



# Regional Subsidiaries: Development of Regulations **Submission**

**7 October 2016**

## About WALGA

The WA Local Government Association (WALGA) is working for Local Government in Western Australia. As the peak industry body, WALGA advocates on behalf of 138 Western Australian Local Governments. As the united voice of Local Government in Western Australia, WALGA is an independent, membership-based organization representing and supporting the work and interests of Local Governments in Western Australia. WALGA provides an essential voice for 1,220 Elected Members, approximately 14,500 Local Government employees as well as over 2.5 million constituents of Local Governments in Western Australia.

### **Western Australian Local Government Association**

LV1, 170 Railway Parade, West Leederville WA 6007

PO Box 1544 West Perth WA 6872

Tel: +61-8-9213 2000

Fax: +61-8-9322 2611

[info@walga.asn.au](mailto:info@walga.asn.au)

## Contact

### **Tony Brown**

Executive Manager, Governance & Organisational Services

(08) 9213 2051

[tbrown@walga.asn.au](mailto:tbrown@walga.asn.au)

## Contents

About WALGA.....	2
Contact.....	2
Background.....	4
WALGA’s Policy Position.....	4
Benefits of the Regional Subsidiary Model.....	5
Flexibility and Fit-for-Purpose.....	5
Compliance Balance.....	5
Governance Arrangements, Accountability and Risk Mitigation.....	6
Applications of the Regional Subsidiary Model.....	7
Regulatory Principles.....	8
Consultation Paper.....	9
1. Community Consultation.....	9
2. Approval of Charter.....	10
3. Amendment of Charter.....	10
4. Employees of a Regional Subsidiary.....	10
5. Conflicts of Interest.....	10
6. Minister Can Investigate a Regional Subsidiary.....	11
7. Minister Can Wind Up a Regional Subsidiary.....	11
8. Direction of Constituent Councils.....	11
9. Annual Budgets and Financial Statements.....	11
10. Provision of Information to Constituent Councils.....	11
11. Guarantee of Liabilities by Constituent Councils.....	11
12. Insolvency.....	12
13. Protection from Liability.....	12
14. Limits on Investment and Corporate Acquisition.....	12
15. Tender Requirements.....	12
16. Charter to Address Certain Matters.....	12
Conclusion.....	14
Implementation.....	14

## Background

WALGA congratulates the Government for amending the *Local Government Act 1995* to enable Local Governments to establish regional subsidiaries. As a longstanding advocate for the regional subsidiary model to be available in Western Australia, WALGA welcomes the opportunity to put forward a submission in relation to the development of Regulations relating to regional subsidiaries.

WALGA has advocated for Local Governments to be empowered to establish regional subsidiaries for many years. WALGA put forward a comprehensive submission to the Legislation Committee of the Legislative Council in 2011 when the Committee conducted an Inquiry into the *Local Government Amendment (Regional Subsidiaries) Bill 2010*.

The submission is available from: <http://walga.asn.au/getattachment/Policy-Advice-and-Advocacy/WALGA-Advocacy-Position-Statements/Regional-Subsidiaries-Section-2-3-2-Attachment.pdf.aspx>.

Since the 2011 Inquiry, WALGA has developed a model charter, which is provided as an attachment to this submission and will be available for Local Governments seeking to establish a regional subsidiary and WALGA is committed to assisting and advising any group of Local Governments seeking to establish a subsidiary.

## WALGA's Policy Position

WALGA's longstanding policy position is that Local Governments, under the principle of general competence, should be empowered to select the appropriate regional collaborative model to suit the task at hand.

There are three key points to WALGA's policy position:

1. The compliance obligations of **Regional Local Governments** should be reviewed to ensure that the compliance burden does not reduce the potential cost savings that aggregated service delivery may achieve through increased efficiency nor act as a disincentive for Local Governments to establish Regional Local Governments.
2. The *Local Government Act 1995* should be amended to enable Local Governments to establish **Regional Subsidiaries**, which are governed by a charter.
3. The *Local Government Act 1995* should be amended to enable Local Governments to establish **Council Controlled Organisations**, which would enable one or more Local Governments to establish a wholly Local Government owned commercial organisation for the purpose of undertaking a commercial activity with appropriate oversight.

