



# **OMBUDSMAN**

for the

**NORTHERN TERRITORY OF AUSTRALIA**

## **Report of the Ombudsman for the Northern Territory**

An investigation into the adequacy of the administrative actions taken by certain government authorities in relation to the granting and acceptance of a 'Special Purpose Grant'.

March 2005



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for the

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The Hon. Clare Martin  
Chief Minister  
Parliament House  
DARWIN NT 0800

March 2005

Dear Chief Minister

In accordance with section 28(2) of the *Ombudsman (Northern Territory) Act*, I hereby furnish to you for presentation to the Legislative Assembly, my report on '*An investigation into the adequacy of the administrative actions taken by certain government authorities in relation to the granting and acceptance of a 'Special Purpose Grant'*'.

The investigation considers the administrative conduct of the Department of Community Development, Sport and Cultural Affairs and a local government council.

Yours sincerely

PETER A BOYCE  
Ombudsman

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## Foreword

My Office receives thousands of complaints every year. Of these complaints, relatively few are considered serious enough to warrant investigation by my Office. Rather, the majority of these complaints result in preliminary inquiries being undertaken by my Office with the desired (and more often than not – achieved) outcome being that the complaint is resolved expeditiously. It is in this context that the subject matter of this report came to my attention.

Having finalised my preliminary inquiries into a number of issues of complaint raised by a complainant I, however, remained concerned with the subject matter of this report – the purchase and disposal of a 4WD vehicle by the local government council subject of this report. As a result of my concerns, I determined to conduct an ‘Own Motion’ investigation into the events surrounding the purchase of the vehicle and the subsequent ‘gifting’ of that vehicle by the local government council to a number of Traditional Owners of that community.

In doing so, my objective was to identify any systemic issues that may have contributed to the decision-making process falling below an acceptable standard, rather than focusing on any one individual’s actions. It is for this reason, for the purposes of this report, that I have determined that it is not appropriate for me to identify the specific local government council involved in the transactions subject of my investigation.

It is important to note that my investigation occurred against the backdrop of an increased focus on local government arrangements in the Northern Territory by the current Government. This has been highlighted by the launch of the ‘*Building stronger regions—stronger futures strategy*’ in May 2003 by the Minister for Community Development, the Hon. John Ah Kit MLA, who fourteen months earlier in a statement to Parliament, described the “*organisational bankruptcy of the vast majority of remote Aboriginal communities.*” In this respect, it is my understanding that the Northern Territory Government has committed to an extensive local government reform and development agenda which will necessarily involve consultation with key stakeholders in a number of regions.

While I do not wish to comment on Government’s initiatives in this regard, I am fully supportive of any process which is designed to develop the infrastructure of the Indigenous local government sector and improves the mechanisms for delivery of services to those living on regional and remote communities.

My intention in presenting this report in the Legislative Assembly is that, ultimately, the report will provide a constructive contribution to achieve an overall improvement



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in Aboriginal self-management in communities as well as an improvement in the administrative processes within the Department of Community Development, Sport and Cultural Affairs' regulatory and funding regimes relating to local government organisations.

In order that the public interest is served, my role in undertaking any investigation of this type is to conduct that investigation in a professional and impartial manner. Having done so, the findings of this investigation (and those of a number of other investigations that I have undertaken but have not publicly reported upon) would appear to suggest that small community government council organisations are having difficulty meeting and or achieving the operational requirements imposed on them by local government legislation and the principles of good public administration.

It is therefore, also in the public interest that I present this report on my investigation to the Legislative Assembly.

PETER A BOYCE  
Ombudsman

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## Executive Summary

### Investigative Context

I have undertaken an 'Own Motion' investigation into the adequacy of the administrative actions of the Department of Community Development, Sport and Cultural Affairs (the Department) and a local government council in relation to the events surrounding the purchase of a 4WD vehicle and the subsequent 'gifting' of that vehicle by the local government council to a number of Traditional Owners of that community.

The 'Own Motion' investigation was initiated as a result of my remaining concerns after having finalised preliminary inquiries into a number of issues of complaint concerning the administrative actions of the local government council subject of this report. Specifically, these concerns were in relation to the events surrounding the purchase and disposal of a 4WD vehicle by the local government council subject of this report.

My role, as Ombudsman for the Northern Territory is to investigate the administrative actions of agencies within my jurisdiction, in order to consider whether the administrative actions were, amongst other things:

- taken contrary to law;
- unreasonable, unjust, oppressive or improperly discriminatory;
- based wholly or partly on a mistake of law or fact; or
- wrong.

I am empowered under the *Ombudsman (Northern Territory) Act* to make recommendations to the principal officer of the relevant authority under investigation to improve the administrative actions within that authority.

I am also empowered at any time under the *Ombudsman (Northern Territory) Act* to prepare and furnish to the Chief Minister, for presentation to the Legislative Assembly a report on any matter arising in connection with the exercise or performance of my functions and duties under that Act.

### Public Report

This report summarises my investigation into the issues subject of my 'Own Motion' investigation and details my subsequent opinions and recommendations.

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I have provided this report to the Chief Minister of the Northern Territory pursuant to section 28(2) of the *Ombudsman (Northern Territory) Act* for presentation to the Legislative Assembly. I have taken this step as I consider that the matters raised are of considerable public interest as the findings of this investigation (and those of a number of other investigations that have not been publicly reported) would appear to suggest that small community government council organisations are having difficulty meeting and or achieving the operational requirements imposed on them by local government legislation and by the principles of good public administration.

I am therefore satisfied that it is in the public interest to report on this matter to the Legislative Assembly.

## **The Circumstances**

During the course of preliminary inquiries undertaken by my Office into a complaint concerning the administrative actions of a local government council, the Chief Executive Officer of that local government council concerned advised me that in 2002, the Minister for Local Government provided funding of \$35 000 to the council in order to purchase a vehicle.

The council's Chief Executive further advised that the local government council did not request the vehicle, rather a number of the community's Traditional Owners had requested the vehicle. The council's Chief Executive advised me that despite the council not requesting the grant, the grant '*had to go through the [local government council's] books.*'

The council's Chief Executive further advised that the vehicle and the vehicle registration papers were signed over to one of the Traditional Owners a short time later. This was done as a 'gift' as the vehicle was never wanted by or intended for the local government council.

