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Department of Local Government

LAKE MACQUARIE CITY COUNCIL

INVESTIGATION REPORT

MAY 1999

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1. Background

Following a restructure in June 1998, and the appointment of senior staff to the new positions at the Lake Macquarie City Council (LMCC), an allegation of a breach of the Local Government Act (LGA) in relation to the implementation of the new structure was made under the Protected Disclosures Act to the ICAC. The ICAC referred the matter to the Department of Local Government for investigation on November 13, 1998 with a request that the agency furnish a report advising the Commission of the findings of the investigation and of any actions taken by, or proposed to be taken by the agency as a result of the investigation.

A preliminary review was conducted by an officer of the Department of Local Government on 10 February, 1999. Its conclusion was that on the information provided:

1. The Council has not acted in accordance with industry standards and good human resource management practice in the recruitment of the two positions of Group Manager, and
2. There is prima facie evidence to indicate that the Council may be in breach of section 349 of the LGA ("Appointments to be made on merit").

As a result of this finding, the Director General of the Department of Local Government authorised a section 430 investigation to investigate and report on:

1. the processes followed by the Lake Macquarie City Council in relation to the recruitment and selection of the managers and group managers following the adoption by Council on 29 June, 1998 of a new structure, and
2. any other matter which warrants special attention.

This investigation was conducted by Susan Chapman of S. Chapman and Associates in March 1999.

2. Methodology

The Departmental representative reviewed the documentation prepared for the initial enquiry. She then wrote to the General Manager requesting documents to be made available to her on Monday 15 March. (Annexure 1 for the list of documents) These were reviewed that evening and referred to during the subsequent interviews. On Tuesday 16 March the Departmental representative interviewed the General Manager, Mr Ken Holt, the Mayor, Cllr John Kilpatrick and the Human Resources (HR) Manager, Mr Jeff Green.

3. The requirements of the Local Government Act 1993 in relation to the structure and appointment of senior staff

Section 332.(1) of the Act states that "A council must determine:

- an organisation structure
- those positions within the organisation structure that are senior staff positions
- the resources to be allocated towards the employment of staff."

Section 335.(1) & (2) of the Act outlines the functions of the General Manager, including responsibility for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay of decisions of council and to appoint staff in accordance with an organisation structure and resources approved by council.

Section 337. states that "The general manager may appoint or dismiss senior staff only after consultation with the council".

Section 348.(1) & (2) describes the requirements for advertising staff positions, including advertising in a manner sufficient to enable suitably qualified persons to apply for the position and "if the position is a senior staff position... the position is [to be] advertised at least twice in a daily newspaper circulating throughout the state".

Section 349.(2) states that "the merit of the persons eligible for appointment to a position is to be determined according to:

- (a) the nature of the duties of the position, and
- (b) the abilities, qualifications, experience and standard of work performance of those persons relevant to those duties"

4. The restructure process

The restructuring of the council commenced with the former General Manager, Mr Robert Gray, and continued after the appointment of the current General Manager, Mr Ken Holt in May 1998. The aim of the restructure was to reduce the number of managers and to obtain better coordination of services through the reduction in the number of stand alone departments. According to the Mayor the restructuring had been progressing slowly and at the time of Mr Holt's arrival there was considerable instability and unhappiness amongst the staff. He requested the new general manager to finalise the structure as quickly as possible.

Mr Holt worked closely with the four existing senior staff to finalise the structure. He wanted to have only two Group Managers leading two divisions, Strategy and Operations, to reflect the purchaser/provider model now popular in local government. This was a reduction from the four senior managers envisaged originally by the previous General Manager.

The process to develop the new model was consultative and the council was kept informed of progress on the structure through a number of power-point presentations prior to the Extraordinary Meeting of Council held on 29 June, 1998 at which time the new structure was approved by council and the Group Managers' positions were identified as senior staff positions. (Annexure 2)

Staff of LMCC were informed of the new structure in an edition of the internal newsletter, *Benchmark*, which was published on June 25 following a briefing session held for councillors on that same day. A timetable for progressing the appointment of the Group Managers was published in the newsletter along with an outline of the way in which the Managers' positions would be filled. (Annexure 3)

Based on the information available and the interviews conducted with the General Manager, the Mayor and the HR Manager the development of the new structure was handled appropriately and with the full concurrence of the council.