---

## Benefits of the Regional Subsidiary Model

There are a number of advantages and benefits to the regional subsidiary model including:

- Opportunities to realise **economies of scale**;
- **Flexibility**, as the charter can be tailored to the specific needs of the collaborative task;
- In this way the model is **fit-for-purpose**;
- Regulated by a charter, the model provides for **reduced compliance obligations**, while maintaining appropriate accountability;
- **Independent directors** are able to be appointed to the governing board;
- The model provides **specific and measurable accountability**; and,
- Provides a robust **risk mitigation** measure for Local Governments undertaking joint regional projects.

### Flexibility and Fit-for-Purpose

As the regional subsidiary's charter is its primary regulatory instrument, regional subsidiaries are able to be established to meet a specific collaborative purpose. Provided regional subsidiaries are not over-regulated, flexibility is inherent in the model as the charter can be developed to meet the needs of the constituent Councils.

In this way, the charter of a regional subsidiary is able to be developed to suit a specific collaborative purpose. For example, the charter – and therefore the regulatory and compliance burden – for a subsidiary established to undertake regional economic development on behalf of a number of small, rural shires may be different in scope to the charter developed for a regional subsidiary that manages significant public assets such as waste management facilities.

It is evident from the South Australian experience that the regional subsidiary model is scalable. Regional subsidiaries exist for basic collaborative tasks as well as for more complex tasks with significant public assets under management.

It is important that the charter retains its primacy as the principle regulatory document to ensure flexibility and the ability for regional subsidiaries to be fit-for-purpose are maintained.

### Compliance Balance

The regional subsidiary model provides an appropriate balance between compliance and accountability, while maintaining flexibility for its constituent Local Governments.

Through the development of a comprehensive charter – that is ultimately subject to Ministerial approval – the regional subsidiary model provides sufficient compliance and accountability obligations without the need for expansive regulations.

The regional subsidiary model contains numerous checks and balances without the need for onerous regulatory compliance obligations. Firstly, under the principle of general competence, each constituent Council must be satisfied that entering into a regional subsidiary arrangement will be beneficial for their own organisation and their own community. Secondly, as the charter is subject to Ministerial approval, opportunities exist for the regulatory body – the Department of Local Government and Communities – to review the charter and ensure that the charter is sound. Thirdly, given the regional subsidiary’s reporting requirements to its board of management and to its constituent Councils, there are sufficient opportunities to ensure the regional subsidiary is being managed properly. For these reasons, it is viewed as inappropriate for onerous regulations to be developed that would reduce the advantages and benefits of the model discussed in this submission.

It is WALGA’s strong view that the charter should be the mechanism responsible for the bulk of the compliance requirements, supplemented by the Regulations. The Regulations should be developed to dictate the issues that the charter must address, but should not be overly prescriptive to ensure flexibility for Local Governments to establish regional subsidiaries appropriate to the collaborative task.

## **Governance Arrangements, Accountability and Risk Mitigation**

A key advantage of the regional subsidiary model is the ability for independent directors to be appointed to the board of management. While the board will comprise of a majority of Elected Members from constituent Councils, independent, skills-based directors can bring specific, external expertise to the subsidiary and this provision can be utilised by the constituent Local Governments to mitigate risk.

The governance arrangements of the model inherently enhance the accountability of regional subsidiaries relative to other models. Direct oversight of a particular function or project by a board of directors enhances accountability relative to the traditional Local Government approach of reporting up the organisational hierarchy through the Chief Executive Officer to a Council with a multitude of competing priorities.

