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When Liquidation is NOT an Option: A Global Study on the Treatment of Local Public Entities in Distress

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CONTENTS

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Local public entities in distress – a critical analysis of the Argentinian approach

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1. Introduction

The purpose of this study is to present the legal framework applicable to Argentine local public entities facing financial difficulties.

Municipalities are Argentina's local public entities, and are necessary entities in the Argentine federal system. Therefore, in the event of an economic-financial crisis, the insolvency or bankruptcy procedures for the private sector in terms of Argentine legislation are not applicable to municipalities.[1] There is however no general procedure determined by law to aid Argentine municipalities in navigating financial crises.

1.1 Legal nature

In contrast to the model in the United States, the Argentine federal model is based on three levels of territorial power division: the national state, the provinces (including the autonomous city of Buenos Aires) and the municipalities.

The federal state has nationwide powers, allowing it to legislate and control defence, foreign affairs, customs, and common legislation throughout Argentina. The 24 provincial states (which together make up the entire national territory) have residual powers circumscribed to their respective provincial limits. The municipalities make up the third level of government and have powers relating to local interests. Their authority is limited to the spatial scope individually delimited by the provincial law of their creation in each particular case.

Therefore, municipalities are one of the three necessary levels that make up the Argentine federal system. Municipalities are constitutional subjects of the federal state together with the national state and the provincial states. Each municipality is created by a provincial state that establishes a provincial law. As necessary subjects of the Argentine federal system, municipalities are of a public nature. Due to their public nature, municipalities will not be liquidated in the event that they are financially distressed, but will be returned to

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1 A municipality's financial distress is to be addressed by public law; therefore, the National Bankruptcy Law (Law 24.522/1995, as amended by Law 26.684/2011) is not applicable to municipalities as they are not amongst the subjects included (National Bankruptcy Law, art 2).

solvency through the utilisation of mechanisms that are analogous to those used by federal and provincial states in times of distress.

Municipalities are constitutional subjects formed by the federal Constitution, and are imposed on the provinces as a federal mandate. Each provincial state is obliged to incorporate and regulate in its local constitution the regime that regulates the mode of creation, the model of government organisation, and the competences assigned to the municipalities that it creates in order to manage local issues, which is guaranteed by the federal Constitution.[2]

Because municipalities are of a constitutional nature, they must exist. This means that a province is prevented from absolutely prohibiting the presence of municipalities or totally eliminating them from its internal structure, either by local constitutional provision or by local legislative decision. These prohibitions apply even when a municipality is experiencing economic or financial loss. Once a minicipality has been created, it cannot cease operating through the actions of those controlling it. However, under provincial law, a municipality can be divided into several municipalities or merge with others to form a larger one.

A municipality is democratically governed, meaning that its authorities (a mayor with executive function and a deliberative council with normative functions) are elected by popular vote. There are even municipal political parties.

Argentine local public entities are subject to public law and governed by federal and provincial constitutional and provincial public law. The new Civil and Commercial Code (Law 26.994/2014) recognises this in article 146 by dictating that "[p]ublic legal entities are:…the National State, the Provinces, the Autonomous City of Buenos Aires, the municipalities, the autarchic entities and the other organisations established in the Republic to which the legal system attributes that character". Therefore, the rules governing the legal relationships of private persons are not applicable to municipalities. Article 147 of the new Civil and Commercial Code makes this clear by dictating that "[p]ublic juridical persons are governed as to their recognition, beginning, capacity, operation, organization and end of their existence, by the laws and ordinances of their constitution". As mentioned previously, in cases of insolvency, the judicial procedure of the National Bankruptcy Law (Law 24.522/1995, as amended by Law 26.684/2011) does not apply since municipalities (and provincial states) are not amongst the subjects included in the list of entities subject to the National Bankruptcy Law.

2. Local public entities – regulatory framework

Under the Argentine constitutional system, the federal state ensures that the provinces guarantee, within their local constitutional order, the autonomous municipal regime. However, provinces determine the concrete local configurations of the municipal

[2] Federal Constitution, arts 5 and 123.

organisations under their jurisdiction. Accordingly, provincial constitutions dictate the competences, organisation, categories, and other matters regarding municipalities. The terms relating to municipalities vary between provinces.

The framework governing municipalities stems from the federal Constitution, the provincial constitution where the municipality is located, the organic law of municipalities, the law creating the municipality, and the municipal charter.

2.1 Federal Constitution

The municipality as an entity of local management in Argentina was created in 1853 with the sanction of the federal Constitution (the third oldest text in force in the world after that of the Untited States and Norway). The federal Constitution made it mandatory for provincial states to establish a municipal regime to take care of local interests.[3] Following the provision's enshrinement within the federal Constitution, it was made mandatory for the 14 provincial states that existed at the time to ensure that their provincial constitutions facilitated and effected the existence of this type of entity for the management of local affairs. The modality of the municipal regime was left in the hands of each province, and there is thus a variety of configurations of municipalities in the different provinces. Some provinces have a strong municipal tradition (meaning that it has traditonal legal status due to being in existence for a long time, such as Córdoba and Santiago del Estero), whilst other provinces rely less on their municipalities (such as Tucumán and the province of Buenos Aires (not the autonomous City of Buenos Aires) that has 135 districts (these are municipalities that together cover the entire provincial territory)).

The institutional position of the municipality was reinforced by the 1994 reform of the federal Constitution. The reform took a step forward by requiring that: "[E]ach province dictates its own constitution, in accordance with the provisions of article 5, ensuring municipal autonomy and regulating its scope and content in the institutional, political, administrative, economic and financial order".[4] The federal Constitution only requires provinces to assure the perpetual and unchallengeable existence of municipalities as territorial entities within each province and provides that they must be endowed with municipal autonomy. The federal Constitution does not contain any further provisions in this regard as it is up to each provincial state to determine its institutional structure.[5]

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3 Federal Constitution, art 5. At that time, no province had established a municipality. After 1853, the first municipalities were created in the province of Santa Fe by provincial law in 1858, in the city of Rosario in 1860 and in 1868 in the province of Tucumán. Only in 1876 was a municipal regime established in the city of Buenos Aires (see C M Gorla, "Evolución histórica del régimen municipal en Argentina" (CONICET, 2007) available here).

4 Federal Constitution, art 123.

5 The 1994 reform attributed the autonomous city of Buenos Aires a status analogous to that of a province. However, the autonomous city of Buenos Aires does not contain municipalities, but it does contain several "neighbourhoods" (*Comunas*) within it for administrative and organisational purposes.

The Argentine Supreme Court of Justice recently made a distinction between the content and scope of municipal autonomy and dictated that:[6]

> "[B]y explicitly enshrining its autonomy, the Constitution of 1994 differentiated the contents and the scope of such status. The contents are exhaustive and comprise the institutional, political, administrative, economic and financial spheres; the scopes, which make up the variable perimeter corresponding to each content, were delegated to the proper regulation of provincial public law. The determination of the aforementioned "contents" prevents autonomy from being reduced to a mere grandiloquent literary formula but, in practice, empty of meaning (Fallos: 341:939, Considerando 6; Fallos 343:1389); the "scopes" corresponding to each content may have a greater or lesser extension, depending on several factors (amount of population of the municipality, regional incidence, character of provincial capital, etc.), but in no way may they be so minimalist as to frustrate the content they regulate."

In short, the powers afforded by the federal Constitution to a municipality cannot be reduced by the provinces to such an extent as to make municipal autonomy (one of the *Wesensgehalt* of this institutional guarantee) impossible in practice. Consequently, provinces are not only responsible for modulating the scope of these contents without abolishing them, but they are further obliged to support the existence of their municipalities in cases of crisis. This study will thoroughly analyse the protection of municipalities in times of crisis.

2.2 Provincial constitutions

The distribution of powers between the federal and provincial governments is governed by the federal Constitution which provides that: "[T]he Provinces retain all powers not delegated to the national government".[7]

In line with these federal parameters, it is the responsibility of each province to design the municipal model to be adopted as, in terms of constitutional law, it is a matter reserved for provinces. The federal Constitution does not make further provision in this regard, as all municipal issues are matters of provincial constitutional law and local (provincial) laws.

Each province is thus responsible for guaranteeing an autonomous municipal regime (that is, one that allows municipalities to manage their activities without interference from the provincial state). The principle of democratic legitimisation of the municipal authorities by popular election of the inhabitants is thus imposed.

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6 *Caso Municipio de La Rioja s / Casación*, CSJ 1490/1491/*2018, RH 1, of 17/02/2022).

7 Federal Constitution, art 121. It embodies the principle introduced in 1791 by Amendment X to the Constitution of the United States.

The federal Constitution states that the provinces may dictate their constitutions with freedom of institutional configuration and elect their authorities without the intervention of the federal government.[8] As previously discussed the provinces are compelled to establish municipal entities for the management of local interests,[9] and additionally, the federal Constitution[10] further seeks to ensure municipal autonomy and regulate the scope and content of the institutional, political, administrative, economic, and financial powers of municipalities.[11]

Each province can design its own model of municipal administration, although it must guarantee municipal autonomy in its different degrees – from the simplest (political-administrative autonomy) to the most intense (institutional autonomy, when the inhabitants have the power to dictate their municipal charter).

In short, within the territorial perimeter of a province, municipalities must exist, together with a provincial government, as public entities with their own territorial scope. Their geographic delimitation is established by provincial law, although juxtaposed to the provincial space, and their competences are reduced to the management of local interests.

In Argentina, these local public entities are regulated by provincial constitutions.[12] Therefore, within a provincial territory, there is a separation of functions between the provincial state and the municipality. On the one hand, a provincial state has jurisdiction within the territory of that provincial state, whilst, on the other hand, a municipality is in charge of the management of the local interests of a specific geographic area assigned to it by provincial law.

All of the constitutions of the 23 provinces contain, by necessity, provisions that regulate the scope of their municipal regime, and these provisions usually occupy an extensive part

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8 *Idem*, art 122 provides that: "They have their own local institutions and are governed by them. They elect their governors, their legislators and other provincial officials, without the intervention of the federal government". (This article remained unchanged by the 1994 reform.)

9 *Idem*, art 5 provides that: "Each province shall dictate for itself a Constitution under the republican representative system, in accordance with the principles, declarations, and guarantees of the National Constitution and [that] ensures its administration of justice, its municipal regime, and primary education". (This text was not modified by the 1994 reform, as it was prevented from doing so. However, art 123 was amended by the 1994 reform, as set out in the footnote *infra*.)

10 *Idem*, art 123 provides that: "Each province dictates its own constitution, in accordance with the provisions of Article 5, *ensuring municipal autonomy and regulating its scope and content in the institutional, political, administrative, economic and financial order*" (the addition in italics).

11 The interpretation of the CSJA, which, in 1989 in *Rivademar, Ángela v Municipalidad de Rosario* (*Fallos* 312:326), affirmed the nature of the municipalities and their autonomy, was taken up to a great extent.