As I considered that, on the face of the information provided by the council's Chief Executive, the transaction appeared to be highly irregular in that the council appeared to have been used inappropriately as a conduit for the provision of a vehicle to the Traditional Owners, I initiated my 'Own Motion' investigation into the matter.

## **Proposed Adverse Comment**

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In order that I met my obligations to give procedural fairness under section 26(7) of the *Ombudsman (Northern Territory) Act*, certain officers who could be considered to have

been the subject of adverse comment in my draft investigation report were provided with the relevant extracts of my draft report and were invited to make submissions to me. The responses that I received have been incorporated into my final investigation report.

### Maladministration

I am of the opinion that the administrative actions of the Department of Community Development, Sport and Cultural Affairs and the local government council subject of this report were at various times:

- contrary to law;
- unreasonable;
- based wholly or partly on a mistake of law or fact; or
- wrong,

within the meaning of sections 26(1)(a), 26 (1)(b), 26(1)(f) and 26(1)(g) of the *Ombudsman (Northern Territory) Act*.

### Systemic Issues

As indicated earlier, I have decided to report on my 'Own Motion' investigation to the Legislative Assembly because of the significance of the subject matter, the seriousness of the maladministration that I have identified and the systemic issues that may have led or contributed to that maladministration.

The systemic issues that I have identified include the following:

- a lack of appropriate administration by the Department of 'Special Purpose Grant' funding to local government councils;
- small council organisations are having difficulty meeting or achieving the operational requirements imposed on them by local government legislation and general principles of good public administration;
- a lack of clear understanding or knowledge of responsibilities/functions under the *Local Government Act* by council Chief Executive Officers and council

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members;

- a lack of understanding as to the appropriate identification and management of conflicts of interest by council Chief Executive Officers and council members.

### Recommendations

I have made the following recommendations under section 26(2) of the *Ombudsman (Northern Territory) Act*:

1. That the Department establish and implement an appropriate protocol with the Minister for Community Development to facilitate the sharing of relevant information in all instances where a community government organisation applies for 'needs based funding' under the Local Government Funding Program;
2. That the Department advise me on what mechanisms are in place or will be implemented to ensure that information received from local governing bodies about their Special Purpose Grant applications, including formal acceptances of such grants, is accurate;
3. That the Department instigate an appropriate ongoing training program for all departmental staff to inform them of their respective obligations and responsibilities under relevant legislation, particularly the *Local Government Act*;
4. That the Department obtain legal or other advice as to the possible avenues for recovery of the grant money provided to the local government council;
5. That the Department report to me as to the specific action(s) it proposes to take as a result of the finalised 'compliance audit' report on the local government council;
6. That the Department facilitate or promote an appropriate ongoing training process to familiarise the local government council's staff, its Chief Executive Officer and members of the council with the requirements and obligations of the *Local Government Act*;
7. That the local government council consider my comments and findings in regard to Part 7.2(e) and report to me as to what action it proposes to take or has taken in response;

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8. That the local government council consider my comments and findings in regard to Part 7.2(f) and report to me as to what action it proposes to take or has taken in response;
  9. That the community government council implement an appropriate ongoing training process to familiarise council's staff, the Chief Executive Officer and members of the council, with the requirements and obligations of the *Local Government Act*;
  10. That there should be a complete review of the local government council's policies in regard to the duties and responsibilities of council staff, the Chief Executive Officer and council;
  11. That the local government council implement a policy pertaining to the management of conflict of interest situations;
  12. That the Minister for Local Government refer my findings with regard to the possible contravention or failure to comply with the provisions of the *Local Government Act* by the local government council's Chief Executive Officer to the relevant agency responsible for the administration of the *Local Government Act* with a view to determining whether any further action is required as against the Chief Executive Officer;
  13. That the local government council immediately implement a practice of including on any agenda in respect to a council meeting, a statement which highlights to members of council their need to declare any actual or possible conflict of interest;
  14. That a copy of my report be provided to the Auditor-General for his consideration and advice as to what action, if any, he deems appropriate in the circumstances.

### Relevant Ministerial Announcements

My investigation into this matter occurred against the backdrop of an increased focus on local government arrangements in the Northern Territory by the current Government. This was highlighted by the launch of the '*Building stronger regions—stronger futures strategy*' in May 2003 by the Minister for Community Development, the Hon. John Ah Kit MLA, who fourteen months earlier in a statement to Parliament, described the, "...organisational bankruptcy of the vast majority of remote Aboriginal communities."

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In this respect, it is my understanding that the Northern Territory Government has committed to an extensive local government reform and development agenda which will necessarily involve consultation with key stakeholders in a number of regions.

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### 1. INTRODUCTION

This report details my findings regarding the administrative actions taken by the Local Government & Regional Development Division (LGRD) of the Department of Community Development, Sport & Cultural Affairs (the Department), and a Community Government Council (LGC) in relation to the events surrounding the purchase of a 4WD vehicle by the LGC and the subsequent 'gifting' of that vehicle to certain members of the LGC's community in August 2002.

My investigation into this matter occurred against the backdrop of an increased focus on local government arrangements in the Northern Territory by the current Government. This was highlighted by the launch of the *'Building stronger regions—stronger futures strategy'* in May 2003 by the Minister for Community Development, who fourteen months earlier in a statement to Parliament, described the, "...organisational bankruptcy of the vast majority of remote Aboriginal communities." In this respect, it is my understanding that the Northern Territory Government has committed to an extensive local government reform and development agenda which will necessarily involve consultation with key stakeholders in a number of regions.

While I do not wish to comment on Government's initiatives in this regard, I am fully supportive of any process which is designed to develop the infrastructure of the Indigenous local government sector and improves the mechanisms for delivery of services to those living on regional and remote communities.

My intention is that, ultimately, this report will provide a constructive contribution to achieve an overall improvement in Aboriginal self-management in communities as well as in the Department's regulatory and funding regimes relating to local government organisations.