5. The recruitment and selection of the Group Managers

Following approval for the establishment of the two Group Managers' positions, the General Manager moved quickly to recruitment action. He developed the position descriptions using the format established by the HR Department (Annexure 4), prepared the advertisement and had it placed in the *Sydney Morning Herald (SMH)*, the *Newcastle Herald* and the *Local Government Job Directory* (Annexure 5). The advertisement appeared on July 11 and 14 in the *SMH*, 11 July in the *Newcastle Herald* and 13 July in the Job Directory. The closing date was 24 July 1998. Mr Holt stated that he particularly stressed the need for a brief one-page summary in the advertisement to assist him when it came to shortlisting. This did not prevent applicants from including more detailed supporting documentation, which the majority did. He did not believe any applicant was placed at a disadvantage by complying with this instruction.

The positions were not sized using the job sizing system in operation at LMCC. This system was introduced to the council in 1992 following the changes to the Local Government State Award and is based on the Evans-Webb system of job-sizing. The use of the system for positions in the council is found in the council's enterprise agreement. It does not say which positions are to use the system only that it is the system operating within LMCC. The General Manager doesn't believe it applies to contract positions as they sit outside the industrial relations system.

The General Manager conducted his own market research to determine the appropriate remuneration for the positions. This involved scanning the newspapers for similar positions and talking to colleagues in the recruitment industry. Eighty-nine applications were received by the closing date. A further couple were received in the first mail of the following Monday and as is the custom at LMCC, they were considered before the report was finalised for council. Mr Holt stated that the majority of applicants contacted him by phone so he felt he developed some understanding of them through conversation.

A selection committee was not established by the General Manager. He conducted the shortlisting over the weekend following the close of applications, using the position descriptions to identify selection criteria. Mr Holt stated that he wouldn't know whom to involve in a selection committee for this level of position.

His secretary had prepared the summary sheet as applications were received, filling in the sections headed 'name and position', 'summary qualifications' and 'summary positions held'. Mr Holt completed the 'comments' column and identified the appropriateness of the positions

and qualifications by using ticks and crosses. Mr Holt believes that success in previous positions is a strong indicator of likely success in the positions advertised and believes that many of the skills and attributes listed in the position descriptions are implicitly covered by reviewing the applicants' previous positions. So although he did not separately identify the essentials and desirables on his culling sheet he believes they are covered by the columns listed.

In his first cull, Mr Holt identified five applicants worthy of closer consideration (he included a sixth from the late applications on Monday), two of whom were the internal applicants. He stated that he then went through the detailed applications comparing each against the internal applicants. As a result of this he found that none were in his opinion more meritorious than the two internal candidates and hence determined that interviews were not needed, as it 'would be dishonest' and 'a waste of time for the other applicants'.

Mr Holt had earlier been informed by many of the councillors that they believed that Mr Farrell and Mr Hale were exceptionally good employees who were performing their jobs with distinction, and that they would be strong candidates for the positions. This could be construed as some pressure on the General Manager to make particular appointments; however when asked about this perception Mr Holt said he would not have appointed the two if he had had any doubts at all, irrespective of what the councillors had said. He believed that leaders were only as good as their staff and as he wanted to do well he would only appoint good people to his staff.

The previous General Manager had conducted performance reviews with his senior staff including the two applicants. He had also sought comments from the councillors and on a number of occasions these had been highly favourable for Mr Hale and Mr Farrell. The HR Manager confirmed this information.

Mr Holt did not prepare a summary report following his shortlisting exercise which is the practice following selection interviews. As he didn't conduct an interview he didn't believe it was necessary.

Mr Holt prepared a minute to be taken as late business to the council meeting of 27 July so that he could conduct the consultation with the council as required by the Act. (Annexure 6) The council saw no reason to delay the appointments and determined that they would take effect from the following Monday. The Mayor informed the Departmental representative that he and other councillors were concerned about the level of instability amongst the staff and that he felt they risked losing good people like Mr Farrell (who had made it known that he was applying for another position) if they didn't move quickly. Council did not query the General Manager's decision not to hold interviews as they believed it was his job to manage the staff and he was in the best position to determine the appropriate action. According to the Mayor no councillor queried whether there were other suitable applicants or whether appointing without conducting a selection interview was good practice.