12 The autonomous city of Buenos Aires is not included, as although it is a "constitutional autonomous city" occupying a territory of 22 000 hectares of urban nature, it does not contain municipalities in its interior (like New York). However, it is internally divided into districts (called *barrios* for administrative purposes) that are not overseen by municipalities – it is a federated city without municipalities in its interior.

of the constitutional text.[13] Typically, several chapters are dedicated to establishing the basic points of a province's municipal regime. A constitution will generally contain provisions setting out how to establish municipalities, the urban or territorial extension of the municipalities, categories of municipalities according to the number of inhabitants, the resources allocated to the municipalities, the basic structure of a province's government, and a list of local competences allocated to the muncipalities (which list is non-exhaustive).

In general, a province's governmental structure follows the presidential model of an executive department and a deliberative council directly elected by the vote of the residents. There is no local judicial power, meaning there are no municipal judicial magistrates, since the judicial function is in the hands of the provincial state. Even though some municipalities have established misdemeanour courts, these are not of a judicial nature but are administrative tribunals that review misdemeanours, restrictions, or administrative sanctions imposed by a municipal authority (the purpose of which is to guarantee a municipal resident access to an impartial body to oversee a due legal process).[14]

The municipality has competencies of a local nature, usually indicated in the provincial constitutional texts.[15]

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[13] The following Constitutions may be consulted: Province of Buenos Aires/1994 (arts 190-197); Province of Catamarca/1988 (arts 244-262); Province of Chaco/1994 (arts 182-206); Province of Chubut/1994 (arts 244-245); Province of Cordoba/1987-2001 (arts 190-197); Province of Corrientes/2007 (arts 216-236); Province of Entre Rios/2008 (arts 229-256); Province of Formosa/2003 (arts 177-186); Province of Jujuy/1986 (arts 178/196); Province of La Pampa/1994 (arts 115-124); Province of La Rioja/2008 (arts 168-174); Province of Mendoza/1916 (arts 197-210); Province of Misiones/1988 (arts 161-171); Province of Neuquen/2006 (arts 270-298); Province of Rio Negro (arts 225-240); Province of Salta/1986-1998 (arts 170-183); Province of San Juan/1986 (arts 239-255); Province of San Luis/2006 (arts 247-280); Province of Santa Cruz/1998 (arts 140-154); Province of Santa Fe/1962 (arts 106-108); Province of Santiago del Estero/2005 (arts 204-223); Province of Tierra del Fuego/1991 (arts 169-187); and Province of Tucumán/2006 (arts 132-143).

[14] The decisions of these administrative tribunals can always be reviewed before the provincial courts.

[15] See the Constitution of Córdoba, art 186 which lists the municipal competences: "The following are functions, attributions and purposes inherent to the municipal competence: 1. To govern and administer local public interests aimed at the common good. 2. To politically judge the municipal authorities. 3. To create, determine and collect economic-financial resources, prepare budgets, invest resources, and control them. 4. To administer and dispose of the assets that make up the municipal patrimony. 5. To appoint and remove municipal agents, guaranteeing the administrative career and stability. 6. To carry out public works and provide public services by itself or through private parties. 7. To attend to the following matters: sanitation; health and assistance centers; hygiene and public morality; old age, disability and homelessness; cemeteries and funeral services; building plans, opening and construction of streets, squares and promenades; design and aesthetics; roads, traffic and urban transportation; use of streets and subsoil; construction control; environmental protection, landscape, ecological balance and environmental pollution; To establish and foster institutions of intellectual and physical culture and educational establishments governed by ordinances in accordance with the laws on the subject; tourism; social welfare, social assistance and banking services. 8. To establish and promote policies to support and disseminate cultural, regional and national values; in general. To conserve and defend the historical and artistic heritage. 9. To regulate the administrative procedure and the system of misdemeanors. 10. To establish restrictions, easements and to qualify the cases of expropriation for public utility in accordance with the laws that govern the matter. 11. To regulate and coordinate urban and building plans. 12. To publish

Although a municipal entity is guaranteed by the federal Constitution and the scope of its competences and its most relevant features are regulated in each provincial constitution, a municipal entity's existence and organisation depend fundamentally on the enactment of two provincial laws: (i) the special law of creation of each municipality and (ii) the general law regulating the organisation and functioning of all municipalities (usually called the "organic law of municipalities"). The provincial tax and budget laws that regulate and provide financial resources to the municipalities are also of crucial importance in allowing municipalities to operate.

2.2.1 Special law of creation

The creation of a municipality depends on the sanction of a special law by the provincial legislature that provides for the creation of a municipality and determines precisely the territory assigned to the municipal jurisdiction. Every municipality has an individual law creating it.[16]

In some provinces, an entire provincial territory is overseen by municipalities, each of which has its own territory. Other provinces only recognise urban municipalities, and provinces that do so retain provincial jurisdiction over the territory not occupied by municipalities. It is up to each provincial constitution to establish either a territorialist or urban municipality geographic model.

An Argentine municipality cannot be assimilated to the concept of "county" used in the Anglo-Saxon world (some North American counties[17] contain municipalities within them, whilst some cities, such as New York, are divided into counties). Although the formation of the counties in North America depends on the constitution of each state (unlike the Argentine model), many of them were pre-existing and were created by what Tocqueville terms element "community spontaneity".[18]

2.3 Organic law of municipalities

The provincial regulatory regime contains a general law on municipalities, usually called the "organic law of municipalities", which is issued by the provincial legislative branch and develops more detailed aspects of how a province organises its municipalities. This law establishes different categories of municipalities (although sometimes the provincial constitution itself establishes categories), the structure of the various types of municipal

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periodically the state of its income and expenses and, annually, a report on the work carried out. To exercise the functions delegated by the Federal or Provincial Government, finally, an opening clause is always included as clause 14. To exercise any other function or attribution of municipal interest that is not prohibited by this Constitution and is not incompatible with the functions of the powers of the State".

16 It is very rare that a provincial constitutional text refers to a pre-existing municipality (eg Tierra del Fuego: Transitory Provisions 8, 9 and 15), although all of them establish the capital city where the provincial authorities must reside, which usually also has its own municipal regime.

17 See the National Association of Counties available here.

18 A de Tocqueville, *De la démocratie en Amérique,* 1835/1840.

government (generally with a deliberative body or council), and an executive body (mayor) elected by vote of the inhabitants.

2.3.1 Provincial fiscal laws (tax and budgetary)

Provincial fiscal laws are the provincial legal provisions on tax matters that affect the resources allocated to municipalities to carry out their functions.

Provinces obtain their resources from two sources: provincial tax collection and federal co-participation (a percentage of the national tax collection).[19] From the amount that the provinces receive from tax collection, a percentage is provided to the municipalities as second-degree co-participation. The percentage of the secondary co-participation that each municipality receives, in many cases, depends on the category assigned to it.[20] For instance, a first category municipality receives a higher percentage than a lower category municipality.

The impact of provincial tax laws is indirectly relevant[21] to distressed municipalities as tax collection by the provincial state constitutes one of the sources of municipal revenue. According to the principle of fiscal legality, provincial taxes must be established by law.[22]

Consequently, the municipal treasury is fed by two main sources: the co-participation that comes from the provincial state and the fees for municipal public services that the municipality receives from its residents. Municipalities may also receive special funds from the provincial and national governments specifically earmarked for certain local public works or services. They may also receive assets through donations from individuals, commercial companies, or public good entities.

2.4 Municipal charter

Some municipalities enjoy "institutional" autonomy. The residents of municipalities with "institutional" autonomy can dictate their own municipal charter. The municipal charter is equivalent to a statute dictated by the community itself through an extraordinary assembly, made up of representatives elected by popular vote where they autonomously determine

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19 The provinces receive a percentage of the co-participable mass (a set of taxes collected by the Nation) whereof they must allocate a portion to the municipalities (Law 23,548 on Federal Co-participation, art 9(g)). In this sense, some provincial constitutions and laws set a percentage on such federal co-participation that must be directly distributed amongst the municipalities that they oversee.

20 The category levels are established by taking into account the size of the population that a municipality oversees, territorial extension, amount of municipal services, etc.

21 The usual provincial taxes are real estate tax, gross income tax, stamp tax and motor vehicle tax, and the municipal taxes are traffic tax and vehicle patents. The municipal taxes are collected by the province in exchange for a lower percentage as a commission, in order to remit most of it to the municipalities.

22 A discussion on whether municipalities have the capacity to charge taxes or only fees as consideration for services falls outside the scope of this study.

the organisational form and operation of a municipality, without the provincial state intervening.[23]

3. Economic-financial regime

Municipalities provide their municipal services and public work functions with resources obtained from their own revenues (taxes for services to neighbours or on certain economic activities within their jurisdiction) and from the fiscal provision received by the provincial state that they report to that is then contributed to them (secondary co-participation). Provinces may receive fiscal provision from the state's collection of, for example, motor vehicle tax or certain percentages of provincial fiscal resources. To a lesser extent, a municipality may receive contributions from the national treasury for certain specific works or special social plans.[24]

This capacity to carry out its economic and financial activity corresponds to the constitutional principle of economic autonomy, which guarantees the municipality the power to contract payment commitments for services or public works without the intervention of the provincial government.

The economic-financial turnaround of a municipality – as well as the provincial and federal state – may be effected by allocating funds to it from the municipal budget, which is annually approved by the deliberative council. Like all budgets, it is an advanced estimate of the resources to be received and expenses to be incurred, calculated for the following fiscal year (from 1 January to 31 December of each year).

A municipality must calculate how much its revenues will be in the following annual period; that is, it must approximate all of the funds that it will receive during the following fiscal year. Municipalities must also make a forecast of the expenditures that will be authorised for that period. As in all budgets, resources are usually calculated on the basis of those obtained the previous year.[25] Expenditures, due to the principle of fiscal balance, must correspond to the revenues expected for that year.

This calculation of expenses is based on the previous year's disbursements. Some expenses cannot be easily changed (such as payroll expenses, the expenses incurred to pay currently utilised services, etcetera), whilst others are contingent (such as expenses for public works projected for that year or commitments carried over from the previous year, multi-year works, etcetera).

When expenditure forecasts exceed revenue estimates, the budget will reflect a deficit. If a municipality's budget reflects a deficit, its budget must indicate how it intends to cover

[23] There are 186 municipalities with an organic charter.

[24] E Arraiza (eds), *Manual de Gestión Municipal* (2nd ed, Konrad Adenauer Stiftung, Buenos Aires, 2019) at 70-88.

[25] In inflationary times, a corrective coefficient is usually included to consider increases in both resources and expenses because of the estimated inflation for that year.

this shortfall (through borrowing, issuing securities, setting new taxes, etcetera) in accordance with the principle of fiscal responsibility.

A draft annual budget ordinance must be submitted by a municipal executive department to a deliberating council. A council will analyse, deliberate on, and approves a municipal budget, which is then published in the Official Gazette.