### 2. BACKGROUND

In September 2003, I wrote to the Department in relation to a complaint lodged by Mr A against the LGC. In that letter, I advised that preliminary inquiries had been conducted into Mr A's issues of complaint and that the outcome of those inquiries had been reported to both the complainant and the LGC's Chief Executive Officer, Mr B. The Department was also advised that this Office would not be taking any further action regarding Mr A's specific issues of complaint.

I indicated, however, that I was concerned with one particular matter which had arisen as a result of the investigation into Mr A's complaint – the purchase and disposal of a 4WD vehicle by the LGC in or about August 2002 (the transaction).



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The Department was requested to provide me with specific information in relation to the transaction in question. A summary of their subsequent response is as follows:

- On 17 June 2002, the Minister for Local Government made a decision to approve \$39,000, under the umbrella of a 'special purpose grant' (SPG), to the LGC for the purchase of a vehicle *"to allow the Council to monitor country and sites"* (this figure was later adjusted to \$35,000 by the Department);
- On 18 June 2002, the Department made an offer to the LGC for the purpose of buying a 4WD vehicle. The offer did not include the Minister's note that the purchase of the vehicle would *"allow the Council to monitor country and sites"*;
- This offer was formally accepted by the LGC on 19 June 2002;
- Alleged that the LGC was aware of the need for this activity to occur (ie for it to *"monitor country and sites"*);
- The LGC was concerned that it possessed an asset which it had not budgeted to service and maintain;
- The LGC discussed this matter with Departmental officers and decided to 'gift' the vehicle to the Traditional Owners;
- Departmental officers failed to advise the LGC that disposal of the vehicle in the manner proposed would be in direct breach of section 129 of *the Local Government Act*. According to Mr C, Chief Executive of the Department, such disposal should receive the prior approval of the Minister;
- No application was made to the Minister by the LGC for disposal of vehicle by way of 'gift';
- Mr C acknowledged that his Department had made a *"mistake"* and said that it was *"regretted"*;
- The 'mistake' was brought to the attention of the officers concerned and *"the rules relating to the disposal of council property have been reinforced to other officers who may be called upon to provide advice"*.

### 3. OWN MOTION INVESTIGATION

#### 3.1 Issues

Upon review of the Department's response to my initial inquiries, it appeared that numerous questions pertaining to the events surrounding the offering of the SPG to the LGC, and the subsequent gifting of the 4WD vehicle by the LGC to, in effect, 3 members of the LGC's community, remained unanswered. Consequently, in November 2003, I determined to commence an 'Own Motion' investigation into this matter.

The following issues formed the basis of my investigation:

- The circumstances surrounding the Department's offer to the LGC regarding the SPG;

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- The circumstances surrounding the LGC's acceptance of that offer;
- The 'gifting' of the 4WD vehicle by the LGC;
- The actions, or advice, of the officer(s) from the Department to the LGC in relation to the handling/treatment of Council's property (ie 4WD vehicle);
- The response and subsequent actions of the Department to address the actions of its officers and/or the LGC in relation to the transaction in question;
- Whether the Department, the LGC and/or other community councils had been involved in other similar transactions in the past.

### **3.2 Administrative Actions under Investigation**

The administrative actions that I determined required investigation were:

- (a) The decision by the Executive Director, LGRD in offering the special purpose grant totalling \$35000 to the LGC for the purchase of a 4WD vehicle;
- (b) The action taken by employees of the LGRD in failing to provide advice to the LGC that disposal of the vehicle in question would be a breach of section 129 of the *Local Government Act*;
- (c) The advice provided to the LGC by employee(s) of the LGRD in relation to the handling/treatment of the vehicle in question;
- (d) The action taken by the Department in addressing the actions of its employee(s) and the LGC regarding the transaction in question;
- (e) The decision by the LGC in accepting the offer by the Executive Director, LGRD;
- (f) The decision by the LGC, effectively 'gifting' the vehicle to Mr D (although the vehicle had been registered in Mr D's name, the 'gift' had been intended for all three Traditional Owners-Mr D, Mr E and Mr A);
- (g) The decisions/actions taken by the LGC and/or other Community Councils in relation to other special purpose grants.

### **3.3 Jurisdiction**

Section 14 of the *Ombudsman (Northern Territory) Act* provides me with jurisdiction to investigate the administrative actions of most government departments and authorities.

In this instance there were no provisions in my Act which precluded me from inquiring into the actions of the Department, in particular the LGRD and the LGC. In addition, there were no issues of jurisdiction raised by any of the affected parties as part of this investigation.

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### **3.4. Authority**

This investigation was conducted pursuant to section 16 of the *Ombudsman (Northern Territory) Act* on a matter which was initially identified through a complaint made in accordance with section 17 of the Act.

### **3.5 Outline of Ombudsman's Inquiries/ Investigation**

In broad terms my inquiries and resulting investigation has considered the following material:

- All files held by the LGRD in relation to the LGC;
- Documentation provided by the LGC in relation to the transaction under investigation, including minutes of relevant Council meetings;
- Departmental responses to formal correspondence from me;
- The relevant *Community Government Scheme*;
- Relevant provisions of the *Local Government Act (NT)*
- The *Local Government Grants Commission Act (NT)*
- Relevant information contained on the Department's website;
- Annual Reports that summarise the Local Government funding programs for the 2001/2002, 2002/2003, 2003/2004 financial years, administered by the LGRD;
- Speech delivered by the Minister for Community Development to the Local Government Association of the Northern Territory in Alice Springs, in relation to the launch of the "*Building Stronger Regions – Stronger Futures Strategy*", on 14 May 2003;
- Informal discussions with the LGC's CEO;
- Informal discussions with Mr F, Manager, Monitoring and Grants Administration, LGRD regarding the local government funding program;
- Recorded interviews conducted on Oath or Affirmation with:
  - Mr G, Executive Director, LGRD;
  - Mr H, Regional Director, LGRD;
  - Mr I, Community Development Officer, LGRD;
  - Mr J, Co-ordinator, Housing Management Programs, Indigenous Housing;
  - Mr F, Manager, Monitoring and Grants Administration, LGRD;
  - Mr B, CEO of the LGC;
  - Mr K, LGC member and employee;
  - Mr L, Chairperson LGC;
  - Mr M, former LGC member.