For instance, the current situation where a ‘host’ Local Government must take on the role of ‘bank’ for regional projects undertaken by a Voluntary Regional Organisation of Councils (VROC) is sub-optimal. A regional subsidiary would be a more appropriate vehicle to manage regional projects with the regional subsidiary’s ability to open bank accounts in its own name with direct and thorough oversight by the subsidiary’s board. In this way, regional subsidiaries provide a significant risk mitigation tool for Local Governments seeking to undertake joint regional projects. Again, it is crucial that regional subsidiaries are not over-regulated to disincentivise Local Governments from establishing subsidiaries in these or similar circumstances.

## Applications of the Regional Subsidiary Model

Inherently flexible, scalable, and adaptable, the regional subsidiary model lends itself to a range of collaborative functions with the charter suitably drafted to balance risk with appropriate compliance obligations.

Applications of a regional subsidiary could include:

- Road construction and maintenance;
- Economic development including business incubation and tourism;
- Asset management;
- Building, planning, environmental health or ranger services;
- Accounts, records, information technology and other back office functions;
- Child care;
- Aged care;
- Waste management services;
- Coordination of volunteer emergency services;
- Management of civic facilities including libraries and recreation centres; and,
- Management of regional projects.

The regional subsidiary model is applicable to a range of activities and functions from relatively simple, with minimal risk exposure – such as regional tourism initiatives – to more complex functions with significant public assets under management.

---

## Regulatory Principles

To ensure realisation of the benefits of the regional subsidiary model – particularly flexibility, and the ability to establish regional subsidiaries that are fit-for-purpose – it is important that the model is not over-regulated. The regional subsidiary’s charter – that is developed in the context of the constituent Councils’ needs for the specific collaborative task – should be the principal regulatory document.

The regional subsidiary model contains sufficient compliance obligations and checks and balances, including:

- 1. Obligations of the constituent Councils to be satisfied**, in accordance with the principle of ‘general competence’, that entering into a regional subsidiary arrangement is in the best interest of their organisation and their community;
- 2. Ministerial Approval** of the proposed charter, which provides a significant opportunity for oversight by the regulatory body;
- 3. Establishment of Board of Management** that can include independent skills-based directors depending on the collaborative function of the regional subsidiary;
- 4. Reporting requirements to the board of management** which will contain members from the constituent Councils; and,
- 5. Reporting requirements to the constituent Councils.**

Conceptually, the regional subsidiary model is similar to the incorporated associations model. Incorporated associations are primarily governed by a constitution that establishes the objects of the association, eligibility for membership, governance structure and other important matters. Similarly, it is WALGA’s view that the charter of a regional subsidiary is the optimal document to contain matters relating to the subsidiary’s purpose, governance arrangements, staffing issues, funding arrangements and other important matters.

To support the establishment of regional subsidiaries, a best practice charter should be developed, which can be amended to suit the requirements of the constituent Councils and specific collaborative task. Further, guidelines and policy should underpin the contents of the charter with support provided by WALGA and the Department of Local Government and Communities as required.

It is WALGA’s strong view, therefore, that the Regulations should be limited to two matters. Firstly, the regulations should outline what *must* be addressed in the charter of a regional subsidiary. Secondly, the regulations should outline which sections of the *Local Government Act 1995* will apply to a regional subsidiary such as provisions relating to scrutiny of Local Government and protection from liability. It is WALGA’s view that application of the *Local Government Act 1995* should be kept as minimal as possible.

## Consultation Paper

WALGA welcomes the opportunity to provide comment on the *Consultation Paper: Proposal for Regional Subsidiaries Legislation*.

WALGA acknowledges “*The intention of the Liberal-National Government is to create an option that takes advantage of the structure of a Statutory Regional Local Government, while avoiding the level of regulation that applies to such entities.*”

### 1. Community Consultation

It is WALGA’s view that requirements specifying the nature and level of community consultation for a regional subsidiary to be established should not be enshrined in regulation, given the nature and function of regional subsidiaries can vary in complexity and scope.

While some regional subsidiaries may be akin in complexity and scope to a major trading undertaking, many would be much simpler and community consultation in the manner proposed would be unnecessary.

