

MUNICIPAL ASSOCIATION OF VICTORIA

**DRAFT SUBMISSION TO THE
MUNICIPAL ASSOCIATION ACT REVIEW
CONSULTATION PAPER**

JUNE 2017

INTRODUCTORY COMMENTS

Thank you for the opportunity to provide feedback on the Municipal Association Act Review Consultation Paper. The tight timeframe between the release of the Consultation Paper and the deadline for submissions has not provided sufficient time for the MAV to consult with its members.

You will be aware that the MAV State Council passed a resolution in September 2016 to “seek a commitment from the Victorian Government that the planned review of the *Municipal Association Act 1907* will include meaningful consultation directly with Victoria’s municipal councils, and will not rely solely on consultation with the MAV itself, or sector consultation facilitated by the MAV”.

Given the State Council Resolution and the tight timeframe for submissions, the Board has encouraged councils to make their own submissions. This submission is from the Management Board of the MAV.

From the MAV's perspective it is imperative that the new Act:

- Contemporises the current legislation
- Reinstates the full suite of body corporate powers that were inadvertently diminished by a previous amendment to the current Act
- Maintains the MAV as a strong and independent advocate for the sector not unreasonably constrained by State oversight or regulation
- Clarifies the role and functions of the MAV removing any perceived ambiguity
- Provides power for MAV to engage in insurance activities and not be subject to the *Insurance Act 1973 (Cth)*
- Be sufficiently enabling for the MAV to meet the evolving needs and expectations of its member councils

The Consultation Paper does not make reference to borrowing and investment powers. It is considered that the new Act should contain clear borrowing and investment powers. It is proposed that this be achieved by importing standard borrowing and Investment powers from the *Borrowing and Investment Powers Act 1987* by reference to that Act.

MAV is generally pleased with the tenor of the Consultation Paper. Our main concerns relate to the insertion of provisions for State oversight that have not applied in the past. This particularly relates to proposed reform 29 and is elaborated on in the detailed comments on that reform.

MAV looks forward to your positive consideration of our submission. As you can appreciate our comments are based on general directions outlined in the proposed reforms. We also look forward to the opportunity to provide further feedback on the actual wording contained in the draft legislation.

ROLE AND POWERS

PROPOSED REFORM

1. Replace the preamble with a provision that clearly sets out that the role of the MAV is to represent members' interests and be accountable to member councils including:
 - Advocating and promoting local government interests
 - Building the capacity of councils
 - Facilitating collaboration and shared services between councils
 - Providing support and advice to local government
 - Providing insurance protection for local government.

MAV position:

MAV is supportive of the objective "not to limit the scope of MAV's functions but to clarify MAV's role in line with its activities". The "role" of MAV is critical in defining the range of MAV's powers as a body corporate. The five dot points set out in this reform are supported. It is also considered that the role should also encompass:

- Proving services that strengthen the role and functions of the sector
- Being the representative body for councils on a state-wide basis
- MAV being able to act as a self-insurer under section 374 of the Workplace Injury Rehabilitation and Compensation Act 2013
- The establishment of the Local Government Funding Vehicle
- MAV's participation as an employer body in relation to the Local Authorities Superannuation Fund
- Grant funded projects with other levels of government

The issue of private health insurance for council employees and councillors is flagged here as a matter requiring further consideration.

PROPOSED REFORMS

2. Retain MAV's status as a body corporate under the MA Act.
3. Amend MAV's powers to provide that MAV has the power to:
 - Do all things necessary or convenient to be done for or in connection with, or as incidental to, the achievement of its role or the performance of its functions
 - Undertake and carry on in Victoria or elsewhere insurance business for the purpose of providing insurance or insurance services under and for the purposes of the MA Act.

MAV position:

These reforms address deficiencies in the current Act. MAV should have all of the powers of a body corporate in order to perform its role and functions. MAV supports these reforms subject to any broadening of the role to cover the full range of MAV's activities (refer to comments on proposed reform 1).