It should be noted that there were 2 former members and 2 current members of the LGC who were not formally interviewed as part of my investigation into this matter.

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In this regard, I accept that they might have been able to provide relevant information about some of the issues under investigation, as they had been identified as being present and/or involved in Council's various discussions relating to the transaction in question. In so saying, however, given the material I had obtained to date during the course of my investigation, I am of the view that seeking their evidence was unwarranted. In this regard, the information obtained during the course of my investigation has been extensive and provides a more than sufficient base upon which I make my findings and recommendations regarding the administrative actions under scrutiny.

Also, given my focus on reviewing the actions of the administrative bodies involved in the transaction, I did not believe it was necessary to interview the beneficiaries of the LGC's 'gift'. It is significant, however, that one of those beneficiaries was in fact a member of the LGC at the relevant time. That being the case, I considered the question of whether there might have been any conflict of interest issues in relation to the transaction and if they had been addressed/managed by the LGC.

### **3.6 Preparation of Final Report**

In late September 2004, my draft investigation report was forwarded to the LGC, its CEO, Mr B and the Department for their consideration and formal response.

The *Ombudsman (Northern Territory) Act* provides that no adverse comment or adverse report can be made by the Ombudsman unless the parties, the subject of the adverse comment, have been given an opportunity to comment. All relevant parties have, during the investigation, been interviewed and have been given a reasonable opportunity to comment on the subject matter of the investigation.

In terms of addressing the responses received I have, where appropriate within the context of my final report to the Department and the LGC, referred to the submissions or points raised and commented thereon. I have also specifically indicated whether or not I accept the submission/point raised and if I am prepared to change any comment, opinion or conclusion I have made or reached. The final report issued to the Department and the LGC reflect changes I have made from the draft report as a result of matters or points raised in the responses received.

Due to the complexities of the matters investigated in this case, I also forwarded a copy of my draft report, together with copies of all responses received to it, to Senior Counsel requesting an independent legal analysis of the specific administrative actions which had come under my scrutiny.

Finally, it should be noted that I also wrote to the Minister for Local Government and Regional Development enclosing a copy of my draft report. In that letter, I stressed that the draft report expressed my preliminary views in relation to the issues

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considered within my 'Own Motion' investigation. I also advised that my final views would be dependent upon any responses received to the draft report. At the time of preparing my final report, I had not received any formal comments from the Minister's Office nor any requests that the Minister wished to be consulted prior to the completion of my final report.

#### 4. THE ADMINISTRATIVE BODIES UNDER INVESTIGATION

In order to place into context my findings and recommendations regarding the administrative actions of the Department (in particular the LGRD) and the LGC, it is useful to appreciate the general functions/responsibilities of those bodies.

##### 4.1 The LGRD

According to the LGRD's 2003-2004 Report headed 'Local Government Grant Programs', its major objective is to:

*Promote and extend local government to all Territorians while maximising the proficiency in community self-management through such governance. In addition, the Division also provides advice to Government on local government matters throughout the Northern Territory.*

*One of the Division's primary functions is to ensure the timely and equitable annual distribution of special purpose grants, operational subsidies and infrastructure maintenance grants that facilitate local government and allow it to prosper and develop throughout the Northern Territory. In addition, the Department of Community Development, Sport and Cultural Affairs has a small regionally based field service network, which provides support to existing councils.*

I note that the Department's website provides the following description:

*Our Local Government program aims for continued development of viable and sustainable local governing bodies that effectively and efficiently deliver services.*

*We facilitate this through:*

- *Development of methodologies for effective needs based distribution of grants to local governing bodies.*



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- *Distribution of funds to local governing bodies in accordance with the Territory and Commonwealth legislation.*
  - *Financial monitoring, analysis and review of local governing bodies.*
  - *Monitoring of minimum standards of service delivery in identified priority areas.*
  - *Provision of specialist advice to local governing bodies and Government.*
  - *Implementation of the Accounting Code, including introduction of a standardised chart of accounts, as well as preparation and publishing of annual business plans.*
  - *Preparation and publishing of performance indicators.*
  - *Executive support to the Northern Territory Grants Commission.*

I would observe at this point, that local government legislation extensively regulates the activities and behaviour of local governing bodies under its umbrella. Indeed, it appears that the consequence of failing to comply with certain provisions of the *Local Government Act* (and its subordinate legislation) constitutes an 'offence' under the Act.

As the Department is charged with the responsibility for the Act's administration, it is unclear to me as to why the Department does not expressly refer to its 'regulatory' role. Given the absence of any other specific arm of government that has been established to oversight/enforce the provisions of the Act, it strikes me that the Department, in particular the LGRD, must assume a regulatory role.

In my draft report to the Department, I strongly urged the Department to consider including this particular function in its description of its Local Government program in unambiguous terms.

In response, the Department made the following comments:

*It has been our view that reference to 'financial monitoring, analysis and review of local governing bodies' is a reference to the regulatory function and that the words provide an accurate statement. There is no doubt that local governing bodies understand our regulatory role as they are required to comply with the Local Government Act and Regulations, which are regularly enforced. Nevertheless, your view is understood and the Division will ensure that an appropriate change is made.*

### **4.2 The LGC**

The LGC is established as a separate, semi-autonomous, legal entity pursuant to the *Local Government Act*, and is, ultimately, regulated by that Act. By way of Names (other than the Department of Community Development, Sport and Cultural Affairs) have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.



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background, this Act was designed to provide the legislative framework for the 'third tier' of government. Though general in its provisions, the law appears to be intended, among other things, to promote local government in Aboriginal communities throughout the Territory by providing them with the ability to control their own local affairs.

Importantly, the LGC is bound to operate within the parameters of its 'constitution', the '*...Community Government Scheme*'. This Scheme sets out, among other things, the functions/powers of the LGC, the process for elections of council members, and the accountability of the LGC to its community.