Because annual municipal budgets are public, municipal fiscal accounts are known and accessible by any person. Whoever contracts with a municipality or grants it a loan cannot claim that it was unaware of, or lacked knowledge about, the financial state of the municipal entity that they have contracted with.

In short, the economic commitments assumed by a municipality have budgetary support derived from the specific allocation of fiscal resources that will be received during the period of one year. Therefore, every creditor of a municipality knows in advance whether a commitment has budgetary support.

Furthermore, municipalities, similarly to any other state entity, carry out their economic activity based on a financial administration system founded on the legal principle that no expenditure may be committed without the corresponding budget reflecting that commitment. In other words, if there is no prior budgetary item or if it does not have sufficient funds, a municipality cannot assume an economic commitment. As this is a general rule that does not admit ignorance, ignorance cannot be invoked. Internal accounting services (and external, if any)[26] are responsible for enforcing this essential condition of validity and, correlatively, may observe the conclusion of a fiscal commitment without the corresponding budgetary allocation.

A municipality has current expenses (salaries and current services such as electricity, water, gas, etcetera) that are unavoidable, and their payment is a priority due to their essential nature. Any other financial commitment agreed with third parties for public works or for the rendering of municipal public services must be supported by the corresponding budgetary forecast that constitutes a fiscal commitment to meet such purposes. As stated above, the municipality cannot validly assume these obligations without budgetary support.

In addition, any contract that involves a commitment of public funds is regulated by an exhaustive and normatively regulated public contracting system (accounting or financial administration, contracting, public works, and public employment ordinances). Any contractor of a municipality has access to this information. In addition, if a contractor in good faith assumes that its credit has budgetary support and complies with all of the applicable legal regulations, it is not the contractor's responsibility if a counterparty municipality fails to comply with the agreed payments.

[26] Some municipalities are controlled by an external body: a municipal Court of Auditors (in Córdoba, Rio Negro and Santa Fe) and the provincial Court of Auditors (province of Chaco and Buenos Aires).

4. Insolvency situations

Notwithstanding the aforegoing, municipalities may experience moments of non-compliance with obligations or payments. These situations could be once-off and temporary, or widespread and serious. Situations of this kind could originate in an unexpected retraction of resources to cover committed expenditures, or represent a high number of cases that break the budgetary balance in a sustained manner so that there are not enough resources to meet the commitments accrued in the future. The discussion that follows will firstly analyse the normal sporadic cases and then the situations of serious anomalous insolvency.

4.1 Normal cases: lawsuits for debts, liens for credits

Aside from situations of general, extended, and sustained cessation of payments, municipalities may be sued by creditors should they default on their debt payments in alignment with debts of any nature (salary or other debts).

Consequential to these non-payments, a municipality may be sued by judicial action to facilitate the collection of sums of money and may have their income (such as funds in bank accounts) or assets (vehicles, real estate in the private domain, securities in their possession, or other enforceable assets) seized so that a debt can be paid by judicial foreclosure. In this case, judicial execution is no different from any other judicial process of debt collection.

In some provinces, there are laws that set limitations on judicial orders against municipalities, providing, for example, that measures may not affect the provision of essential services such as the provision of public health services. Some provincial constitutions contain provisions for the seizure of municipal assets or resources.[27] In some cases, the absolute prohibition of seizure of revenues and assets required to conduct public works and services is established;[28] a seizable percentage limit is set;[29] a term for the execution of judgments is set;[30] or there are conditios for the inactivity of the municipality.[31]

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27 See the provincial Constitutions of Córdoba, arts 178, 179 and 189; Catamarca, arts 41 and 258; Chaco, arts 76, 83 and 199; Chubut, arts 98 and 120; Corrientes, arts 20, 211 and 230; Entre Ríos, arts 46 and 248; Formosa, arts 34 and 183; Jujuy, arts 11 and 74(7); La Rioja, art 15; Mendoza, arts 40 and 202; Neuquén, art 156; Río Negro, art 55; Salta, art 5; San Juan, art 8; San Luis, arts 12, 78 and 276; Santiago del Estero, art 11; and Tierra del Fuego, art 80.

28 See the provincial Constitutions of Catamarca, art 258; Chaco, art 199; Chubut, arts 98 and 120; Corrientes, arts 211 and 230; Mendoza, art 202(9); Tierra del Fuego, art 80; and Cordoba, art 179 (only for preventive seizures).

29 See the provincial Constitutions of Entre Ríos, art 248 (providing up to 20%); Formosa, art 183 (providing up to 10%); Río Negro, art 55 (providing up to 20% of revenues); and Salta, art 5 (providing up to 25%).

30 See the provincial Constitutions of Cordoba, art 179; Jujuy, arts 11 and 74(7); and San Juan, art 8.

31 Provincial Constitution of San Juan, art 8.

These types of immunity clauses for municipalities raised questions about the constitutionality of the provincial rule of granting provinces or the municipalities under their jurisdiction the ability to create a prohibition on the seizure of assets. This matter was analysed by the Supreme Court of Justice of the Nation in *Dearborn Chemical Co. v Municipality of Rosario*,[32] which determined that, except in instances where judicial attachment represented an excessive percentage of the municipal revenues to the point of making the rendering of public services impossible, the measure must be prudentially limited to establish an annual quota.

In *Compañía Luz y Fuerza Motriz v Municipalidad de Córdoba*[33] the court declared the unconstitutionality of article 149 of the provincial Constitution of Córdoba, which provided that "[i]n no case may execution or seizure be made on municipal revenues". The Supreme Court of Justice of the Nation takes a restrictive position on these types of powers of the provinces. In *S.A. Liebig's Extract of Meat Company v Province of Entre Rios*, article 30 of what was then the provincial Constitution of Entre Rios was questioned, and the Court stated that:

> "Any provisions contained in local laws tending to remove from the action of creditors the assets, resources and revenues of the provincial State, contrary to the rights and guarantees granted by civil law, cannot be validly invoked, since the relations between creditor and debtor are under the exclusive legislation of the National Congress."[34]

Since the precedent in *Filcrosa* was set,[35] the Supreme Court of Justice has maintained its position; and it did so most recently in *Municipalidad de Resistencia c/ Lubricom S.R.L. s/Ejecucion Fiscal*.[36]

4.2 Abnormal cases

It is possible to have a more general and extended municipal cessation of payments. This situation could arise due to an unforeseen drop in revenues (due to economic activity retraction), due to a municipality's general inability to comply with salary obligations for its personnel, or with its accounts to its suppliers of services and public works.

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32 *Fallos* 182:229 of 26 March 1939.

33 *Fallos* 188:383 of 29 November 1940.

34 *Fallos* 284:458/1972. An extension or confirmation of this position can be seen in the case of *Volkswagen de Ahorro para Fines Determinados SA v Provincia de Misiones - Dirección General de Rentas y otro s / demanda contenciosa administrativa* (*Fallos*: 342:1903 del 05/11/2019), which was decided by the same court as *Recurso de hecho deducido por la parte actora en la causa Montamat y Asociados SRL v Provincia de Neuquén s / acción procesal administrativa* (*Fallos* 343:1218/2020).

35 *Fallos* 326: 3899.

36 *Fallos* 332:2108/2009.

The remedies to address this type of municipal insolvency or bankruptcy situation in Argentina are as follows: (i) extraordinary provincial assistance, (ii) state of municipal economic-financial emergency and (iii) provincial intervention.

4.2.1 Extraordinary provincial assistance

Should a municipality face an economic crisis, it is the responsibility of the provincial government to which it is accountable to guarantee the maintenance and continuity of municipal services (salaries of municipal employees, local public services, etcetera).

The province does not assume the municipal debt but financially assists the municipality with either reimbursable or non-reimbursable contributions so that the municipality may face and overcome its financial distress. Such financial assistance is usually accompanied by provincial controls being enforced, such as freezing the number of personnel appointments or controlling the municipal public works or services plan. Therefore, the financial or economic imbalances incurred by a municipality are dealt with by a provincial treasury allocating it extraordinary support. A provincial government, due to its greater economic power, can cover the financial deficits or losses of a municipality.

Notably, if the provision of provincial control over a municipality in crisis is prolonged, it would seriously affect municipal autonomy since provincial control would have the effect of submitting a municipality to the rule of a provincial government, taking away its constitutionally guaranteed autonomy.

4.2.2 State of municipal emergency

Should a municipality be facing a very serious and widespread insolvency, it may resort to an extraordinary and exceptional *ad hoc* procedure: declaration of an economic-financial state of emergency. This is a *sui generis* procedure: declaring an economic and financial emergency by ordinance of a deliberative council or, exceptionally, by decree of a mayor.

An economic state of emergency is an extraordinary, exceptional, and temporary legal tool. A subject of state (national, provincial or municipal) that has declared such a state will formulate a public declaration of emergency that involves expressing that it is in an anomalous and transitory situation. Whilst it is in this situation, it is declaring that, in general, it is unable to normally comply with its obligations.

In order to be legally valid, an economic and financial emergency must be implemented by a declaration issued by the highest municipal regulatory body – a city council. Furthermore, it must be temporary and must not affect the essential content of the rights of the creditors of the municipality, and its implementation must be applied in a similar

way to the application of a national state of emergency by the Supreme Court of Justice of the Nation.[37]

In this regard, a state of emergency involves informing all creditors in a public, general, and reliable manner that a declaring municipality is unable to meet its financial commitments. It is essential that this emergency status, in addition to being declared publicly, is not only justified and proven but also temporary. It must be accompanied by a clear determination of the general measures that will be taken to overcome the crisis situation, including, for example, freezing the filling of vacant positions, extending the terms of overdue unpaid economic obligations, the compulsory transformation of monetary debts into public securities, or altering the modalities of compliance with outstanding benefits (known as "consolidation"). In short, there is a wide variety of modalities and compulsory modifications that must be clearly established by a municipal government itself in a general way so that all of its creditors are treated equally.

This modality of declaring a state of emergency, especially in economic and financial matters, has been repeatedly applied by the national government[38] and imitated by provincial states and municipalities in financial crises.

The following cases should be noted:

(a) By Ordinance of the Deliberative Council: Municipality of Regina in the province of Rio Negro in 2020,[39] Municipality of Colonia Caroya in the province of Córdoba in 2020,[40] and Municipality of San Carlos de Bariloche in the province of Rio Negro in 2015;[41] and

(b) By Resolution of the Mayor: Municipality of the City of Mendoza in the province of Mendoza in 2020[42] and Municipality of Rojas in the province of Buenos Aires in 2020. In some cases, courts invalidated the declarations of emergency.[43]

In several cases, a state of financial emergency dictated by a provincial state inevitably had an impact on municipal public accounts, which is why this type of law usually allows

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37 See *Peralta, Luis A y otro v Estado Nacional (Ministerio de Economía - Banco Central)" Fallos* 313:1513/1990; *Bustos, Alberto Roque y otros v Estado Nacional y otros Fallos*: 327:4495/2004; and *Massa, Juan Agustín v Poder Ejecutivo Nacional* - dto 1570/01 *y otros s amparo ley* 16.986" *Fallos*: 329:5913/2006.

