

**SUBJECT: REPORT ON NOTICE OF MOTION - NOM 28/06/16 - LEGAL ACTION COUNCIL AMALGAMATION**

**REPORT BY: INTERIM CHIEF EXECUTIVE OFFICER**

**CONTACT: INTERIM CHIEF EXECUTIVE OFFICER**

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## **ICEO COMMENT**

Following receipt of this Notice of Motion, a deal of research has been undertaken and the following comments are provided for Councillors when considering the Motion.

At the Ordinary Council Meeting held on 23 February 2016 Council resolved:

- "1 That Council amend the current draft submission to include the following points:
- a) The merger would result in a significant reduction in local democratic representation, evident in the lower ratio of elected representatives per capita from 1 councillor per 12,309 voters to 1 per 17,763 down currently.
  - b) Consideration of the merger has ignored relevant evidence that would be detrimental to the merger case.
  - c) A comprehensive community consultation process, including a full plebiscite, should precede any firm proposal for a merger.
  - d) The process that has produced this proposal has been flawed with key information withheld, in particular the full KPMG Report.
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- a) Council receives the report.
  - b) Council reiterates its first preference is to remain a standalone entity.
  - c) Should a merger proceed, despite Council's position, its preference is that:
    - i The new entity be named The City of Newcastle or The City of Greater Newcastle
    - ii The title of Lord Mayor be decreed for the new entity as part of the Governor's Proclamation
    - iii The Lord Mayor be popularly elected by the people of the new local government area
    - iv The new entity comprise 13 Councillors including the Lord Mayor
    - v That 12 of these councillors are to be elected by vote of ward residents. Council's preference is for three (3) wards each with four (4) councillors. Ward boundaries should be determined based on approximately equal populations, and be generally based around the current boundaries of the State Seats of Newcastle, Wallsend and Port Stephens.
- The Geographic Names Board should be given the opportunity to convene a public exhibition of ward names.
- d) Council supports the proposed minor boundary variations to:

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- i Incorporate Woodberry in the new Local Government Area
  - ii Revise the southern boundary to follow the natural catchment divide, as distributed by the Interim Chief Executive Officer (outlined below):

*A variation to the Lake Macquarie City Council (LMCC) boundary change to seek greater efficiencies and cost savings to ratepayers through improved integrated watercourse and drainage management by bringing the upper reaches of Ironbark Creek and Throsby Creek catchments into the Newcastle Local Government LGA. This is an extension of the proposal in the report to adjust the boundary with LMCC to the Newcastle Link Road.*
  - iii Revise the western boundary to follow the natural divide to include the Hexham Swamp Catchment.
- e) Council delegates authority to the Interim Chief Executive Officer to make necessary amendments to the Submission, in consultation with the Lord Mayor, that arise from Council's resolution relating to the Submission and to lodge the amended Submission on Council's behalf with the Delegate by 28 February 2016. A final copy of the submission is to be made available to Councillors prior to submission."

I note that Council's second preference was that Newcastle City Council merge with Port Stephens council. This resolution was approved with the Council having had the opportunity to review and confirm its endorsement of the final version of the written submission that was to be lodged with the Delegate prior to the lodgement deadline of 28 February 2016.

Further, at the last Ordinary Council Meeting held on 24 May 2016, Council's concern with the merger process was to resolve to write to the Premier and the Minister for Local Government requesting that further consideration be given to the merged council being named as The City of Newcastle or, alternatively, The City of Greater Newcastle and the seeking of legal advice on the feasibility of retaining the "Newcastle" name and on the retention of an elected decision making body through the amalgamation process.

An issue in attempting to commence legal proceedings against the amalgamation at this late stage, is that it is contrary to the position previously adopted by Council on the merger proposal issue generally.

The ability of Council to challenge the substance of the Delegate's report is not immediately obvious as the report appears to be reasonably well argued and his recommendations are supported by the Local Government Boundaries Commission.

