Valley Council	60	1	61
Cobar Shire Council	4		4
Coffs Harbour City Council	56		56
Coolamon Shire Council	3		3
Cooma-Monaro Shire Council	13		13
Coonamble Shire Council	11		11
Cootamundra Shire Council	4		4
Corowa Shire Council	11		11
Cowra Shire Council	17		17
Dubbo Regional Council	51		51
Dungog Shire Council	11		11
Edward River Council	12		12
Eurobodalla Shire Council	39		39
Fairfield City Council	70	2	72
Forbes Shire Council	12		12
Gilgandra Shire Council	5		5
Glen Innes Severn Council	14		14
Gloucester Shire Council	4		4
Goldenfields Water County Council	3		3
Gosford City Council	106		106
Goulburn Mulwaree Council	28		28
Great Lakes Shire Council	34		34

Greater Hume Shire Council	11		11
Greater Taree City Council	26		26
Griffith City Council	16		16
Gundagai Shire Council	7		7
Gunnedah Shire Council	24		24
Guyra Shire Council	7		7
Gwydir Council	19		19
Harden Shire Council	6		6
Hawkesbury City Council	30		30
Hay Shire Council	8		8
Holroyd City Council	36	2	38
Hornsby Shire Council	65	2	67
Hunters Hill Municipal Council	6		6
Hurstville City Council	32		32
Inverell Shire Council	20		20
Jerilderie Shire Council	8		8
Junee Shire Council	10		10
Kempsey Shire Council	30		30
Kiama Municipal Council	28		28
Kogarah City Council	16		16
Ku-Ring-Gai Municipal Council	36	1	37
Kyogle Shire Council	11		11
Lachlan Shire Council	7		7
Lake Macquarie City Council	152		152
Lane Cove Municipal Council	11		11
Leeton Shire Council	9		9
Leichhardt Municipal Council	42		42
Lismore City Council	50		50
Lithgow City Council	21		21
Liverpool City Council	39	1	40
Liverpool Plains Shire Council	17		17
Lockhart Shire Council	3		3
Maitland City Council	45		45
Manly Council	15		15
Marrickville Municipal Council	53		53
Mid Western Regional Council	22		22
Midcoast County Council	16		16
Moree Plains Shire Council	18		18
Mosman Municipal Council	14		14
Murray River Council	16		16
Murrumbidgee Shire Council	4		4
Muswellbrook Shire Council	10		10
Nambucca Shire Council	14		14
Narrabri Shire Council	7		7
Narrandera Shire Council	9		9
Narromine Shire Council	7		7
Newcastle City Council	153		153
North Sydney Municipal Council	35		35
Oberon Shire Council	6		6
Orange City Council	45		45
Palerang Council	7		7
Parkes Shire Council	23		23
Parramatta City Council	59	1	60
Penrith City Council	56	1	57
Penrith City Council - Child Care	6		6
Penrith City Council - Library	11		11

Penrith City Council - Senior Officer	1		1
Pittwater Municipal Council	23		23
Port Macquarie-Hastings Council	52	1	53
Port Stephens Council	33		33
Queanbeyan City Council	27		27
Randwick City Council	60		60
Richmond Valley Council	22		22
Riverina Water County Council	17		17
Rockdale City Council	46	1	47
Rous County Council	5		5
Ryde City Council	42		42
Shellharbour City Council	28	1	29
Shoalhaven City Council	92		92
Singleton Council	9		9
Snowy River Shire Council	5		5
Strathfield Municipal Council	12		12
Sutherland Shire Council	109	1	110
Tamworth Regional Council	41		41
Temora Shire Council	11		11
Tenterfield Shire Council	11		11
The City Of Sydney Council	202	1	203
The Hills Shire Council	29		29
Tumbarumba Shire Council	10		10
Tumut Shire Council	12		12
Tweed Shire Council	85		85
Upper Hunter County Council	2		2
Upper Hunter Shire Council	14	1	15
Upper Lachlan Council	28		28
Uralla Shire Council	11		11
Urana Shire Council	6		6
Wagga Wagga City Council	33		33
Walcha Council	8		8
Walgett Shire Council	3		3
Warren Shire Council	7		7
Warringah Shire Council	34	1	35
Warrumbungle Shire Council	10		10
Waverley Municipal Council	45		45
Weddin Shire Council	8		8
Wentworth Shire Council	7		7
Willoughby City Council	28	1	29
Wingecarribee Shire Council	18		18
Wollondilly Shire Council	24		24
Wollongong City Council	228	3	231
Woolshra Municipal Council	37		37
Wyong Shire Council	102		102
Yass Valley Council	10	1	11
Young Shire Council	10		10
<b>Grand Total</b>	<b>4544</b>	<b>26</b>	<b>4570</b>