For the purposes of this report, the LGC's key functions may be described as:

- Providing services and facilities that benefit its area and residents, and visitors to its area, including general public services or facilities, health, welfare or community services or facilities and cultural or recreational services or facilities;
- Providing for the welfare, well-being and interests of individuals or groups within its community area;
- Providing for infrastructure for its community and for development within its area;
- The management and control of sites of historic interest; and
- The maintenance and preservation of Aboriginal law and custom.

## 5. OVERVIEW OF THE DEPARTMENT'S LOCAL GOVERNMENT FUNDING PROGRAM

### 5.1 *The Local Government Grants Program*

Local government grant funding is allocated to local governing bodies through the Department. These allocations are based upon recommendations made by the Department for the distribution of funds provided under the *Northern Territory Appropriation Act* from year to year. The local government grants program appears to have two main components being:

- an appropriation from the Federal Government under the *Local Government (Financial Assistance) Act (Cth)* to the Northern Territory Government for distribution to local governments; and
- a Territory appropriation for distribution to local governments.

The responsibility for determining the allocation of the appropriation from the Commonwealth Government rests with the Northern Territory Grants Commission using a methodology approved by the Minister for Local Government and the Commonwealth Minister responsible for local government. Information obtained from Mr F indicated that this methodology was introduced in 1993.

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I note that the Northern Territory's Grants Commission's two main functions (as identified in its 2002/03 Annual Report) are:

- to make recommendations to the Federal Minister in respect of amounts of money to be allocated to local governing bodies from the money provided to the Territory by the Commonwealth under the *Local Government (Financial Assistance) Act*; and
- to make recommendations on such other matters relating to the finances of local governing bodies as the Northern Territory Minister for Local Government, from time to time, refers to the Commission.

The NT sourced appropriation is allocated to eligible local governments and associations using a pre-determined methodology that has been approved by the Minister for Local Government and endorsed by the Cabinet of the previous government.

NT sourced appropriations paid through the Northern Territory Operational Subsidy are said to provide less than 10% of the operating expenditure of a normal council. This subsidy provides the main source of untied financial support to non-municipal local governing bodies.

In the 2001-2002 financial year - the period in which the Department offered the SPG in question to the LGC - the grants program totalled about \$43.09 million, comprising of: \$19.78 million appropriated from the Commonwealth, and \$23.31 million appropriated from the NT Government. Of the appropriation from the NT Government, \$21.98 million was allocated using the methodology mentioned above. The balance of the program, \$1.33 million, was provided for 'needs based grants' (which fell under the umbrella of SPG funding). The needs based program is the balance remaining after having allocated funds for the NT financial assistance programs.

While a portion of this pool is identified especially for projects relating to 'capacity building', pursuant to policies outlined by the Government's *'Building Stronger Regions – Stronger Futures'* strategy, the funds within this program are available for specific purposes relating to the needs of individual local governing bodies. According to the LGRD Division's 2003-2004 Local Government Grant Programs Report, the focus of needs based funding in previous years has been in the areas of:

- training;
- key staff housing;
- road plant/equipment;
- social infrastructure/recreational facilities; and
- management consultancies.

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Evidence provided by the Department and its officers clearly indicated that 'needs based grants' are currently made available at the discretion of the Minister responsible for the local government portfolio, and are subject to application by Councils.

It should be noted that in its response to this particular section of my draft report, the Department made the following comments with a view to clarifying the information I obtained in relation to its Local Government Grants Program:

*You also refer in this area to the origin of Special Purpose Grant funding from the needs based pool and the means by which the amount is assessed, that is, 'the balance remaining after having allocated funds for the NT Financial assistance programs'.*

*In fact, an amount is appropriated to this Department for Local Government Grants. The Department provides advice to the Minister on the allocation of those funds to particular program areas. These programs include:*

*Northern Territory Operational Subsidy  
Aboriginal Urban Living Areas/Minor Communities Funding  
Dumps  
Infrastructure Maintenance Support  
Other Specific Grants  
Reserves and Other Organisations  
Needs Based (Special Purpose Grants)  
Capacity Building*

*An element of the overall funds is allocated for provision under Special Purpose Grants on a needs basis. This element of the overall program is allocated to deal with those funding requests that fall outside normal funding programs of this Department and that a local governing body can demonstrate are a particular need.*

*....The pool of funds from which Special Purpose Grants are paid is known as the 'needs based' pool. While this title has been used to provide a view that there should be some kind of 'needs' assessment, the purpose of the allocation is to deal with 'special' needs in a local government area rather than on the basis of an overall 'needs' assessment of an area...The grants are, and have always been, Special Purpose Grants paid from a needs based pool.*



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*...I should note though that, by its very nature, special purpose funding is for special purposes. Such purposes are not capable of sensible prediction. Thus, it is of limited value to place extensive criteria around decision making nor is it particularly useful to establish detailed procedures that do not add value.*

*Other grants programs are administered on the basis of published distribution methodologies. Given that it would be nonsensical to attempt to provide such a methodology or criteria for the Special Purpose Grant program, all requests for such grants are put to the Minister for Local Government, normally with an analysis of the Department's views on the need for payment of the grant sought and of the previous grant history of the organisation.*

*While it is considered to be imperative to maintain the capacity of the program to respond flexibly to requirements that cannot be easily planned for or predicted, **it is clearly necessary that public accountability be maintained at a high level, perhaps higher than for other grants programs with specific methodologies attached** (my emphasis). In some previous years the nature of the grants made was not made public.*

*The Department's Annual Report has, in the past 4 years at least provided advice on all grants paid. This advice is also provided in the Annual Report on Local Government Grants Programs. All of the information is made available on the Department's web site.*

### **5.2 Procedures prior to 2001-2002 in relation to 'needs based' grants**

Mr F's evidence indicated that there were 'established' procedures for processing of applications for need based grants. The Department required bids to be sought from each local governing body early in each financial year. Bids were then assessed against criteria such as service delivery, finance compliance and acquittal of previous grants. An omnibus bid, in regional priority order, was then prepared.

As the bids usually exceeded the amount available in the pool, a departmental priority list was also prepared. The omnibus bid was then submitted to the Minister for consideration which included a schedule that showed the bids 'supported' by the Department, bids that required 'further consideration' and bids that were 'not supported'. Bids 'endorsed' by the Minister required the relevant local governing body to submit a formal application to the Minister for approval which were then processed by the regional offices.