A practical difficulty that Council may face in the proceedings is that the public inquiry sessions conducted in Newcastle were poorly attended by members of the local community, and failed to attract enough input to fully utilise the time available, despite the publication of the notice in the Sydney Morning Herald and local newspaper publications, and the media interest created by the activities in Port Stephens. The poor attendance could be construed as indicating that the merger proposal did not raise significant concerns in the majority of the local community.

Because the Council's unique circumstances are different from the other councils that have already commenced litigation, Council will need to initiate its own separate legal proceedings against the Minister for Local Government to challenge the merger proposal. His Honour, Moore J, is hearing the legal proceedings in the NSW Land and Environment Court and it is apparent

that the hearing of those proceedings is almost complete. The possibility of the legal proceedings being heard concurrently with those already commenced is too late. This conclusion has been confirmed with one of the law firms acting in the legal proceedings.

It is understood that court hearings of approximately two and a half days per week have been underway for three weeks up until Friday, 17 June 2016. The five separate legal proceedings are being heard concurrently involving Strathfield, Lane Cove, Mosman, Hunter's Hill and North Sydney councils. It is understood that that a final hearing is scheduled to be held on 4 July 2016 prior to his Honour going on leave on 8 July 2016 and returning on or about 25 July 2016. The earliest date that a judgement decision can be reasonably anticipated to be handed down in respect of the legal proceedings involving the five councils is August 2016.

Commencing separate legal proceedings at this very late stage will involve Council incurring substantial legal expenses, the quantification of which would be difficult to accurately and definitively predict, but may potentially involve multiple \$100,000's. In this regard, it is understood that one of the five councils has already incurred \$250,000 to-date in legal costs and is anticipating incurring a further \$90,000 by the time the proceedings are concluded. Anecdotal evidence is that this is a typical level of expenditure being incurred across the various councils.

The issue for Newcastle Council is that its proceedings, if they were to be commenced, need to be argued from scratch. Council will not be able to benefit from the sharing of any barristers (as occurred with the five councils and the potential saving of legal costs that it brings) and will have to undertake the full legal processes involved in the legal proceedings which will substantially increase the legal costs that will need to be incurred.

Council has undertaken some preliminary enquiries as to the potential legal costs that it would be expected to incur should it proceed with the proposed litigation. It has been quoted a potential cost of \$350,000. This would be substantially increased in the event that it was unsuccessful at first instance and was forced to appeal the judgement decision to the NSW Court of Appeal.

The other serious issue that must be borne in mind is that, in the event Council was unsuccessful in its legal proceedings, it would have to bear not only its own legal costs, but also the legal costs of the Minister for Local Government, which no doubt would effectively at least double the quantum of the total legal costs that would need to be paid by Council. In this worst case scenario, the total legal costs that could potentially be anticipated to be incurred by Council may amount to \$700,000 or more. If Council were to pursue an appeal in the event that it was unsuccessful at first instance, then further legal costs of at least \$100,000 could be expected to be incurred.

Even if the legal proceedings commenced by Council were ultimately successful, the proposed amalgamation would still have a strong chance of proceeding as it is likely that any legally defective steps undertaken by the Delegate, as identified by the court, could well be rectified by the NSW Government/Office of Local Government undertaking another modified public inquiry process.

**RECOMMENDATION:**

1. That Council notes the ICEO comment.

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2. Should Council resolve to initiate legal proceedings against the Minister for Local Government to legally challenge the merger proposal between Newcastle City Council and Port Stephens Council, that the Interim Chief Executive Officer be delegated authority to engage the services of, and instruct an appropriate legal firm within three business days. Any such legal proceedings are to be undertaken in consultation with the Lord Mayor.
3. Should Council resolve to commence legal action, that Council delegates the authority to the Interim Chief Executive Officer to incur legal expenses of up to \$350,000 on behalf of Council to undertake the legal proceedings against the Minister for Local Government to challenge the forced amalgamation of Newcastle City Council with Port Stephens Council and that a budget of \$350,000 be established for this specific purpose in Council's 2016/17 Operational Plan.