Following the appointments, concern was raised at the Staff Consultative Committee meeting about the process followed in relation to the appointment of the Group Managers and an explanation was requested. (Annexure 7) The HR Manager informed the Departmental representative that once the process was explained and the rationale for not holding interviews

outlined, the Committee appeared satisfied that the process was reasonable in the circumstances.

The HR Manager indicated that the normal practice is to hold interviews for all positions and that this was what staff were expecting in the case of the Group Managers. Past experience indicated that these appointments could take a considerable amount of time to complete and people were surprised that such rapid action had been taken. As it was unusual, questions were raised, however no-one appeared unhappy about the decision or the process used according to the HR Manager.

6. The recruitment and selection of the Managers

The fifteen Managers' positions were job-sized using the system in operation at the LMCC. This is based on a weighting for various factors and analysis of the job requirements. The sizing was carried out for all positions by the job-sizing subcommittee of the Consultative Committee.

The Managers' positions were filled following the appointment of the Group Managers. Originally, Mr Holt considered appointing existing staff to the new positions based on a 'best fit' approach, however following discussion with the Consultative Committee he agreed to advertise all of the positions, either externally or internally. This was to be determined by the executive group based on their opinion as to whether or not the change in the position was minor or significant. Positions which had limited change were advertised internally and where only one person applied, interviews were not conducted. An appointment was made following discussion between the Group Manager and the General Manager. This happened in only a few cases.

A selection committee was established for all the Managers' positions for which an interview was to be held. The committee comprised the General Manager, the two Group Managers and Ms Kerry Houlihan, a representative from the HR Department. Questions were prepared for every position and a summary report prepared following the interviews.

The Departmental representative sighted all of the applications for these positions, the selection questions and in some cases the handwritten notes of members of the committee made during the interviews. The fact that the summary reports were signed by only two of the committee members was raised with the General Manager. He stated that it was an oversight but that all had agreed at the end of the interviews as to the nature of the content of the reports.

It appears that only three staff members were unhappy with the process or the outcome. One Director was displaced, didn't apply for any of the positions and took a redundancy package; one manager who was redeployed to an Executive Officer position, subsequently left for a position at another council; and the IT manager left following negotiations with the General Manager over performance issues according to the General Manager.

The appointment of the Managers was announced in the *Benchmark* on 24 September with an explanation that those who were appointed from among the external candidates would be arriving from 12 October.

7. Best practice and council policy

The Departmental representative was provided with a copy of Practice Note 5, March 1994 published by the Department of Local Government by the General Manager, regarding the 'Recruitment of the General Manager and Senior Staff' (Annexure 8). Although these are not regulations nor do they form part of the Act, the Note states that:

"These guidelines highlight the legislative requirements which must be satisfied for the valid appointment of General Managers and senior staff, and they suggest good recruitment practices which will ensure that each council fulfils both its legislative duty and its responsibility as a public sector employer, by ensuring that all recruitment is based on merit (s349) and is seen to be based on merit".

The Note discusses how merit is determined, including the applicant's presentation at interview. It makes reference to the selection committee, including making it clear that the General Manager should be the *convenor* of the committee for senior staff positions. Further the Practice Note states that:

The inclusion of at least one person from outside the council is recommended to demonstrate council's commitment to ensuring that the selection process is as impartial as possible'.

There is no indication in the Practice Note that the establishment of a selection committee is optional.

In addition, the Departmental representative was provided with a copy of the LMCC procedures for Recruitment and Selection which were in operation in 1998 (Annexure 9 for relevant sections) The procedures clearly identify the requirements in relation to advertising, the formation of the selection committee and the summary report. The policy states that:

'A selection panel is mandatory for all advertised vacancies...'

When asked, the HR Manager confirmed his understanding that this policy applied to all positions including senior positions, and only where the policy explicitly stated that it wasn't applicable to senior positions was alternative action appropriate.

The LMCC EEO Management Plan also states that 'appointments, promotions and advancement are based on an employee's merit and skills' and further that council needs to 'Ensure that job applications are assessed objectively on selection criteria only in keeping with Council's Recruitment and Selection Procedures'. (Annexure 10 for relevant sections)

All of these documents make a clear assumption that the process for recruitment and selection involve advertising, the establishment of a selection committee to shortlist against identified selection criteria and to interview applicants in order to demonstrate appointment on merit.