38 Law 23.697 of 1989; Law 23.982 of 1991; Law 25.561 of 2002; and Law 27.541 of 2019.

39 Available at https://www.rionegro.com.ar/el-deliberante-de-regina-prorrogo-la-emergencia-economica-del-municipio-1720157/.

40 Available at https://boletinoficial.cba.gov.ar/wp-content/4p96humuzp/2020/05/5_Secc_200520.pdf.

41 Available at https://www.concejobariloche.gov.ar/index.php/informacion-institucional/novedades-del-concejo-municipal-de-bariloche/10428-se-aprobo-la-emergencia-economica-administrativa-y-financiera-de-la-municipalidad.

42 Available at https://www.unidiversidad.com.ar/la-ciudad-de-mendoza-se-declaro-en-emergencia-economica-y-financiera.

43 In 2007, the Superior Court of Justice of the Province of Misiones declared the declaration of a state of emergency of the municipality of Posadas invalid.

municipalities to adhere to the guidelines and mechanisms for reorganisation proposed by the legal regulations.

4.2.3 Provincial intervention

A provincial state is a guarantor of the operation of a municipality. Therefore, in the event of a deep and insoluble cessation of payments by a municipality, an extreme constitutional measure may be utilised: a provincial intervention of the operation of the distressed municipality that involves the temporary displacement of its elected authorities (mayor, councilmen (municipal legislators) and non-permanent officials). Each provincial constitution establishes the grounds on which an intervention may be made, and the relevant body (the governor of the province and its legislative branch) assesses the suitability of an intervention. Generally, a decision to intervene is implemented by the provincial legislature passing a law that results in the termination of the elected municipal authorities (mayor and / or city council), and they are replaced by an intervener. The aim of this temporary official is to balance the municipality's finances with extraordinary help from provincial resources. Once this objective is achieved, the intervener must call the municipality's residents to vote for a new mayor and / or city council to oversee the municipality.

5. Conclusion

In short, there is no pre-established court insolvency procedure to address situations where a municipality faces insolvency, bankruptcy, or is failing to make payments that are due. In contrast, private parties facing financial distress may use insolvency procedures to make an arrangement with creditors, or some type of universal judgment that brings together creditors to receive a payment proposal from the failed entity. A municipality, by its nature as a public legal entity, is governed by *ad hoc* administrative law provisions. There is no law in the provinces that regulates, in a general and set manner, a process analogous to the reorganisation or bankruptcy proceedings for municipalities.

Local public entities in distress – a critical analysis of the Australian approach

By Elizabeth Streten*

1. General context of insolvency law

The insolvency of local public entities, generally called local governments in Australia, is arguably an under-researched area. Where it is considered, it is generally assessed outside of the general insolvency field and deliberated upon within the field of public governance. This is likely because insolvency of local governments is not regulated by the same legal framework as most corporate insolvencies, and local governments are subject to a different framework under local government legislation and authority, rather than under corporate insolvency legislation *per se*.

Insolvency laws themselves are fragmented in Australia. The country has a federal government system with powers split between the Commonwealth (federal) government and the different State governments under the Australian Constitution.[1] Due to its unique federalisation history surrounding colonisation, the Australian Constitution has defined federal powers.[2] Under the Australian Constitution the federal Parliament is granted the specific power, concurrent with each of the States, to make laws with respect to bankruptcy and insolvency.[3]

The bankruptcy of natural persons is not relevant to this project and is addressed in its own separate suite of legislation.[4] The Australian Financial Services Authority (AFSA), a Commonwealth federal government body, manages the application of bankruptcy and personal properties securities law.

The Corporations Act[5] is the principal legislation managing the liquidation and rescue of companies. There are also supporting provisions in the Corporations Regulations,[6] the Australian Securities and Investments Commission Act,[7] and the Insolvency Practice Rules (Corporations).[8]

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1 R Mason, "Insolvency Academics Contributing to the Review of Insolvency Laws: An Australian Perspective", *Nottingham Business and Insolvency Law e-journal* (2015) 3 263 at 265.

2 Commonwealth of Australia Constitution Act 1900 (Cth). The Federal powers are set out in s 51.

3 *Idem,* s 51(xvii).

4 Primarily the Bankruptcy Act 1966 (Cth); Bankruptcy Regulations 2021 (Cth); and Insolvency Practice Rules (Bankruptcy) 2016 (Cth).

5 Corporations Act 2001 (Cth).

6 Corporations Regulations 2001 (Cth).

7 Australian Securities and Investments Commission Act 2001 (Cth).

8 Insolvency Practice Rules (Corporations) 2016 (Cth).

External administration is addressed in Part 5 of the Corporations Act and winding-up in the case of insolvent companies is addressed more particularly from Part 5.4 onwards. The Corporations Act provides mechanisms for the appointment of receivers, voluntary administrators and liquidators. Registered insolvency practitioners are appointed to these positions. There are detailed processes regarding the registration and appointment of practitioners as receivers, administrators and liquidators, together with detailed processes regarding court involvement, creditor involvement, and provisions regarding the various stakeholders impacted by insolvency, such as employees and debtors. The Australian Securities and Investments Commission (ASIC), a Commonwealth (federal) government body, is Australia's corporate, markets and financial services regulator. ASIC regulates, amongst other things, corporate insolvency practitioners.[9]

In recent decades, there have been numerous inquiries and reviews of Australian insolvency laws and the regulation of Australian insolvency practitioners.[10] Some of these inquiries have deliberated upon the foundation of Australian corporate insolvency laws. In particular, the 1988 Harmer Report[11] set out nine guiding principles of contemporary insolvency law.[12] The Harmer Report contemplated that the essential purpose of Australian insolvency is the provision of a fair and orderly process for dealing with the financial matters of insolvents.[13] The report also makes reference to the relief of insolvents from liability, the need for creditor participation and the relevance of equality and support for the community.[14] In addition to serving the interests of creditors, the Harmer Report raises the importance of debtors and society in the administration of Australian insolvency law. However, the later 2010 Senate Enquiry is more creditor-focused; it argues that the role of insolvency law, being derived from the United Kingdom, is to protect the interests of creditors.[15]

After the 2010 Senate Enquiry, there were numerous legislative reforms to Australian insolvency processes and the regulation of Australian practitioners.[16] This was a time of

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9 See ASIC's website here.

10 See for example the Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988); Commonwealth, *Review of the Regulation of Corporate Insolvency Practitioners: Report of the Working Party* (Ms Veronique Ingram, Chairperson) AGPS, Canberra, June 1997; Parliamentary Joint Committee on Corporations and Financial Service, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004); and Senate Economics References Committee, Parliament of Australia, The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework (2010).

11 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988), at 2.

12 R P Buckley, "Commentary: The systemic benefit of insolvency law: a lacuna in the Australian literature", *Insolvency Law Journal* (2003) 11(1) at 38.

13 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988), at 2.

14 *Ibid*.

15 Senate Economics References Committee, Parliament of Australia, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework* (2010) 1.

16 The Insolvency Law Reform Bill 2013 was released as an exposure draft by the Attorney-General and Parliamentary Secretary to the Treasurer on 19 December 2012 seeking submissions by 8 March 2013. Almost two years later, the Insolvency Law Reform Bill 2014 was released as an exposure draft on 7 November 2014 seeking submissions by 19 December 2014. It then became the Insolvency Law Reform

significant disruption to the industry.[17] A major reform was the Insolvency Law Reform Act 2016 (ILRA). The ILRA, together with associated legislation and practice rules, amended amongst other things core aspects of corporate insolvency regulation and practice. Some of the main changes pertained to practitioners' legal responsibilities as set out in Australian federal corporate insolvency legislation.[18] The ILRA was passed in February 2016, but it had a staggered implementation with the first stage commencing on 1 March 2017 and the second stage on 1 September 2017. Further legislative changes took place in 2017 and 2018 with the commencement of a user-pay regulation levy,[19] "*ipso facto*" regulation impacting contractual creditor protections, and the commencement of regulation regarding "safe harbour" director protections.[20]

Apart from Covid-19 legislative responses, there have also been some other significant recent reforms in Australia – the Corporations Amendment (Corporate Insolvency Reforms) Act[21] commenced on 1 January 2021. This act established a new framework for small businesses with a new formal debt restructuring process, a simplified liquidation process and further measures available to eligible small business.

Local governments are different from companies: they are established and managed pursuant to local government legislation in order to deliver State / Territory local and regional priorities. In recent years there has been debate about the recognition of local governments in the Australian (federal) Constitution. There were attempts to amend the Australian Constitution to include such recognition by way of national referendums, including in 2013 with the Constitution Alteration (Local Government) Bill on the financial recognition of local government. However, no referendum has succeeded.

As a consequence of various concerns regarding alleged corruption, unsafe workplaces and financial distress, local governments have also been the subject of numerous public inquiries and investigations.[22]

Bill 2015 before passing both Chambers of the Houses of Parliament and receiving Royal Assent as the Insolvency Law Reform Act of 2016.

17 E Streten, "Insolvency Practitioners: A Phenomenological Study", *Insolvency Law Journal* 29(2) at 83.

18 Corporations Act 2001 (Cth); Corporations Regulations 2001 (Cth); and supporting provisions in the Australian Securities and Investments Commission Act 2001 (Cth).

19 The Australian Securities and Investments user-pay regime commenced on 1 July 2017. The relevant legislation, the ASIC Supervisory Cost Recovery Levy 2017 (Cth), received Royal Assent on 19 June 2017 after passing through both houses of Parliament on 15 June 2017.

20 See the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (Cth). Provisions colloquially known as "safe harbour" commenced on 19 September 2017. The provisions colloquially known as "*ipso facto*" commenced 1 July 2018.

21 Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth).

22 See for example https://www.parliament.nsw.gov.au/tp/files/77157/Balranald%20-%20Public%20Inquiry%20-%20Dismissal%20-%20Public%20Inquiry%20Report.pdf; https://www.dlgsc.wa.gov.au/docs/default-source/local-government/inquiries/report-of-the-inquiry-into-city-of-cockburn.pdf?sfvrsn=c0c343fa_3; https://www.parliament.qld.gov.au/work-of-committees/committees/PCCC/inquiries/current-inquiries/InquiryCCCLCC2021; https://www.olg.nsw.gov.au/media-releases/public-inquiry-into-central-coast-council/; and https://www.regional.gov.au/territories/norfolk_island/public-inquiry-nirc/index.aspx.

2. Local public entities

2.1 General position

This study focuses on local public entities (namely local governments in Australia), which are sometimes referred to as the third tier of government in Australia. As discussed above, Australia has a federal government system (called the Commonwealth government) which could be referred to as the first tier of government that provides laws for the entirety of Australia. There is a division of powers between the federal Commonwealth government and the various second tier State governments, which retain various law-making powers under the Australian Constitution.[23] There are six States (New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania), and there are also two self-governing Territories (the Northern Territory and the Australian Capital Territory).