PROPOSED REFORM

4. Provide that each council has a right to appoint a councillor from that council as their representative and that these representatives constitute MAV.

MAV position:

This provision confirms the decision of the Supreme Court on 20 February 2017 that the current Act requires a council to appoint a representative from amongst its own councillors. The MAV supports this position. Under the current Act, "... each council has a right to appoint a councillor from that council as their representative and that these representatives constitute MAV". It is considered that the member councils should constitute the MAV rather than their representatives. The member councils would continue to have the right to appoint a councillor from their own council to be that council's representative.

Whitehorse Council Comments

Where a Council has Administrators or Commissioners in place before the election of a council, during that interim time, an Administrator or Commissioner should be appointed as that Council's representative to the MAV.

RESPONSIBILITIES

PROPOSED REFORM

5. Insert a provision that provides that the appointed representatives are responsible for:
 - Determining the rules of the association
 - Appointing the president and board of management
 - Determining the strategic direction of MAV.

MAV position:

Currently, there is no reference to the State Council in the MA Act. The State Council is a creation of the MAV Rules. It is considered that the State Council should have a legislative foundation. This proposed reform is supported.

PROPOSED REFORMS

6. Provide MAV the power to make rules for the management of MAV.
7. Provide that a rule that is inconsistent with the Municipal Association Act or contrary to law is of no effect.
8. Provide that the following matters must be provided for in the rules:
 - Annual fees
 - Rights, obligations and liabilities of members
 - The election of the President and board of management
 - Procedures for assessing the performance of the board of management and dealing with governance failures.
9. Provide that the rules may be amended, removed or remade if 60 per cent of the representatives vote in favour of the change.

MAV position:

The current Act provides the MAV with the power to make rules with the approval of the Governor in Council. It is considered that the MAV should have the power to make its own rules without government oversight. Accordingly, proposed reform 6 is supported. It is considered that proposed reform 8 should include "Regulation of proceedings of the State Council and the management board". Embedding proceedings in the Rules provides certainty and transparency for members.

PROPOSED REFORMS

10. Provide for MAV to have in place a board of management with functions to include:
 - The sound and prudent management of the affairs of MAV
 - Exercising the powers of MAV (including the power of delegation)
 - Providing general directions as to the performance of MAV's functions and the achievement of its objectives
 - Reporting on MAV's performance and financial transactions
 - Monitoring the performance of its Chief Executive Officer.
11. Provide that the board of management must have mechanisms in place for monitoring the exercise of delegated authority.

MAV position:

The current Act does not contain any provisions for the existence of the board of management. The board of management is enabled by the MAV Rules. MAV supports the provision for a board of management in the new Act. It is considered that the functions specified should also include:

- Determine and classify regional groupings of councils
- Determine the annual budget and set the subscriptions to be paid by participating member councils
- Determine the levels of cover, guarantees and associated matters for all insurance coverage
- Determine the allowances to be paid to members of the board
- The appointment of a CEO for the day to day management of and administration of MAV (refer to proposed reform 14)
- Develop a strategic plan (refer to proposed reform 19)

PROPOSED REFORMS

12. Provide that the board of management must have processes in place for dealing with conflicts of interest, misuse of position and the prevention of fraudulent behaviour.
13. Provide that board members must at all times in the exercise of the functions of their office act:
 - Honestly
 - In good faith and in the best interests of MAV
 - With integrity
 - In a financially responsible manner
 - With a reasonable degree of care, diligence and skill
 - In compliance with the MA Act and MAV Rules.

MAV position:

These conduct provisions are considered to be a reasonable component of any sound governance framework. The proposed reforms are supported.

Whitehorse Council Comments

Board members in addition to acting in the best interests of the MAV, should also give consideration in representing the best interests of the region that elected them to the board.

PROPOSED REFORMS

14. Provide that the board of management may appoint a CEO for the day to day management and administration of MAV.
15. Provide that MAV must have in place a CEO remuneration policy that broadly aligns with the Victorian Public Sector Commission's *Policy on Executive Remuneration for Public Entities in the Broader Public Sector*.