8. Findings

1. *The new structure*

The new structure was developed in an open and consultative manner, although in comparison with other restructures it was done quite quickly. The structure is appropriate for the outcomes required by council. The councillors were appropriately consulted and approved the structure before action was taken to fill the positions. There were no breaches of the Act in relation to the structure.

2. *The Managers' positions*

The establishment, sizing and recruitment and selection process for the Managers' positions was appropriate. The test for appointment on merit was met and the process was open, transparent, followed good practice principles and was in keeping with the council's own policies. The selection committee was appropriately constituted, the interview questions were relevant to the positions and the selection reports were sufficiently detailed. There is no evidence that council did not adhere to the Local Government Act in implementing the new structure as far as the Managers' positions were concerned. However, the summary reports should have been dated and signed by all of the selection committee members to maintain the standard of good practice.

3. *The Group Managers' positions*

The Group Managers' positions were established appropriately, the position descriptions were in keeping with LMCC procedures and the advertising process met the requirements of the Act. The subsequent consultation with the council also met the requirements of the Act.

The fact that the General Manager did not establish a selection committee to shortlist and did not conduct selection interviews, and that he moved so quickly after the closing date for applications to consult with the Council are the matters which raise questions of propriety in relation to the appointment of the Group Managers. Whether merit can be demonstrated without the applicants coming to an interview is the issue, as the Act requires that merit be demonstrated for appointment.

Not to hold interviews is in clear breach of the Council's own policy. It also ignores the current good practice guidelines which councils are encouraged to follow to ensure that the merit principle operates and is seen to operate. The General Manager stated that in his opinion the guidelines were just that and that he was under no obligation to follow them. He stated that he had been conducting his own research into selection issues and found evidence that supported his belief that interviews were not good indicators of the merits of applicants; that they simply showed who was good at interview technique; and that selection interviews could in fact make discrimination more likely as interviews meant that appearance was taken into account and could influence the final decision unfairly.

Mr Holt stated that he did not believe that interviews provided better information about the candidates than their job history and rigorous referee checking, both of which are done outside the interview situation. He prepared the undated file note (Annexure 11) for his own records as a summary of his thinking. It was not provided to council.

When asked why he had not followed the council's written recruitment and selection policies, he stated that senior managers could be treated differently if the General Manager chose to do so. The policies do not say that the General Manager may depart from them although he is of the opinion that the Act provides General Managers with considerable autonomy. He did not believe that mandatory interviews applied to the senior managers as other parts of the policy specifically exempted these staff from certain actions.

Subsequent to the Departmental representative's meeting with the General Manager, he forwarded excerpts of the Law Book Company's "Local Government Law and Practice, NSW" which he believed supported his view that he could act in the way he did. The information note states that 'local government employees are not "in the service of the Crown", that ministerial control does not reach down to council employees as it does to other employees such as those in area health services and that local government has a great deal of independence and self-control.

When asked about the need for such rapid action, Mr Holt stated that he needed to move quickly to bring stability to the staff. He acknowledged that nothing would have been irrevocably lost if there had been a delay of a week or two in the making the appointments, but saw that there was no need to delay as the decision was a clear one and council was meeting on the Monday night.

He had not considered establishing a selection committee for the positions to assist in the review of the applications, as he stated that he was not sure whom he could have included, and as the decision was his "there was no point". The Departmental representative suggested a General Manager from another council and a senior person from the HR Department would have been appropriate as selection committee members. Mr Holt did not appear to have thought of this possibility. Once he had reviewed the applications he was convinced that conducting interviews would be unfair and dishonest as he believed he would be bringing people up under false pretences, as none were better than the internal candidates.

Mr Holt felt that as the roles of the Group Managers were not much different from the roles the internal applicants had been previously filling (save for a greater emphasis on leadership skills), he could fully and accurately judge the merits of the applicants as required by the Act; ie, through the nature and duties of the position and the abilities, qualifications, experience and standard of work performance of those persons. Although he had only been at the council for a short time, he had worked closely with the two men on the restructure and had been informed by many councillors that Mr Hale and Mr Farrell were excellent employees. He stated that the Act did not require an interview to be held.