For example, community consultation in the manner proposed in the consultation paper for a number of small, rural Local Governments to undertake collaborative tourism promotion would seem to be unnecessary and superfluous.

Further, enshrining community consultation requirements in regulations would not provide flexibility for a case-by-case approach. For instance, many existing VROCs undertake collaborative functions that may be more appropriately undertaken by a regional subsidiary. The suggestion that all members of the VROC should undertake a significant community consultation process to improve the governance structure of an existing function again seems to be superfluous.

Community consultation is core Local Government business. The community consultation processes that Local Governments undertake in relation to the Integrated Planning and Reporting (IPR) Framework would be sufficient, in many cases, to address the community consultation obligations associated with establishing a regional subsidiary. While the governance arrangements associated with the subsidiary may be new, the activity that the subsidiary undertakes on behalf of its constituent Local Governments would be an existing activity of the Local Governments that the community would have the opportunity to consider or provide comments about through the IPR process.

Given the charter will ultimately be subject to Ministerial approval, a superior approach would be for the nature and level of community consultation to be outlined in Departmental policy or guidelines with exemptions provided for low-level or existing collaborative functions.

## 2. Approval of Charter

It is WALGA's view that documentary evidence of due diligence prior to Ministerial approval of a regional subsidiary should be guided by guidelines or policy, and not enshrined in regulations.

It may be appropriate for regulations to state that endorsement of the draft charter, by absolute majority, is required from each of the constituent Councils.

## 3. Amendment of Charter

It is WALGA's view that the requirements for a charter to be amended should be detailed in the charter upon its establishment. Whether the amendment is proposed by a member Council or the subsidiary's board is irrelevant provided the thresholds to amend the charter, as detailed in the charter, are met.

It is not appropriate for an amendment to a charter to trigger an automatic need for significant community consultation, as proposed in part 1 of the consultation paper, as some amendments may be minor or inconsequential in nature. Only amendments to the high level purpose or the membership (i.e. if a Council is seeking to join or withdraw from the subsidiary) should be subject to community consultation, if community consultation is relevant.

In response to **Question 3** of the consultation paper on this topic, it *would be appropriate* for the Minister to approve an amendment made *in accordance with the charter* if some of the constituent Councils object to the proposal, because the amendment would be made *in accordance with the charter*. The thresholds for amendments to be made to the charter would be outlined in the charter and agreed to prior to establishment of the regional subsidiary.

## 4. Employees of a Regional Subsidiary

Under the principle of general competence, Option 1 as outlined in the consultation paper is preferred: *"Employees of a regional subsidiary count as Local Government employees if specified in the charter"*.

This option provides maximum flexibility for the subsidiary, which should also be able to specify conditions on an employee-by-employee basis.

## 5. Conflicts of Interest

In the interests of transparency and good governance, conflicts of interest should be reported and recorded.

Conflicts of interest should be reported at the level of the subsidiary's governing board only, given the constituent Councils would have access to information about conflicts of interest from the regional subsidiary.

## **6. Minister Can Investigate a Regional Subsidiary**

The proposal for Part 8 – Scrutiny of Local Governments – of the *Local Government Act 1995* to apply to regional subsidiaries is supported.

## **7. Minister Can Wind Up a Regional Subsidiary**

The proposal for section 3.63(1)(a) of the *Local Government Act 1995* to apply to regional subsidiaries is supported.

A regional subsidiary's charter should address the process by which the regional subsidiary will be wound up.

## **8. Direction of Constituent Councils**

This matter should be addressed in the regional subsidiary's charter and not enshrined in regulations. The model charter that WALGA has developed includes provisions relating to directions from constituent Councils which can be included, amended or deleted as appropriate for the subsidiary's circumstances.

## **9. Annual Budgets and Financial Statements**

Financial reporting requirements should be addressed in the subsidiary's charter to suit the circumstances of the particular regional subsidiary.