The treatment of local governments across the States and Territories is not uniform. However, each State has taken legislative steps to recognise local government in its State constitutions and has enacted a number of legislations establishing and governing those local governments. The Northern Territory also has a governing legislation. However, as a Territory, its power is limited to the power granted by the federal Commonwealth. Legislation relevant to the government of the Territories is set out in the Northern Territory (Self-Government) Act[24] and the Australian Capital Territory (Self-Government) Act.[25] The Australian Capital Territory is unique in Australia in that it does not have a separate system of local government.[26]

The regulatory framework for local government in Australia involves a Department of Local Government, at second tier government, a Local Government Grants Commission and ancillary regulatory bodies together with statutes in the form of a Local Government Act and supporting legislation.[27] The following is a list of the relevant second tier government constitutional recognition of local governments and the main governing legislations:

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[23] R Mason, "Insolvency Academics Contributing to the Review of Insolvency Laws: An Australian Perspective", *Nottingham Business and Insolvency Law e-journal* (2015) 3 263 at 265. Also see a visual diagramme of the levels of Australian government, available here.

[24] Northern Territory (Self-Government) Act 1978 (Cth).

[25] Australian Capital Territory (Self-Government) Act 1988 (Cth).

[26] In this regard, see here.

[27] B Dollery, S O'Keefe and L Crase, "State Oversight Models for Australian Local Government", *Economic Papers* (2009) 28(4) 279 at 280.

State / Territory	Constitution	Main governing act
Queensland	Constitution of Queensland (Qld)[28]	Local Government Act (Qld)[29] (the Queensland Act)
New South Wales	Constitution Act (NSW)[30]	Local Government Act (NSW)[31] (the NSW Act)
Victoria	Constitution Act (Vic)[32]	Local Government Act 1989 (Vic)[33] has been replaced by Local Government Act 2020 (Vic)[34] (the Victorian Act). It has been labelled the most ambitious reform to the government sector in over 30 years.[35] However, parts of the earlier act remain in force at the time of writing.
South Australia	Constitution Act (SA)[36]	Local Government Act (SA)[37] (the South Australian Act)
Tasmania	Constitution Act (Tas)[38]	Local Government Act[39] (the Tasmanian Act)
Western Australia	Constitution Act (WA)[40]	Local Government Act[41] (the Western Australian Act)
Northern Territory	Not applicable	Local Government Act[42] (the Northern Territory Act) which commenced on 1 July 2021.

The terminology for local governments is not always consistent across each of the above States and the Northern Territory. They are generally called "local governments", "local councils", "local government bodies", and sometimes "councils", but can also be called "municipal councils". In the Northern Territory there are nine large regional councils and

28 Constitution of Queensland 2001(Qld), Ch 7.
29 Local Government Act 2009 (Qld).
30 Constitution Act 1902 (NSW), Part 8, s 51.
31 Local Government Act 1993 (NSW).
32 Constitution Act 1975 (Vic) Part IIA, ss 74A-74B.
33 Local Government Act 1989 (Vic).
34 Local Government Act 2020 (Vic).
35 See https://www.localgovernment.vic.gov.au/council-governance/local-government-act-2020.
36 Constitution Act 1934 (SA) Part 2A, s 64A.
37 Local Government Act 1999 (SA).
38 Constitution Act 1934 (Tas) Part IVA, ss 45A-45C.
39 Local Government Act 1993 (Tas).
40 Constitution Act 1889 (WA) Part IIIB, ss 52-53.
41 Local Government Act 1995 (WA).
42 Local Government Act 2019 (NT).

within these there are 63 local authorities in remote communities.[43] The Australian Capital Territory has seven not-for-profit community councils (which are not local governments).[44]

Local governments are subject to oversight by the relevant Minister of Local Government across each State and in the Northern Territory, with the assistance of their office and appointed officers. The roles of local governments are described on websites across the States and the Northern Territory as making, executing and administering local laws or making significant decisions for local communities; they exist for the good rule and local government of their area.[45]

2.2 Laws across different States and the Northern Territory

The laws that apply to local governments differ between the various States and the Northern Territory in accordance with the provisions of the applicable Local Government Acts and associated acts and regulations. By way of example, some, but not all, have the ability to form organisations to provide local governments with a more efficient mechanism to serve their communities.

In New South Wales, there is the ability to form county councils, which may have functions comprising any one or more of the functions of the local government council.[46] There is also the ability to form or participate in the formation of a corporation or other entity, or acquire a controlling interest in one, in the circumstances detailed below.

In Queensland and Victoria, organisations called "beneficial enterprises" may be formed. Pursuant to section 39 of the Queensland Act, a beneficial enterprise is "an enterprise that a local government considers is directed to benefiting, and can reasonably be expected to benefit, the whole or part of its local government area". In conducting a beneficial enterprise in Queensland, the local government may, amongst other things, "participate with an association", which includes forming or taking part in forming an association (such as certain companies).[47] However, there are several provisions limiting the liability of the local government.[48]

Pursuant to section 110 of the Victorian Act, for the purpose of performing its role, a council may participate in any of the following beneficial enterprises: (i) become a member

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43 In this regard, see here.

44 In this regard, see here.

45 See http://www.dlgrma.qld.gov.au/local-government/local-government-ilgp.html, https://www.olg.nsw.gov.au/public/about-councils/, https://knowyourcouncil.vic.gov.au/guide-to-councils/what-councils-do, https://walga.asn.au/About-Local-Government.aspx, https://www.lga.sa.gov.au/sa-councils/local-government-in-sa, http://www.dpac.tas.gov.au/divisions/local_government and https://www.edo.org.au/publication/role-of-northern-territory-commonwealth-and-local-government/.

46 NSW Act, s 394.

47 Queensland Act, s 40.

48 *Idem*, s 40(2)(c). Also, under the Statutory Bodies Financial Arrangements Act 1982, a local government may need the Treasurer's approval before entering into particular financial arrangements.

of a corporation, (ii) participate in the formation of a corporation, trust or other body, (iii) acquire shares in a corporation, trust or other body, and (iv) enter into a partnership or joint venture with any other person or body. There are however various requirements, including an assessment of risk.[49]

Western Australia is very limited in what can be formed,[50] and the Northern Territory cannot form anything beyond local government subsidiaries.[51]

2.3 A deeper consideration – New South Wales

The laws of New South Wales (NSW) will be detailed as an example of the application of law pertaining to local governments in Australia. A council in NSW has the functions conferred or imposed on it by or under the NSW Act or by another act or law.[52] These functions include things supplemental, incidental or consequential to, such functions.[53] A summary of local government roles compared with State and national roles is set out on the NSW Parliamentary website.[54] As shown on that website, local governments have a relatively narrow range of functions; some major responsibilities of the State are hospitals and schools whereas local governments are "concerned with matters close to our homes, such as building regulations and development, public health, local roads and footpaths, parks and playing fields, libraries, local environmental issues, waste disposal, and many community services".[55] In general, Australian local governments are responsible for the provision of local infrastructure such as roads and waste collection.[56] There are some differences among the various States, for example Queensland and regional NSW local

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49 Victorian Act, s 111.

50 Western Australian Act, 3.60; and Local Government (Functions and General) Regulations 1996 (WA), r 32, provides that (1) a local government may form or take part in forming an association that is to be incorporated under the Associations Incorporation Act 2015 and may do things for the purpose of the incorporation of the association under that Act, and (2) a local government may form or take part in forming a body corporate established under the Strata Titles Act 1985 section 14(1) or the Community Titles Act 2018 section 17(1). These incorporations relate to strata (property) schemes and associations.

51 Northern Territories Act, s 67 provides that the Minister for Local Government may approve a local government subsidiary to come into existence on a specific date as a body corporate that has the powers and functions conferred or assigned by its constitution in order to carry out functions related to local government on behalf of its consistent council or councils. The constitution must be approved by the Minister under s 69 of the Northern Territories Act. The Minister has approved the constitution of CouncilBiz (described here as a local government subsidiary established to manage the information technology support of regional councils) and Latitude 12 - East Arnhem Regional Council (which was a local government subsidiary established to carry out functions in relation to local government on behalf of the East Arnhem Regional Council, but as per the discussion here it has since been abolished).

52 NSW Act, ss 21 and 22.

53 *Idem*, s 23.

54 See https://www.parliament.nsw.gov.au/about/Pages/The-Roles-and-Responsibilities-of-Federal-State-a.aspx.

55 *Ibid*.

56 S Jones and R G Walker, "Local government distress in Australia: A latent class regression analysis" in S Jones and D A Hensher (eds), *Advances in Credit Risk Modelling and Corporate Bankruptcy* (1st ed, Cambridge University Press, Cambridge, 2008) ch 9, 242-268, at 247-248.

governments bear the responsibility for water and sewerage whereas many others do not.[57]

Local governments in NSW cannot form or participate in the formation of a corporation or other entity or acquire a controlling interest in one unless it is in accordance with the NSW Act or with Minister consent.[58] An entity means any partnership, trust, joint venture, syndicate or other body (whether or not incorporated). It does not include any such entity that is of a class prescribed as not being within this definition but, at the time of writing, the regulation has not prescribed such a class. This restriction on formation of companies does not prevent a local government from being a member of a co-operative society or company limited by guarantee.

To obtain aforementioned Minister consent, the Minister needs to be satisfied of the public interest in undertaking the relevant participation or formation. Online information assists in understanding the criteria for formation of a corporation.[59] The financial viability of the council is a listed consideration, based upon financial information routinely required from the council.

2.4 Revenue sources

Local governments across the States and the Northern Territory receive funding from a number of sources. The main source of income for local government councils is the payment of rates. However, notwithstanding that rates are the only tax collected by local government, rates make up only some 3.4% of all of the taxes raised by all three tiers of government.[60] There is also federal government assistance provided under the Financial Assistance Grant programme and the Local Government (Financial Assistance) Act.[61] The Australian Government provided almost AUD 64 billion under the Financial Assistance Grant programme to local government since 1974-1975 (including 2022-2023).[62]

It has been estimated that local councils are responsible, on average, for raising 80% of their own revenue, with rates being approximately 38% of that revenue.[63] However, these figures are not necessarily consistent across the States. Australian academics Dollery, Byrnes and Crase have noted that "Australian local councils survive on a relatively narrow revenue base…within this narrow range, most revenue raising has important 'non-

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57 This is discussed in B Dollery, S O'Keefe and L Crase, "State Oversight Models for Australian Local Government", *Economic Papers* (2009) 28(4) 279 at 280.

58 NSW Act, s 358.

59 See https://www.olg.nsw.gov.au/council-circulars/07-49-criteria-for-applications-under-section-358-of-the-local-government-act-1993-formation-of-corporations-or-other-entities/.

60 See https://alga.asn.au/facts-and-figures/.

61 Local Government (Financial Assistance) Act 1995 (Cth).

62 See https://www.infrastructure.gov.au/territories-regions-cities/local-government/financial-assistance-grant-local-government.