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The apparent practice for submitting the bids involved putting a round of bids to the Minister early in the financial year keeping back a certain amount to cover possible contingencies that might arise during the cyclone season. A second round was put to the Minister later in the financial year once the amount remaining in the pool was known.

### **5.3 Current procedures for needs based grants**

The procedures were changed in the 2001-02 financial year to allow the Minister to approve the grants on submission of the omnibus bids and for the Executive Director, LGRD, to formally offer the grant to the relevant local government body. According to a Departmental document headed 'Special Purpose Grants Criteria', to be eligible for SPG funding (including needs based funding), the applicant Council must:

1. *Be a local governing body or incorporated organisation;*
2. *Have acquitted all previous grant payments and have complied with all other accountability requirements of the Department;*
3. *Submit a schedule of all grants received during the previous 5 years and demonstrate that the grant will not duplicate funding already provided under this or other funding sources for the purposes intended;*
4. *Demonstrate that all other avenues of financial assistance have been examined and exhausted;*
5. *Be capable of demonstrating that it is providing local government services to its community and is financially viable.*

#### Response by Department

The information provided under sections 5.2 and 5.3 of this report was included in the draft report which was forwarded to the Department for comment. The response received in relation to these sections has been set out in full below. Before doing so, however, it should be noted that after having reviewed this material I was not persuaded that it was of such a nature as to warrant amendment of the information which was provided in my draft report.

*The Department has been keen for some years to establish processes for dealing with applications for Special Purpose Grants. It has been recognised that this is difficult to achieve with such a program that, by its nature and intent, must be capable of a flexible response to a special need. The process in place at the moment was approved by a previous Minister and has been endorsed by the current Minister. This process is as follows:*

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*Bids may be made by a local governing body or organisation delivering a local government related service at any time during a year;*

*Bids will normally be considered only from local governing bodies but may also be considered from other organisations that deliver functions reasonably related to local government;*

*Bids will normally be considered in two 'rounds' with the first being considered in September/October but they may, and are often, considered outside of the 2 annual rounds;*

*The second round of consideration normally occurs in March or April when any requirements arising from the Wet season can be assessed and when the amount remaining in the pool can be assessed;*

*The Department will encourage, through its regional offices, those councils that may have a particular need to put in a bid at an appropriate time;*

*All bids made, whether those bids are made to a Departmental regional office, a Branch of the Department or directly to the*

*Minister, are required to be put to the Minister for consideration.*

*The Department does not require 'bids to be sought from each local governing body in each financial year'. Bids are assessed by the Department, but there are not specific criteria that can be utilised to actually determine whether a bid would or would not be recommended. The relevance of the bid to the capacity of a council to meet its service delivery obligations is a consideration. The level of financial compliance of a council and the acquittal of previous (sic) is also a matter of consideration. The Department is also encouraging councils to identify their potential bids in their business plans. The Department would normally argue, for instance, that a grant should not be paid to a council that has outstanding non-acquitted grants. These are, however, matters for consideration, they are not criteria that can be*





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*utilised to determine the position that might be recommended to the Minister.*

*There is no 'omnibus bid' put to the Minister. There is an omnibus submission that is put to the Minister to obtain approval to the offer of grants within the two rounds each year. Recommendations for these decisions are made on the best analysis the Department can provide in the relevant circumstances.*

*...you note that Mr [F] has made an assertion that has not been supported by documentary evidence about the decision to move to a process where the Minister approves grants and the formal letter of offer is actually provided by the Department. This has not been a formal change in process and was not a subject of a formal decision occasioning the production of a document. It is simply a slight change in practice aimed at avoiding a situation where multiple letters need to be developed for possible signature by a Minister where it is by no means clear which grant bids in a round might be approved.*

*I should note that the old departmental document that you have referred to is somewhat dated. The criteria are, however, all matters for consideration in analysis of a grant under the Special Purpose Grant program.*

### **5.4 The needs based allocation for 2001-2002**

The local government grants program for the 2001-02 financial year contained a needs based allocation of \$1,330,236.

The evidence indicates that an omnibus submission was put to the Minister on 24 January 2002 which sought endorsement of committed grants totalling \$233,841 and approval of grants totalling \$438,000 which left about \$600,000 remaining in the pool.<sup>1</sup>

A second round brief was submitted to the Minister on 3 June 2002, seeking approval to distribute \$65,395. This was the amount remaining in the pool after providing \$585,000 for 'capacity building' and \$12,000 for legal fees to another Community Council. I note that it was claimed that the responsibility for

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<sup>1</sup> The Minister's endorsement and approval was given on 12 February 2002. The Department's letter to me of 8 Nov 2004, advised that the endorsement of committed grants totalling \$233,841 refers to grants which were previously approved in the previous year. Occasionally, carry-overs occur as do standing commitments.

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recommending the distribution of the capacity building grants did not fall within Mr F's purview.

In any event, Mr F provided this Office with documentation that explained the distribution of funding for capacity building initiatives.<sup>2</sup> I do not make any comments in this regard except to observe that the Minister for Local Government approved this funding.

In the second round brief, which Mr F prepared, it was recommended that \$45,000, \$10,000 and \$10,395 be distributed to 'P' Association, 'Q' Community Government Council and 'R' respectively. Mr F asserted that it had become normal practice to provide support to both 'Q' Community Government Council and 'R' for their respective annual functions. It appears that the recommendation regarding 'P' Association was on the basis that it had been identified in the first round as one that the LGRD would possibly support in the second round. During interview, Mr G, asserted that the Department subsequently became aware that the 'P' Association had been funded by ATSIC for the same purpose for which funds had been proposed in the second round brief to the Minister.

## 6. THE EVIDENCE

Based on a careful review of all the available information obtained during the course of my investigation, I have prepared the following set of 'facts' regarding:

- The circumstances surrounding the 'needs based' funding allocation to the LGC in June 2002;
- The purchase and subsequent disposal of the 4WD vehicle by the LGC;
- The alleged use of the vehicle by the 'Traditional Owners';
- The Department's position regarding the transaction in question at the time of preparing my draft investigation report (September 2004); and
- Funding provided to the LGC by the Department in December 2003 for the purchase of another vehicle.