The Mayor, when questioned, stated that he believed merit is determined through advertising to see if good candidates apply, thoroughly reviewing the applications and *usually* through an interview. He stated that with hindsight he might have suggested that interviews be conducted (for appearances sake) but as he believed that the two internal candidates were outstanding and unlikely to be beaten he really had no concern about the process. He stated that if it didn't work it was Mr Holt's responsibility and he would be held accountable. He was not aware of the specifics of council policy on recruitment and selection but was satisfied with Mr Holt's explanation of the process and satisfied with the outcome. He also reiterated the need for speedy action to reduce the level of instability and anxiety amongst the staff who were

concerned about what the restructure might mean for them. He agreed that a delay of a week or two before the appointments was unlikely to have made a significant difference.

It appears to the Departmental representative that the perception of instability amongst the staff was used as a convenient excuse to fast-track the appointments and so disregard the norm in relation to selection interviews.

The Departmental representative reviewed all of the applications for the Group Managers' positions and compared her views with those on Mr Holt's spreadsheet. In general, she agreed with his assessments except in relation to his view that applicants from small councils were necessarily less appropriate than those from bigger councils. Mr Holt was after all himself appointed to LMCC from a much smaller council (Mudgee). However, in taking the need for large council experience on face value a similar short list to Mr Holt's was developed.

However, it was at this point that the Departmental representative and Mr Holt disagreed. The shortlisted candidates were all very similar in experience and qualifications and with so little to distinguish them further evidence was required, in the opinion of the Departmental representative. Mr Holt suggested local knowledge was the distinguishing advantage and this is why he believed that the internal candidates were more meritorious.

The Departmental representative held that an interview would have provided the additional evidence to ensure merit and to demonstrate the ethical nature of the process. Notwithstanding the fact that selection interviews are not the only indicator of likely success in positions, they are custom and practice in local government, they are considered by most people as part of good HR practice and they do provide additional evidence of appointment on merit. In addition, the Departmental representative pointed out that the council's own policy required an interview to be held. Mr Holt reiterated that he believed that as General Manager he could appoint senior staff in this manner as the Act stated that the General Manager was responsible for appointing staff in accordance with an organisation structure and that is what he had done.

9. Conclusions

Although the General Manager did not hold selection interviews for the Group Managers' positions which current good practice guidelines indicate should occur, *technically* he did not breach the Act as it does not refer to a requirement for selection interviews; it refers only to appointment on merit. How merit is determined is described, however, there is no prescription for the use of selection interviews in this section. This issue comes down to the difference between the *letter of the law* and the *spirit of the law*. Mr Holt is well aware of the legislation and has complied with the exact wording of the Act. He is also well aware of current practice although he apparently believes that as he holds a different view, his view should prevail. There is a contradiction here as he was scrupulous about using interviews for the next layer of management down.

Although there is no evidence of it, the Departmental representative did query with Mr Holt the perception that he "had done a deal" with the two internal applicants as both had been applicants for the General Manager's position. He emphatically denied that any deals of any sort had been done and took exception to the implication that he had done so. He remains firmly of the opinion that they were demonstrably the best applicants and that an interview would not have changed that view.

It appears that in Mr Holt's opinion the spirit of the law is less important than the letter of the law. He was at pains to state that local government is not the public service and that it operates more like private enterprise. Because private enterprise does not focus on selection interviews he believes the same should apply in local government.

The reality is however, that councils do serve the public and the public sector is required to demonstrate higher standards of accountability and transparency. This is demanded by the public and is implicit in the Local Government Act. Staff working in the public sector usually understand the greater expectations placed on them for ethical behaviour and recognise that perceptions play a large part in the belief that people have behaved ethically. Mr Holt appears to have ignored this responsibility and has shown a lack of judgement in his handling of these appointments.

10. Recommendations

1. The General Manager be counselled on his breach of council policy in relation to the mandatory requirement for selection interviews for all advertised positions.
2. The General Manager be reminded of the importance of managing the perception of ethical practice and that abiding by the minimalist wording of the Act is not sufficient in public sector management.
3. The General Manager be required to update by June 1999, the human resource policies of LMCC to reflect current practice, taking into account the good practice guidelines prepared by the Department of Local Government.
4. The General Manager be required to prepare a summary report for the record of the details of the selection criteria for the Group Managers' positions, an explanation of how applicants were assessed against those criteria and the order of merit of his original shortlisted applicants, in sufficient detail to demonstrate the merit of the appointed candidates.



Susan Chapman
Departmental representative

20 May 1999