In general, it would seem appropriate for the subsidiary to report to its constituent Councils rather than just its board, but this matter should be determined in the charter to suit the needs of the constituent Councils and the function of the regional subsidiary.

## **10. Provision of Information to Constituent Councils**

Provision of information to constituent Councils should be addressed in the charter. In principle, WALGA supports the application of sections 5.92 and 5.93 of the *Local Government Act 1995* to regional subsidiaries.

## **11. Guarantee of Liabilities by Constituent Councils**

The consultation paper states that "it is not intended for regional subsidiaries to take out loans in their own right."

WALGA fundamentally rejects this statement, as a regional subsidiary acquiring debt in its own right might absolutely be appropriate depending on the circumstances. For instance, debt is an appropriate funding mechanism for public assets with a long life to enable the cost of the asset to be apportioned to its users over time. The alternative to the subsidiary acquiring debt would be to draw funds from its constituent Councils which may be inappropriate depending on the role and function of the subsidiary. WALGA notes that regional subsidiaries in South Australia are able to borrow money.

It would be appropriate for Local Governments to be guarantors of the subsidiary's liabilities; this matter should be addressed in the subsidiary's charter.

## 12. Insolvency

The regional subsidiary's charter should address the extent to which the constituent councils are liable in the event of insolvency.

Further, it may be appropriate for the subsidiary to operate at loss for certain periods, particularly during the first few years, depending on the nature of the subsidiary's functions and activities.

## 13. Protection from Liability

WALGA supports the application of section 9.56 of the *Local Government Act 1995* to board members, employees and agents of a regional subsidiary. Any erosion of these protections would impact the risk profile of regional subsidiaries and would be incongruous to the rest of the sector.

## 14. Limits on Investment and Corporate Acquisition

The charter should be the regional subsidiary's primary governance document and the charter should therefore stipulate the limits on investment on behalf of the constituent Councils.

The model charter that WALGA has developed incorporates requirements consistent with the *Local Government (Financial Management) Regulations 1996*.

## 15. Tender Requirements

As the charter, which is subject to Ministerial approval, is the subsidiary's primary governance document, the charter should contain provisions relating to the procurement requirements of the subsidiary. The model charter that WALGA has prepared contains provisions that subsidiaries be required to adopt a procurement policy and go to public tender to procure good and services worth more than \$150,000.

## 16. Charter to Address Certain Matters

A regional subsidiary's charter should address the following matters:

- The purpose of the subsidiary;
- Membership;
- Constitution of the board of management;
- Method of appointment of board members and details regarding terms of office;
- Staffing issues;
- Funding arrangements;
- Financial management and reporting arrangements including limits on investment;

- Procurement requirements;
- Reporting obligations;
- Dispute resolution procedures;
- Addition and withdrawal of members;
- The extent to which constituent Local Governments are liable in the event of insolvency;
- The manner in which property of the subsidiary will be distributed in the event of winding up; and,
- Any other matter as determined by the constituent Local Governments.

## Conclusion

It is WALGA's strong view that realisation of the regional subsidiary model's benefits – particularly flexibility and the ability to establish a subsidiary that is fit-for-purpose – is contingent on the charter being the primary governing document.

There are sufficient accountability measures inherent in the regional subsidiary model – including the requirement for Ministerial approval – without the need for excessive regulation.

## Implementation

Successful implementation of the regional subsidiary model relies on an appropriate regulatory framework being established. If the regulatory framework imposes an excessive compliance burden, the benefits of the regional subsidiary model may no longer outweigh the costs.

WALGA is strongly of the view that implementation of the model should be supported by guidelines and further policy development. Training and further support should be provided to Local Governments seeking to establish a regional subsidiary as required. WALGA has developed a draft model charter, which will be provided to Local Governments seeking to establish a subsidiary and is provided as an attachment to this submission.

WALGA again congratulates the Government for amending the *Local Government Act 1995* to enable Local Governments to establish regional subsidiaries. WALGA looks forward to contributing to further policy development and providing ongoing support to Local Governments seeking to establish a regional subsidiary.