### 6.1 *The needs based/SPG funding allocation to the LGC in June 2002*

- It appears that on or about **5 June 2002**, Mr G stated that he met with the Minister for Local Government to discuss the second round brief. In this regard, he stated that the Minister "*also mentioned that the [LGC] had put in a bid for some money. They wanted to use it to monitor sites and country*". Furthermore:

*...he [the Minister] thought that something should be provided to them and at that point I made the point that it was possible in my*

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<sup>2</sup> Memorandum to the Minister for Local Government from A/Chief Executive, Mr G, dated 9 May 2002. Names (other than the Department of Community Development, Sport and Cultural Affairs) have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.



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*view to provide that sort of money to a Council, that it was not all that normal for council's to receive money to monitor sites and country but that it fell within the functions of that particular council.*

Mr G also stated:

*We provided advice that it was a grant that was possible to be made. We had clearly provided advice prior to that about what we considered to be the priorities. That however is our recommendation, we do not make the decision.*

- According to evidence provided by Mr B (including handwritten notes) on **6 June 2002**, the Minister and his staffer met with Mr A and Mr D at a nearby pub. Mr B was also present at this meeting. It should be noted that this was not confirmed with the Minister or his staffer as part of my investigation.
- Though the purpose of this meeting (and who organised it) is not clear, Mr B suggests that the Minister wanted to 'catch up' with Mr A, Mr D and Mr E as their father had passed away.

Mr B, who stated that he attended the meeting at the request of the Mr A, Mr D and Mr E, also asserted that the Minister was a close friend of the deceased and provided various advice to Mr A and Mr D given their status as Traditional Owners of a specific land area.

Mr B stated that at the same meeting, Mr A, an elected member of Council at the time, asked the Minister for a vehicle to monitor sacred sites within the specific land area. It was also asserted that Mr A asked the Minister for financial assistance to build a house at '...' and discussed the need to have "proper signage all around the sacred sites areas."

Mr B also stated that the Minister requested Mr B to assist Mr A, Mr D and Mr E to put their request in writing to the Minister. During the interview, Mr B indicated that Mr B had known the Minister for about 20 years and that, "it is like a sort of natural thing for him to ask me to help write a letter."

I would make the observation that it does not appear that Mr B was acting in the capacity as CEO of the LGC at the relevant time, but rather as friend to both Mr A, Mr D, Mr E and the Minister. In this regard, I note that Mr B stated:

*After the meeting referred to above, at the request of [Mr A, Mr D and Mr E], I wrote the letter which was dated 11 June 2002 and addressed*



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*to the Minister and received a quote for a vehicle on the same day. I was not acting in my capacity as the CEO of the ...LGC.*

That said, I do not believe it is at all unusual for a CEO of a small community government council to agree to provide a service such as the preparation of a letter as the one referred to. Indeed, a CEO would normally be in no doubt that they have a range of duties outside those that might formally be noted in their contract. The critical distinction to be made here is that the request to the Minister was not made on behalf of the LGC nor was Mr B purporting to act on behalf of the LGC.

- Correspondence signed by Mr A, Mr D and Mr E dated **11 June 2002**, was sent to the Minister requesting, among other things, a *“4WD vehicle to enable us to go around to the sacred sites within the ... area so we can check up on the sites”*. Mr D and Mr E were not elected members of Council at the time.
- On **11 June 2002**, Mr B received a quotation regarding a 4WD vehicle for \$34,963.12.
- On **17 June 2002**, the Minister for Local Government made a decision to approve \$39000 to the LGC for the purchase of a vehicle *“to allow the Council to monitor country and sites”*<sup>3</sup> (this figure was later adjusted to \$35000 by the LGRD Division). The Minister also approved the grants to ‘Q’ and ‘R’ and \$6,000 to ‘S’.

I was unable to find a record of a bid or recommendation in either the first or second round brief to the Minister relating to the LGC or ‘S’. Mr F stated that he was not aware or privy to the basis on which the Minister approved the grants to LGC or ‘S’. He indicated that he did not provide verbal advice to the Minister or any other person regarding grants to those organisations.

At this point I would note comments made by the Department regarding this issue in its response to my draft investigation report:

*...I should note that in his role as Manager, Grants Administration, Mr [F] is normally the Officer who oversees the preparation of recommendations to the Minister on grants. He is not, however, the officer with responsibility for making recommendations. Submissions recommending specific grants are normally made by the Executive Director, Local Government and Regional Development and, in some cases, by the Chief Executive.*

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<sup>3</sup> This approval and instruction was handwritten by the Minister on the bottom of page 3 of the Memorandum prepared by Mr F of 3 June 2002.

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*Your comment...that Mr [F] was not aware of or privy to advice on the basis for particular grants. This from a Departmental perspective, is not remarkable. The responsibility for provision of advice is with the Executive Director or Chief Executive and the approval is given by the Minister.*

Comments made by Mr F, Mr G, Mr I and Mr H, during interview, tended to suggest that the grant to the LGC of \$39,000 (later adjusted to \$35,000) did not go through any process of assessment by the LGRD itself. As stated earlier, however, Mr G stated that he had provided advice to the Minister about the provision of funds to the LGC.

- The Department advised that on **18 June 2002**, an offer was made to the LGC for \$35,000 for the purpose of buying of a 4WD vehicle. It should be noted that neither the Department nor the LGC has been able to provide this Office with the formal letter of offer, which was allegedly sent to Council on 18 June 2002. It is possible that the letter was misfiled.