MAV position:

It is considered that the Act should provide for the appointment of a Chief Executive Officer. Proposed reform 15 is consistent with the proposal in the Local Government Act Review Directions paper (supported in the sector submission to that review) and is supported.

REPORTING AND ACCOUNTABILITY

PROPOSED REFORMS

16. Insert a provision that provides that MAV must comply with the following principles of sound financial management:
 - Manage financial risks prudently, having regard to economic circumstances
 - Undertake responsible spending and investment for the benefit of member councils
 - Provide services which are accessible and responsive to local government needs
 - Ensure full, accurate and timely disclosure of financial information.
17. Provide that MAV must keep proper accounts and records of MAV's transactions and affairs in order to sufficiently explain the financial operations and financial position of MAV.
18. Provide that within 4 months after the end of each financial year, MAV must prepare and have independently audited financial statements in accordance with the Australian Accounting Standards. The financial statements must be included in the annual report for the relevant financial year and contain such information as is necessary to give a true and fair view of the financial transactions and state of affairs of the insurance scheme.

MAV position:

MAV's annual reports are currently prepared in accordance with the Australian Accounting Standards and submitted for tabling in both houses of Parliament. The inclusion of provisions covering "principles of sound financial management", keeping of accounts and financial statements are all appropriate for MAV's operations. These reforms are supported.

PROPOSED REFORMS

19. Insert a provision that provides that the board of management must develop a strategic plan for the implementation of the strategic direction set by the State Council.
20. Provide that MAV must develop an annual report setting out MAV's performance against the objectives set out in the strategic plan.
21. Provide that, within four months after the end of each financial year, MAV must submit the annual report to the annual general meeting of MAV and lodge with the Minister a copy of the annual report to be tabled in both houses of Parliament.

MAV position:

The proposed reforms are generally consistent with other governance models, such as those of companies governed by the *Corporations Act 2001*, and are supported.

PROPOSED REFORMS

22. Insert a provision to require MAV to adopt a procurement policy detailing the principles, processes and procedures that will apply to all purchases of goods and services by MAV.
23. This procurement policy would need to specify:
- The circumstances in which MAV will invite tenders or expressions of interest from any person interested in undertaking the contract
 - The form and manner in which MAV will undertake tenders or expressions of interest
 - A process to regularly review contractual arrangements to ensure they are achieving value for money
 - A process to manage conflicts of interest.
24. Insert a provision to provide that when MAV is carrying out procurement activities on behalf of councils, MAV must provide information to councils on the specifications of the tender and how the tender process was undertaken, and seek to facilitate share service arrangements.

MAV position:

MAV is supportive of the principle that MAV be required to adopt a procurement policy. MAV is keen to comply with any requirements applied by the Minister in order to preserve its exemption pursuant to section 186 of the Local Government Act 1989 when acting as a procurement agent on behalf of councils.

PROPOSED REFORM

25. Provide that MAV establish an independently chaired internal audit and risk committee to review the effectiveness of MAV's financial reporting and risk management frameworks.

MAV position:

MAV has had an audit committee since 2004. The Committee has for a number of years comprised of a majority of independent members with an independent chair. The proposed reform would place similar requirements on MAV as proposed for councils in the Local Government Act Review Directions Paper. This reform is supported.

INSURANCE

PROPOSED REFORMS

26. Retain the requirement for MAV to provide mutual liability insurance for the benefit of Victorian councils and any other sector if expansion of the fund is in the interests of the participating Victorian member councils.
27. Provide that the Minister must ensure a review of the insurance provisions in the MA Act is completed every five years to determine whether the provisions remain appropriate.