63 See https://alga.asn.au/facts-and-figures/.

discretionary' elements".[64] In this respect, "individual councils have differing abilities to raise revenue, based on location, population size, rate base and the ability to levy user charges".[65] The website of the Office of Local Government in South Australia reports that some 70% of its funding is from rates, the other 30% is from statutory charges (3%), user charges (9%), grants and subsidies (14%), investment income (1%), and reimbursements and other (3%).[66] The 2017 published NSW councillor handbook reports that on average NSW councils receive 21% of their regular income from ordinary land rates.[67]

There are only two States in Australia that have a cap on the amount of rates that they can collect, namely NSW and Victoria.[68] The South Australian State government attempted to introduce legislation seeking to implement rate-capping into South Australia in 2018, however it was not passed. The Independent Pricing and Regulatory Tribunal NSW sets the maximum amount that NSW councils can collect in general revenue through an annual rate peg and considers councils' requests to set higher charges with special variations (the 2022-2023 rate peg for each NSW council ranges from 0.7% to 5.0% depending upon the level of population growth).[69] This is the maximum percentage amount by which a local government in NSW may increase its general income for the year.[70]

While investment is permitted,[71] it may only be done in legislated circumstances. In NSW it must be in a permitted form, as notified by the Minister via Gazette, a copy of which is obtainable together with NSW investment policy guidelines from the NSW Office of Local Government website.[72] Under Chapter 15, Part 12 of the NSW Act, a NSW local government may also borrow and provide security for borrowings for a purpose allowed, but the Minister may from time to time impose limitations or restrictions upon particular council(s) or councils generally.[73] The borrowing may be in the form of an overdraft or loan or by other means approved by the Minister.[74] The Minister has issued a revised borrowing order – councils may only borrow Australian currency in Australia. Councils must not delegate the borrowing function, must exercise the reasonable care and diligence that a prudent person would exercise when borrowing funds, and are expected to have a full understanding of the terms and conditions of borrowing arrangements before entering into any contract.[75] Tcorp is a facility that offers borrowing facilities to NSW local governments.[76]

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64 B Dollery, J Byrnes and L Crase, "A typology of the Sources of Council Sustainability", *Working Paper Series University of New England* (2007) 4 1 at 15.
65 See https://alga.asn.au/facts-and-figures/.
66 See this breakdown at https://www.lga.sa.gov.au/sa-councils/local-government-in-sa.
67 See https://www.olg.nsw.gov.au/wp-content/uploads/Councillor-Handbook-2017.pdf at 11.
68 See https://www.lga.sa.gov.au/sa-councils/local-government-in-sa/rate-capping.
69 See https://www.ipart.nsw.gov.au/Home/Industries/Local-Government/For-Ratepayers/The-rate-peg.
70 *Ibid*.
71 See for example NSW Act, s 625.
72 See https://www.olg.nsw.gov.au/councils/council-finances/financial-guidance-for-councils/investments/.
73 NSW Act, ss 621-624.
74 *Idem*, s 622.
75 See https://www.olg.nsw.gov.au/council-circulars/09-21-revised-borrowing-order/.
76 The website is available at https://www.tcorp.nsw.gov.au/html/localcouncils.cfm.

The approach to borrowing is not uniform across all States and the Northern Territory. By way of example, in Queensland a local government is required to obtain the Treasurer's approval to undertake particular financial arrangements / borrowings.[77] Under a General Approval dated 23 May 2003 issued by the Queensland Treasurer, the Department of Local Government, Racing and Multicultural Affairs may grant approval for local governments to borrow from, or establish working capital facility with, Queensland Treasury Corporation (QTC). Separate approval of the Treasurer is, however, still required for borrowings and facilities not sourced from QTC. Further, in Victoria, a local government cannot borrow unless the proposed borrowings were included in its budget or revised budget.[78]

2.5 Oversight

Local governments in Australia arguably have very limited autonomy, due to their State government oversight and due to "the non-discretionary nature of the environment in which they operate, through largely exogenously determined demographic factors, council revenue, municipal expenditure, etc".[79] All the governments of the States and the Northern Territory have oversight of their local governments and there is strict financial accountability: for example in Chapter 13, Part 3, Division 1 and 2 onwards of the NSW Act, a local government is required to keep strict accounting records, and they must be referred to audit by the local government as soon as practicable at the end of each year. The audits are made public. Following a financial audit, the Audit Office issues a variety of reports to entities and reports periodically to Parliament. These reports give opinions on the truth and fairness of financial statements, and comment on entity compliance with certain laws, regulations and government directives. They may comment on financial prudence, probity and waste, and recommend operational improvements.[80] Pursuant to section 426 of the NSW Act, the Auditor-General is to communicate with the Minister on all matters arising under the NSW Act or the regulations and which, in the opinion of the Auditor-General, are sufficiently significant to be brought to the Minister's attention. An inquiry may be instigated by the Department Chief Executive[81] and reported back to the Minister.[82] The Minister has broad powers, including ordering provision of information / documents,[83] requesting an inquiry,[84] and / or ordering the council to do or refrain from doing things as recommended as a result of an inquiry.[85] Where considered necessary, the Governor of NSW has the power to appoint administrator(s) to a council under the

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77 *Statutory Bodies Financial Arrangements Act 1982* (Qld), Part 5, Division 2.
78 Victorian Act, s 104.
79 B Dollery, S O'Keefe and L Crase, "State Oversight Models for Australian Local Government", *Economic Papers* (2009) 28(4) 279 at 289.
80 See https://www.audit.nsw.gov.au/sites/default/files/documents/FINAL%20WEB%20-%20Report%20on%20Local%20Government%202019.pdf.
81 NSW Act, s 430.
82 *Idem*, s 433.
83 *Idem*, s 429.
84 *Idem*, s 430.
85 *Idem*, s 434.

NSW Act.[86] This process, and the process to dissolve a council, are discussed in further detail below.

3. Dealing with local public entities in distress

Australian academics have raised concerns that Australian local government councils face various challenges in maintaining fiscal sustainability, as they face escalating demands on resources while simultaneously having a diminishing financial capacity.[87] Some academics have concluded that government failure is more pronounced among local governments.[88] Dollery has gone so far as to declare in 2009 that the "dawn of the new millennium has given rise to the emergence of acute financial distress in all Australian local government state and territory jurisdictions as repeatedly demonstrated by numerous national and state-based inquiries into the financial sustainability of local government councils".[89] These inquiries were undertaken in particular throughout the first decade of the 21st century and raised concerns with respect to the financial sustainability of Australian local governments.[90]

Local government councils have also featured in the media in recent years because of, amongst other things, alleged corruption,[91] concerns regarding workplace culture and / or failing to provide a safe workplace,[92] as well as concerns regarding financial distress and / or financial management.[93] The Australian Broadcasting Corporation recently

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86 *Idem*, s 256.

87 See for example J Byrnes and B Dollery "Local Government Failure in Australia: An Empirical Analysis of New South Wales", *Australian Journal of Public Administration* (2002) 61(3) 54 at 54.

88 *Idem*, at 62.

89 B Dollery, "Financial Sustainability in Australian Local Government: Problems and Solutions", *Working Paper Series University of New England School of Business, Economics and Public Policy* (2009) 3 1 at 2.

90 *Ibid*. See for example the Commonwealth Grants Commission Report (2001); the Local Government National Report (2004-05); the Commonwealth House of Representatives Standing Committee on Economics, Finance and Public Administration's Rates and Taxes: A Fair Share for Responsible Local Government Report (Hawker Report) (2004); the South Australian Financial Sustainability Review Board's Rising to the Challenge Report (2005); the report entitled "Are Council's Sustainable" undertaken in New South Wales (2006); the report entitled "Size, Shape and Sustainability Report" (2006); the Western Australian Local Government Association's "Systemic Sustainability Study, the PriceWaterhouse Coopers" National Financial Sustainability Study of Local Government Report (2006); and the Local Government Association of Tasmania's "Review of the Financial Sustainability of Local Government in Tasmania" (2007). There was also a 2013 review by Ernst & Young on behalf of the Department of Regional Australia, Local Government, Arts and Sports entitled "National financing authority for local government" which was undertaken to review options for aggregate local government debt in Australia.

91 See for example, https://www.brisbanetimes.com.au/national/queensland/explainer-what-happened-at-logan-city-council-20200107-p53pl8.html, https://www.redlandcitybulletin.com.au/story/7035198/former-qld-councillors-in-court-over-fraud/ and https://www.abc.net.au/news/2021-04-14/fraud-charges-logan-councillors-dropped/100067622.

92 See for example, https://www.governmentnews.com.au/council-sacked-after-report-finds-safe-workplace-not-provided/, https://heraldonlinejournal.com/2020/07/10/cockburn-fesses-up-to-inquiry/ and https://thewest.com.au/politics/local-government/department-of-local-government-launch-inquiry-into-city-of-cockburn-months-after-stephen-cains-departure-ng-b881600843z.

93 See for example, https://www.abc.net.au/news/2019-10-04/central-darling-shire-faces-decade-with-no-elected-councillors/11574000, https://www.abc.net.au/news/2020-12-02/central-coast-council-runs-up-

reported that a local government council was financially distressed due to floods, bushfire and / or the Covid-19 pandemic.[94]

3.1 Laws pertaining to local public entities in distress

When local governments are in distress, they are managed under the aforementioned Local Government Acts in each relevant State and the Northern Territory. These statutes provide processes for the oversight, administration and dissolution of local governments in a range of circumstances, including circumstances of insolvency and / or corruption.

As established above, there are strict auditing and financial accounting processes. Ministers / Governors have broad powers in the oversight of local government councils and can involve various prescribed authorities or individuals in investigating them. Ministers or similar are also generally responsible for dissolving councils. An investigation / inquiry is generally the first step in the process. While there are community complaint mechanisms and general community reporting such as to ombudsmans,[95] and while local councillors are subject to voters at election time, it is ultimately the politicians who action concerns pertaining to financial distress of local governments.

The following is a summary of the laws pertaining to the different States and the Northern Territory.

3.2 New South Wales

The Governor of New South Wales (NSW) has the power to dismiss all civic offices in relation to a council where a public inquiry has been held concerning the council and where the Minister has recommended that the Governor make such a declaration.[96] The Governor may also appoint an administrator or more than one administrator.[97] The appointment of such is generally after public inquiry, but there are limited legislated circumstances where an administrator may be appointed without an inquiry.[98] The administrators take over the role of the elected councillors, who cease to hold office, and have all the functions of the council until their appointment ceases.[99] The administrators are paid a salary from the local government council's funds determined by the Governor,[100] and the Governor may terminate the administrators appointment at any

565-million-in-debt/12944496, https://coastcommunitynews.com.au/central-coast/news/2021/08/sale-of-water-and-sewer-catastrophic-says-union/ and https://www.sbs.com.au/news/residents-of-a-tiny-australian-island-are-calling-for-a-return-to-self-rule-to-save-their-culture.

