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Workplace Relations Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Commissioners

**Workplace Relations Framework: Other Workplace Relations Issues
(Issues Paper No. 5)**

Thank you for the opportunity to make a submission to the Productivity Commission's inquiry into Australia's workplace relations framework. This submission relates to Issues Paper No. 5, and in particular, item 5.5, concerning "Public sector workplace relations".

The Local Government and Shires Association of New South Wales, trading as Local Government NSW ("LGNSW"), represents the employer interests of NSW Local Government and is a registered organisation of employers under the *Industrial Relations Act 1996* (NSW) and *Fair Work (Registered Organisations) Act 2009* (Cth). The members of LGNSW are the 152 councils and 14 county councils established under the *Local Government Act 1993* (NSW).

LGNSW participates in Australia's workplace relations system in a variety of ways, including, making submissions and appearing before the Fair Work Commission ("FWC") in matters involving the federal *Local Government Industry Award 2010* (the "Federal LG Award") [Award Code: MA000112] and representing members in industrial matters before the FWC.

LGNSW is also the employer party to the *Local Government (State) Award 2010*, which is a NSW State award made under the *Industrial Relations Act 1996* (NSW) and which applies to the vast majority of NSW Local Government employees.

Australia's workplace relations system and its application to NSW Local Government

The application of Australia's workplace relations system to NSW Local Government entities is ad-hoc and is often dependent upon complex legal principles. This makes it difficult to work out which workplace relations laws apply to NSW Local Government employers and employees and often leads to confusion. The following paragraphs highlight some of the legal complexities of the Australian workplace relations system as it relates to NSW Local Government.

The application of some sections of the *Fair Work Act 2009* (Cth) ("FW Act") to NSW Local Government entities is dependent on whether the entity is declared to be a non-national system employer pursuant to s14 of the FW Act. Whilst most NSW Local Government entities have been declared to be non-national system employers, there are some that have not.

Some sections of the FW Act do not apply to non-national system employers, whereas other sections apply irrespective of whether the entity is a non-national system employer. For example, whilst most of the FW Act's National Employment Standards (NES) does not apply to non-national system employers, the provisions of the NES relating to parental leave (e.g. pre-adoption leave, no-safe job leave) and notice of termination of employment have extended application to non-national system employers.

Some sections of the FW Act, such as those which are founded on the Commonwealth Parliament's 'external affairs' power or 'industrial relations' power, at sub-sections 51(xxix) and 51(xxxv) of the *Australian Constitution*, apply to all NSW Local Government entities. This includes, for example, termination of employment for a prohibited reason (s772, FW Act).

The application of other sections of the FW Act to NSW Local Government entities is dependent on whether the Local Government entity is a foreign, trading or financial corporation formed within the limits of the Commonwealth, as contemplated by s51(xx) of the *Australian Constitution* ("constitutional corporations"). For example, notwithstanding that s335 of the FW Act provides that an 'employer and employee' have their ordinary meaning for the purposes the General Protections at Part 3-1, s338 provides that Part 3-1 only applies to action that involves or relates to a constitutionally covered entity or Territory or Commonwealth employer. Similarly, Part 6-4B of the FW Act, concerning 'Workers bullied at work', initially indicates that 'employer and employee' have their ordinary meaning (s789FB) but then provides at s789FD that Part 6-4B only applies if the alleged bullying at work involves or relates to a person conducting a business or undertaking that is either a constitutional corporation or Territory or Commonwealth employer.

In the case of NSW Local Government, s220 of the *Local Government Act 1993* (NSW) provides that NSW councils are "a body politic of the State" and "not a body corporate". Accordingly, as NSW councils are not corporations (assuming the NSW law is constitutional), they cannot be constitutional corporations and are therefore not subject to the FW Act's "General Protections" and "Workers bullied at work" provisions. However, some NSW councils own and/or control corporations which are likely to be constitutional corporations and subject to the FW Act's "General Protections" and "Workers bullied at work" provisions (Note: a matter currently before the High Court of Australia involving Queensland Rail has the potential to lead to a finding that state laws such as s220 of the *Local Government Act 1993* are unconstitutional).

LGNSW would welcome changes to the Australian workplace relations system that make it easier for NSW Local Government employers and employees to understand when federal workplace relations laws apply to them.

Public sector workplace relations

Australia's existing dual workplace relations systems, one operated by the various states governments (a "state WR system") and the other operated by the Commonwealth government (the "federal WR system"), has implications for employers and employees which give rise to broader public policy considerations.

Employers and employees that are covered by a state WR system are often subject to different minimum 'safety-net' terms and conditions of employment in comparison to employers and employees who are only covered by the federal WR system. As a consequence, employees in a state WR system and employees in the federal WR system performing similar work can have different award rates of pay and other minimum 'safety-net' terms and conditions of employment. Where the differences in employment costs are significant, some state Public sector and Local Government employers can gain a commercial advantage (or avoid a

commercial disadvantage) by switching workplace relations jurisdictions and/or by adopting other strategies, such as outsourcing (contracting out), establishing Local Government controlled corporations, engaging labour hire businesses and/or utilising group training services providers (which are typically covered by the federal WR system).

LGNSW does not currently have a formal position on whether the workplace relations arrangements in state and public services should vary, or whether the workplace relations provisions should vary between the public or private status of an enterprise. However, as part of this inquiry, LGNSW would welcome the Productivity Commission giving its consideration to whether there should be a level playing field of minimum safety-net terms and conditions of employment for the public sector and private sector, and if so, how this might best be achieved.

LGNSW looks forward to the release of the Productivity Commission's draft report in approximately June/July 2015 and will consider providing further comments during the public hearings scheduled for later this year.

For further contact in relation to the above, please phone the writer

Yours sincerely

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