MAV position:

The requirement for MAV to establish a mutual liability insurance scheme to provide public liability and professional indemnity insurance came about because of market failures that led to excessive premiums, a narrowing of coverage, inadequate limits and the withdrawal of insurers from the market. In the view of the MAV, retaining this requirement is imperative for the long-term financial sustainability of councils and is strongly supported. The requirement to do so being specified in the Act preserves the provisions of the Insurance Act 1973 and

the Insurance Regulations 2002. The proposal for a review every five years seems to be a sound governance oversight and is also supported. It should be noted that the market cycle of liability insurance is longer than five years and hence it is essential that any review considers this.

PROPOSED REFORMS

28. Remove the provisions relating to the fidelity guarantee fund and accident insurance.
29. Provide that, in addition to the mandatory provision of mutual liability insurance, MAV may, subject to Ministerial approval, arrange insurance and receive commissions.
30. Provide that in the performance of all of MAV's insurance functions (including mutual liability insurance), MAV be subject to the general direction of the Minister.
31. Provide that MAV must include in its annual report any directions issued by the Minister and MAV's compliance with each direction.
32. Provide a requirement for MAV to appoint an independent actuary to evaluate the risk and uncertainty associated with MAV's insurance liabilities and provide advice on premium rates, scheme changes and the financial sustainability of each scheme.
33. Provide that, should an insurance scheme be discontinued, the funds after payment of all liabilities and expenses are to be distributed to the contributing members, pro rata based on the sums contributed.

MAV position:

Proposed reform 28 is supported because of its current limitations. In the view of MAV, there is still a benefit to the sector in the provision of a fidelity guarantee fund, albeit that any power would need to extend beyond the current capacity of the MAV to offer protection to councils from losses of the fraudulent acts of employees only to also include third parties. If this was extended, the MAV could offer an affordable and high quality product to the sector that would provide cover commensurate with contemporary crime policies in the market. In relation to proposed reform 29, it is unclear whether the Minister referred to is the Minister for Local Government or the Minister for Finance. If this proceeds, it is considered that the appropriate Minister is the Minister for Finance given his existing prudential responsibilities for WorkSafe, the Transport Accident Commission and the Victorian Management Insurance Authority. Notwithstanding this, this reform proposes further government interference in the operations of an independent body which operates in an existing commercial market. Proposed reform 29 relates to arranging insurance and receiving commissions, that is conducting a broking service (as distinct from providing insurance). MAV should continue to be able to provide broking services without the approval of the Minister as currently provided for in the current Act. Accordingly, proposed reform 29 is opposed. Any new insurance products contemplated by MAV as an insurer (rather than a broker) will require enabling legislation in order to comply with the Insurance Act 1973.

MAV believes that reform 30 is potentially problematic depending on the types of directions that could be issued by the Minister. The MAV's insurance activities currently operate within a commercial market and the power of the Minister to issue Directions could have an influence on the operation of this market. The MAV would be concerned if a direction disadvantaged the insurance activities of the MAV relative to commercial insurers. The State should also give consideration to any risk that is assumed by the Victorian Government in its decision to issue directions and whether this imposes a contingent or other liability on the State. It is important to note that the insurance activities of the MAV are not analogous to those of the state insurers, unless it were to structure the LMI scheme and others as a captive, in which case ministerial oversight and directions would be appropriate. If the State proceeds with recommendation 30, then the MAV would support recommendation 31 on the basis of good governance.

Proposed reform 32 reflects current practice by the MAV and is supported. Proposed reform 33 is already contemplated within the LMI scheme's Deed of Establishment and Supplemental Deeds of Establishment and requires the return of excess funds to members in proportion to their contributions of fund years that are in surplus. This right is not extinguished upon a member ceasing to participate in the scheme. The proposal as it is currently structured is thus inconsistent with the methodology by which the funds would be disbursed if the scheme were discontinued under the current governance framework. In addition, there are alternative methods that could be acceptable, such as a disbursement based on the loss ratios of participating members, which would benefit those members with low claims experience. As such, the recommendation as it currently is structured would have unintended consequences and would not provide any additional financial benefits to participating members of the LMI scheme.