94 See for example, https://www.abc.net.au/news/2020-06-19/lismore-council-budget-on-brink-of-collapse/12374152.

95 See for example, https://www.olg.nsw.gov.au/public/complaints-against-councils/.

96 NSW Act, s 255(1).

97 *Idem*, s 256.

98 *Idem*, s 257.

99 *Idem*, s 258(1).

100 *Idem*, s 258(2).

time.[101] If not terminated by the Governor, the appointment ends immediately before the first meeting of council held after a fresh election.[102] There are also legislative provisions for the appointment of others to assist, such as temporary advisers,[103] financial controllers,[104] and interim administrators.[105]

In NSW a council is constituted for each "area" as determined under the NSW Act.[106] The Governor may, by proclamation, dissolve all or part of an area and the Minister may recommend such a proclamation after an inquiry has been held and the inquiry report has been considered.[107] The proclamation may deal with, amongst other things, transfer of assets.[108] The Governor may also amalgamate areas and, in such cases, the councillors of former areas generally cease to hold office.[109] There have been numerous amalgamations of council areas in NSW, some of which have been disputed by councils, and court action has proceeded in State court.[110]

The NSW Act also allows a proposal to be made to the Minister to establish or dissolve or amend the constitution of a county council pursuant to provisions set out in Chapter 12, Part 5 of that Act. With respect to dissolution, the Minister makes a recommendation to the Governor of NSW and, pursuant to section 397, the Governor may by proclamation revoke an earlier proclamation in force under section 387 for the purpose of dissolving a county council.

Cudgegong (Abattoir) County Council trading as Mudgee Regional Abattoir is a case example of a NSW county council being wound-up due to insolvency. The matter was political and legislation was passed to address the situation – schedule 9 of the NSW Act was added to provide for the winding-up of Cudgegong (Abattoir) County Council. In the second reading speech for the amending legislation, the following was stated in summary of the case:

> "The bill will … amend the Local Government Act 1993 to ensure accountability for the financial failure of the county council. The amendments will allow some or all creditors to be paid out after the winding-up of the abattoir operation. Most importantly, the bill will ensure that the former employees of the county council immediately qualify for financial assistance….As separate corporate and legal entities, county

[101] *Idem*, s 258(3).
[102] *Idem*, s 258(4).
[103] *Idem*, s 438G.
[104] *Idem*, s 438HB.
[105] *Idem*, s 438M.
[106] *Idem*, s 219.
[107] *Idem*, s 212.
[108] *Idem*, s 213.
[109] *Idem*, s 218A.
[110] See https://www.abc.net.au/news/2016-09-20/nsw-councils-win-appeal-to-have-forced-mergers-set-aside/7863126, https://nswcourts.com.au/articles/nsw-supreme-court-rejects-council-merger-plans/ and https://auspublaw.org/2017/11/council-amalgamations-in-nsw/.

> councils, like local councils, are responsible for managing their own affairs on a daily basis and must be guided by their own legal and financial advice. While subject to the Local Government Act, it is not the Minister's or the Department of Local Government's role to oversee or endorse a local or county council's business transactions and decisions. However, as part of the Department of Local Government's brief to monitor the financial health of local government, the county council was placed on the financial monitoring list as one of 30 councils in financial difficulty. Throughout this financial monitoring, the county council's management expressed optimism that despite its difficult trading situation the abattoir could pull through. Nevertheless, on 3 September this year the county council became insolvent and its board members resigned. Mr Stephen Parbery was appointed as administrator of the county council under the Local Government Act. Mr Parbery met with Mudgee Shire Council on 8 September 2003, seeking $2.1 million in financial assistance to keep the abattoir operating for the following six weeks. Mudgee council declined to provide the amount sought. It did agree to provide $100,000 to cover immediate unpaid abattoir wages. Mr Parbery indicated to the Minister that without the required financial assistance there was no legal or financial alternative other than closure of the abattoir operation. On 9 September this year all of the abattoir employees were stood down. Rabo Bank, the major creditor of the county council, is owed approximately $5 million, and employee entitlements are estimated at $2.5 million excluding any redundancy payments that may be payable. There are other significant creditors, including local businesses. It is quite clear that the assets of the county council will not meet its debts. Mr Parbery advised the Minister that due to the hopelessly insolvent state of the county council he intended to seek appointment as a receiver and manager of the county council under the Supreme Court Act 1970. Mr Parbery believed that with the dual powers of administrator and court-appointed receiver and manager he would be able to develop a strategy to maximise the return to creditors, including unpaid employees. Mr Parbery was appointed by the Supreme Court of New South Wales as receiver and manager of the county council on 11 September…."[111]

Essentially, the insolvency provisions of the Corporations Act were applied to the winding-up of this county council as if it were a company, subject to specified alterations under that Schedule 9.[112] Mr Parbery was appointed as liquidator on 1 November 2003 pursuant to Schedule 9.[113] This Schedule facilitated transference of liabilities from the county council

[111] See https://www.parliament.nsw.gov.au/bill/files/3122/A5603.pdf.
[112] NSW Act, Sch 9, cl 1(2).
[113] See https://download.asic.gov.au/media/1320871/ASIC_B48_03.pdf at 4.

to two councils to the extent, or in the proportions, specified in or determined in accordance with the proclamation.[114]

3.3 Queensland

Chapter 5 of the Queensland Act deals with monitoring and compliance and provides for remedial action by the department's chief executive, including recommending matters to the Minister for remedy.[115] The department's chief executive also has the power to appoint advisor(s) or financial controllers.[116] The chief executive may also direct a local government to pay the Minister the salary, allowances, costs and expenses of advisors and financial controllers.[117] The Minister can recommend that the Governor in Council take action, including removing councillors, appointing an interim administrator to act in place of the councillors of a local government, or suspending or dissolving a local council.[118] The fees, allowances and expenses of interim administrators are decided by the Governor in Council.[119]

An interesting case is Ipswich City Council (ICC) which was subject to the Local Government (Dissolution of Ipswich City Council) Act,[120] where the council was dissolved and an interim administrator was appointed to act in place of the councillors. This action was taken not due to insolvency *per se* but rather due to an investigation by the Crime and Corruption Commission and its findings in the report "Culture and Corruption Risks in Local Government: Lessons from an investigation into Ipswich City Council".[121] The above Act was introduced to "resolve those concerns promptly and to provide the Ipswich community with certainty by dissolving the ICC and providing for the appointment of an interim administrator to act in place of the ICC councillors for an interim period ending at the conclusion of the quadrennial election for the Ipswich Local Government area held in 2020".[122] It is reported that former Ipswich council chief executive officer, Carl Wulff, was sentenced to five years in prison with respect to accepting bribes worth more than AUD 240,000.[123]

In relation to beneficial enterprises, the establishment, acquisition, monitoring, sale or winding-up of a beneficial enterprise must be made by resolution of council.[124] In the case of ICC, after implementation of an interim administrator, resolutions were made to wind-up a number of beneficial enterprises, including Ipswich City Developments Pty Ltd.

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[114] NSW Act, Sch 9, Part 2.
[115] Queensland Act, s 116.
[116] *Idem*, ss 117-118.
[117] *Idem*, s 119.
[118] *Idem*, ss 122-124.
[119] *Idem*, s 206(1).
[120] Local Government (Dissolution of Ipswich City Council) Act 2018 (Qld).
[121] See https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-082.
[122] *Ibid*.
[123] See https://www.abc.net.au/news/2019-02-15/ipswich-city-council-ceo-carl-wulff-sentenced-for corruption/10814924.
[124] This is summarised by the Logan City Council in its "Beneficial Enterprise Policy", available here, at 2.

Following a members' resolution on 30 August 2018, Ipswich City Developments Pty Ltd entered into a members voluntary liquidation process and was deregistered on 20 June 2019. A copy of the Council Report for 2018-2019 providing an update regarding these various winding-ups is publicly available online.[125] In the process of winding-up, Ipswich City Developments Pty Ltd sold and transferred the majority of its remaining property and assets to council, including a dividend payment of AUD 2.5 million on 20 August 2018.[126] In the winding-up the liquidator attached standard creditor rights information,[127] and the deregistration was completed under the Corporations Act.

3.4 Other States

Pursuant to the Victorian Act, the Governor in Council may, amongst other things, on recommendation from the Minister, suspend a council, appoint an administrator or appoint a temporary administrator.[128] An administrator assumes the functions of the council, subject to any conditions on appointment, and is entitled to be paid remuneration and allowances and is employed on the conditions fixed by the Minister with remuneration paid by the council.[129] The Governor in Council has broad powers, including the power to abolish a council.[130]

Pursuant to section 9 of the South Australian Act, the Governor of South Australia may by proclamation, amongst other things, constitute a new council or abolish a council. Chapter 13 provides for review of local councils or subsidiaries. This includes internal reviews or reviews by the Minister or referral of matters by the Minister to the ombudsman for investigation. The Minister has broad powers, including power to require information,[131] or to take action based on information from the Independent Commissioner Against Corruption, Auditor-General, or Ombudsman.[132] A "suitable person" or "suitable persons" may also be appointed as administrator(s) to a defaulting council by the Governor upon recommendation by the Minister.[133] The remuneration of an administrator (which is determined by the Governor) and any liability incurred by an administrator in the course of the administration is paid or satisfied out of the funds of the defaulting council.[134] The administrator(s) appointed must report to the Minister on the administration of the affairs of the defaulting council at intervals of not more than three months.[135] There are also

[125] See https://www.ipswich.qld.gov.au/__data/assets/pdf_file/0018/120870/Ipswich-City-Council-Annual-Report-2018-2019.pdf. A copy of the official liquidator reports are also publicly available here and here.
[126] See https://www.ipswichfirst.com.au/ipswich-city-developments-being-wound-up-assets-transferred-to-council/.
[127] See https://www.mcgrathnicol.com/app/uploads/D18-180913-InitialCredInfo-SJW.pdf.
[128] Victorian Act, s 230.
[129] *Idem*, s 231.
[130] *Idem*, s 235.
[131] South Australian Act, s 271A.
[132] *Idem*, s 273.
[133] *Idem*, s 273(2) and (5).
[134] *Idem*, s 273(11).
[135] *Idem*, s 273(13).

avenues to investigate a subsidiary and the Minister can require steps be taken to have it wound-up.[136]

There are also broad powers under the Western Australian Act and Tasmanian Act. By way of example, the Western Australia Act at 2.1 and 2.2 provides that the Governor of Western Australia, on the recommendation of the Minister, may make an order declaring amongst other things, an area of the State to be a district or ward, or abolishing a district or ward. Under the Tasmanian Act, municipal areas are specified in a list in Schedule 3 of that Act, and the Governor of Tasmania on recommendation of the Minister is given the power to adjust, amend or substitute the list.[137]

3.5 Northern Territory

Pursuant to section 16 the Northern Territory Act the power to, amongst other things, constitute or abolish local government may be exercised by the "Administrator" by Gazette. The terminology is different and the administrator of the Northern Territory is an official appointed by the Governor-General of Australia to represent the government of the Commonwealth in the Northern Territory. There is a process of "official management" of councils if the Minister is satisfied there are serious deficiencies in the conduct of council affairs.[138] In this process council members are suspended from office and a suitable person is appointed by the Minister to manage the affairs of the council (an official manager) together with the appointment of a suitable person (who may or may not be the official manager) to investigate and report back to the Minister on the conduct of the councillors suspended and on the financial position of the council.[139] The remuneration of the official manager is determined by the Minister and payable from the funds of the relevant council.[140] The official manager has full power to transact any business of the council and to do anything else the council could have done, but for the suspension or dismissal of its members.[141]

The Minister may approve councils to form a body council (a local government subsidiary) to carry out functions related to local government.[142] Pursuant to section 74, the Minister may, by Gazette notice, abolish a local government subsidiary. In relation to the local government subsidiary CouncilBiz, its constitution provides that, in the event the Minister abolishes the subsidiary or it otherwise becomes dissolved, the amount that remains after dissolution and satisfaction of debts and liabilities will be transferred in equal shares to all members excluding the Local Government Association of the Northern Territory or as

[136] *Idem*, ss 274-275.
[137] Tasmanian Act, s 16.
[138] Northern Territory Act, s 318(1).
[139] *Idem*, s 318(2).
[140] *Idem*, s 321(3) and (4).
[141] *Idem*, s 321(1).
[142] *Idem*, Chap 4, Part 4.4.

otherwise on the basis of a formula agreed by special resolution.[143] In relation to the local government subsidiary Latitude 12, its constitution provided that in the event of abolition by the Minister, all property, rights, and liabilities were to be transferred to the East Arnhem Regional Council of the Northern Territory.[144] However, irrespective of the constitution of a local government subsidiary, the Minister may make directions in relation to the transfer or vesting of a local government subsidiary's property, rights and liabilities upon its abolishment.[145]

3.6 The purpose of these laws

Local governments are creatures of statute and their function, management and powers derive from the relevant Local Government Acts discussed above. The NSW Act describes its overall purpose as:

(a) providing the legal framework for the system of local government for New South Wales;

(b) setting out the responsibilities and powers of councils, councillors and other persons and bodies that constitute the system of local government;

(c) providing for governing bodies of councils that are democratically elected;

(d) facilitating engagement with the local community by councils, councillors and other persons and bodies that constitute the system of local government; and

(e) providing for a system of local government that is accountable to the community and that is sustainable, flexible and effective.[146]

The Office of Local Government in New South Wales describes its local governments as follows:

> "The State's 128 local councils employ over 48,000 staff and spend more than $12 billion annually on providing key infrastructure, facilities and services to local communities. They also manage community assets worth nearly $178 billion. Local councils play an important role in improving the lifestyle and amenity of local communities across NSW."[147]

Although the avoidance of insolvency is not mentioned specifically and the management of financially distressed local councils is different from the framework to manage personal

[143] See https://centraldesert.nt.gov.au/documents/council-documents/council-partners/constitution-of-councilbiz, at cl 8. The members are listed in the constitution, sch 1.
[144] See https://static1.squarespace.com/static/569308c7dc5cb46e49dc9ee5/t/5a010c358165f56ac4a03add/1510018109459/Latitude+12+Constitution.pdf at cl 8.
[145] Northern Territory Act, s 74(2).
[146] NSW Act, s 7.
[147] See https://www.olg.nsw.gov.au/public/.

and corporate insolvency more generally, it is clear that continuity of public service is a part of providing a sustainable, flexible and effective system of local government that delivers to local communities.

There is no general description of the winding-up framework for local government nor of its role. However, it is relevant to look, by way of example, to the Local Government Amendment (Cudgegong (Abattoir) County Council Dissolution) Act[148] which introduced Schedule 9 to the NSW Act to deal with the winding-up of Cudgegong (Abattoir) County Council. The Second Reading speech by Burton (Parliamentary Secretary) noted that the schedule was introduced "to ensure accountability for the financial failure of the county council…[to] allow some or all creditors to be paid out …" and to "ensure that the former employees of the county council immediately qualify for financial assistance".[149]

3.7 Repercussions for councillors

Councillors are of course subject to public opinion at election time. They are also subject to codes of conduct, such as the Model Code of Conduct for Local Councils in NSW,[150] which is prescribed by regulation and sets the minimum standards of conduct for council officials.[151] If a councillor fails to comply with the standards of conduct prescribed, then that constitutes misconduct under the NSW Act, and there is a range of penalties that may be imposed on councillors, including suspension or disqualification from civic office.[152] Many of these prescribed standards pertain to disclosure of interests, concerns regarding misuse of position / corruption and general conduct obligations. There are Codes of Conduct in other states which can similarly lead to disciplinary action.[153]

4. Dealing with local public entities in distress – law in practice

A relevant example, and the first example, of local government financial failure in Australia is the case of Central Darling Shire Council in New South Wales. From January 2011 onwards, there were a number of adverse financial reports regarding this council and a number of requests by the council for financial assistance.[154] In December of 2013, the NSW Minister for Local Government suspended the Central Darling Shire Council for three months (which was later extended by another three months until June 2014) and appointed an interim administrator due to a liquidity crisis.[155] During the period of

[148] Local Government Amendment (Cudgegong (Abattoir) County Council Dissolution) Act 2003 No 56.
[149] See https://www.parliament.nsw.gov.au/bill/files/3122/A5603.pdf and https://www.parliament.nsw.gov.au/bill/files/3122/C5603.pdf.
[150] See https://www.olg.nsw.gov.au/councils/governance/model-code-of-conduct/.
[151] They are prescribed in NSW under the NSW Act, s 440 and the Local Government (General) Regulation 2021 (NSW). A copy is available here.
[152] See https://www.olg.nsw.gov.au/wp-content/uploads/2020/08/Model-Code-of-Conduct-2020.pdf at 5.
[153] See for example, that of Queensland available here. There have been, and continue to be, a number of changes to these Codes such as in Western Australia (see here) and Victoria (see here).
[154] A historical summary is provided in J Drew, "Autopsy of Municipal Failure: The Case of Central Darling Shire", *Australasian Journal of Regional Studies* (2016) 22(1) 79 at 89.
[155] *Idem*, at 79.

suspension, the appointed interim administrator took steps to address the financial and structural issues of the council and delivered an administrator's report and prepared a "recovery plan".[156] On 19 June 2014, the Minister for Local Government also appointed a Commissioner to hold a public inquiry into the Central Darling Shire Council and to have particular regard to "whether the Council had properly carried out its functions of financial management, asset management, legislative compliance and community leadership", and to consider whether the elected council had the capacity to "resolve the outstanding issues, including establishing a sound foundation for the Council's future sustainability".[157]

On 22 October 2014 the final report of that inquiry was handed down recommending, amongst other things, that the civic offices of the Council be declared vacant, that there be extension of the administration period until September 2020 and that the administrator(s) address the financial and structural issues facing the council and ensure "completion of the recovery plan".[158] The administration period was later again extended by the Minister until 2024 so that "a comprehensive long-term plan [can] be developed and implemented to ensure a stronger future for the council and its communities".[159] This saw the Central Darling Shire Council enter its eighth year of administration in October 2021, which raises a number of concerns regarding the absence of democratically elected councillors over a lengthy period of time.

In relation to this concern, on 3 August 2021, the administrator published a release noting:

> "Our limited rate base means that we rely heavily on government funding to ensure essential services are provided to the community, including roads, water and sewerage services and waste management…We are also unique in that we have gone through a long period of administration, and while many residents feel that they are not democratically represented, I can assure all residents they are being heard. This has been shown through the extensive consultations we have undertaken for the development of our Community Strategic Plan, with the addition of targeted town and village plans. Almost 300 people participated in consultations. With a total population of just over 1800, this is an outstanding effort by staff, our consultants and – more importantly – our communities."[160]

In its 2019-2020 annual report, the mission of Central Darling Shire Council was stated to be "[r]ealising quality opportunities for all in the Central Darling Shire through: Effective leadership, Community development through involvement, participation, partnership, ownership and collaborative approach, Facilitation of services, Community ownership,

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[156] *Ibid*. Also see https://www.olg.nsw.gov.au/wp-content/uploads/Central-Darling-Public-Inquiry-Report.pdf at 4.
[157] See https://www.olg.nsw.gov.au/wp-content/uploads/Central-Darling-Public-Inquiry-Report.pdf at 3.
[158] *Idem*, at 5.
[159] See https://www.olg.nsw.gov.au/media-releases/central-darling-administration-extended/.
[160] See https://www.centraldarling.nsw.gov.au/News-articles/LG-WEEK.

Delivery of consistent, affordable and achievable services and facilities".[161] However, the administrator communicated that:

> "The 2019/20-Financial Year has been one of many challenges of drought, floods, fire and COVID19. All have contributed to the challenges of maintaining services and governance which has demanded considerable organisational capacity at the expense of day to day issues. The Minister for Local Government's decision not to hold elections in 2020 and continue under administration for another four years until 2024. This continues to cause concern for some residents in the community, regarding the loss of local democracy and community advocacy to other levels of government. We continue to address the many outstanding legacy issues that face Central Darling Shire, such as the sale of land for unpaid rates was a big step forward. I do not underestimate the challenges in this area particularly, the ongoing issue of attracting staff with the necessary skills and experience to live and work in a rural and remote community."[162]

The report noted that the council was "now in a positive financial position, however there is still much work to be done with our financial and governance systems to ensure our sustainability in the long term".[163]

This case example shows the Minister determining a long gestation of administration of Central Darling Shire Council, even past the council being in a "positive financial position" in order to enable longer-term sustainability. The elected councillors were removed from office, essentially from December 2013, and there is no intention to hold democratic elections now until 2024.The current appointed administrator, Mr Robert Stewart, was appointed by the NSW Minister for Local Government on 25 January 2019. He performs all the functions of an elected council, with support from a general manager and two directors, with his experience of more than 40 years in local government.[164]

It is clear that Australian local governments are not impervious to financial distress. To the contrary, a number of Australian academics have raised deep concerns for the fiscal sustainability of Australian local government,[165] and there are clear examples of financial distress occurring amongst local governments. The narrow financial avenues available for revenue raising, together with adverse costs pertaining to managing the recent Covid-19

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[161] See https://www.centraldarling.nsw.gov.au/files/assets/public/public-documents/annual-reports/cdsc-2019-20-annual-report-final.pdf at 2.

[162] *Idem*, at 7.

[163] *Idem*, at 9.

[164] See https://www.centraldarling.ew.gov.au/Council/Organisation/Administrator.

[165] See for example J Byrnes and B Dollery, "Local Government Failure in Australia: An Empirical Analysis of New South Wales", *Australian Journal of Public Administration* (2002) 61(3) at 54, and B Dollery, "Financial Sustainability in Australian Local Government: Problems and Solutions", *Working Paper Series University of New England School of Business, Economics and Public Policy* (2009) 3 1 at 2.

pandemic, raise further questions about the long term endurability of Australian local governments.