It is also possible, given the *“time remaining between the date the Minister gave his approval, 17 June 2002, and the cut off date for making the grant payments within the financial year was minimal”*, that the offer was made verbally by an (unknown) officer from the Department. I would observe that support for this particular proposition is found in comments made by Mr B in response to my draft investigation report:

*On 19 June 2002, following a telephone request from the Department to the...[LGC] office I arranged to sign, and return an acceptance of SPG document apparently prepared by Aboriginal Development. It was faxed to ...[LGC] following the call and is the **only** document I had received from Government regarding a grant for the proposed purchase of the vehicle following the discussions between...[Mr A, Mr D and Mr E] and the Minister.*

- Documentation provided by the LGC indicated that Council formally accepted the offer at its meeting of **19 June 2002**. The letter of acceptance indicates that the *“Executive Director, Local Government and Regional Development Division”* made the offer.
- Mr B faxed the LGC's letter of acceptance to Mr H on **19 June 2002** with the following message:

*... – this will go thro' Council tonight...*



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I have been unable to find any evidence to suggest that Mr H or, any other Departmental officer, followed up this matter to check whether the LGC did in fact meet on 19 June 2002 and formally accept the grant.

Evidence indicates that no such LGC meeting occurred on the 19 June 2002. In this respect, Mr B's comments, in formal interview, suggest that Mr B had signed the formal acceptance on behalf of Council, on 19 June 2002, in light of the fact that it was close to the end of the financial year and the Department required the acceptance "*back straight away*" in order to "*release the money*". In this regard, Mr B stated that:

*...it is not an uncommon thing that things are put down and then put through [the LGC] retrospectively.*

Mr B also acknowledged that he had provided a false statement to the Department regarding the formal acceptance of offer; that is, the LGC did not hold a meeting on 19 June 2002 in order to reach the alleged resolution. Mr B later asserted that this particular matter was "*put on the agenda for the 25<sup>th</sup>*" June 2002.

Mr K stated that Mr K signed the formal acceptance letter on behalf of Council in the capacity as Acting President at the time. It was Mr K's recollection that Mr K did so during a meeting of Council on 19 June 2002. To date, no record of this meeting has been provided to this Office by the LGC.

Information provided by Mr B, Mr K and Mr M during interview suggested that Council members had had informal discussions between themselves about the purchase of a 4WD vehicle by the LGC on behalf of the Traditional Owners of the area (ie Mr A, Mr D and Mr E).

- On **19 June 2002**, the Department issued a 'Notice of Payment of Grant' to the LGC for the \$35,000. This payment was confirmed by the remittance advice issued to the LGC on 24 June 2002 by, or on behalf of, Local Government.
- On **25 June 2002**, the LGC's 'minutes of meeting' indicated that it had advised Mr A that the Council "*...will not be responsible for any financial costs or running costs for the vehicle*". I note that Mr A was Acting Chairperson at the time of the LGC meeting in question.

Though it is unclear as to who advised Mr A in this regard, the Department has stated that the LGC made this determination as a result of concerns that it would possess an asset which it had not budgeted to service and maintain. I note that the relevant minutes do not give any indication as to whether the LGC considered ratifying Mr B's and Mr K's decision to accept the SPG on behalf of the LGC.



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- On **16 and 18 July 2002**, Mr B wrote to Mr J (LGRD) by way of email, seeking advice in relation to how Council should manage the vehicle when purchased. Mr B has asserted that a response was not received to the request.
  - On **22 July 2002**, a car sales yard issued a receipt to the LGC for the purchase of 'NEW HILUX for \$34,963.12'.
  - On **25 July 2002**, the Department of Infrastructure, Planning and Environment issued a 'Registration Certificate' which indicates that the registered owner of the vehicle in question, at that time, was the LGC. The Certificate also indicated that the LGC had paid the appropriate fees (eg registration, insurance, stamp duty etc);
  - On **19 August 2002**, Mr B and Mr K raised the LGC's concerns about the possession and maintenance of the vehicle, at a meeting with Departmental officers (ie Mr H, Mr I and Mr J). According to 'minutes' of LGC's meeting of 19 August 2002, "*Local Government staff suggested that Council give it to them [traditional owners] as a gift...*".

In relation to the issues raised at the meeting in question, Mr I recalled in interview that:

*I think they were offered the grant, it was offered for the council to carry out functions for looking after sacred sites and we weren't aware of that and the council accepting, they had never done that before and because of the internal problems over there, say, [Mr B] and the council and the recipients of that vehicle, council in the end didn't want to take on that responsibility because they never had it before and they could see that because that hadn't been budgeted for, looking after sacred sites, and they hadn't budgeted for a vehicle and we understand that the vehicle was, that certain people in the community had applied to the Minister on one of his visits and we weren't aware of that.*

- On **26 August 2002**, Mr L, then Chairperson of the LGC, wrote to Mr A, Mr D and Mr E, advising that the LGC had given them the 4WD vehicle as a gift. Mr L stated in that correspondence that "**Council has made this decision because the vehicle was never intended for ... Council but it is in their name purely for funding purposes**".

During interview, Mr L indicated that he was not aware of the contents of the letter of 26 August 2002, prior to signing the same. It should be noted however, that the LGC's decision to gift the vehicle is recorded in its minutes of meeting held on 19 August 2002.

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- On **27 August 2002**, Mr B wrote to the Motor Vehicle Registry, advising that the vehicle in question had been given as a gift from the LGC to Mr D.<sup>4</sup> In this regard, it appears that the 'Application to Transfer' and 'Notice of Disposal' of the vehicle was completed by both Mr B and Mr D on 27 August 2002 and forwarded to the MVR on the same date.

On the same day, Mr B wrote to Mr H, Regional Manager, LGRD informing him of the 'gifting' and providing copies of documentation relating to the disposal of the vehicle.

It is relevant to note that the members of the LGC, at the time of the gifting of the vehicle, appear to have been either the extended family of Mr A, Mr D and Mr E or otherwise related through marriage. If this is in fact not the case, there is also evidence to suggest that members of the LGC, including the CEO did not feel that they were in a position to refuse the grant or the gifting of the vehicle, given the express wishes of the Traditional Owners, their cultural demands/respect towards the same and the Minister's approval.

In this regard, I note that according to 'minutes' of LGC's meeting of 19 August 2002 (where it was determined to gift the vehicle), members of Council were as follows:

Mr L, Mr M, Mr K, Mr A (not present), Mr O (not present) and 2 other members not mentioned previously in this report.

### **6.1 Use of the vehicle**

Under the LGC's *Community Government Scheme*, the LGC may perform functions which include the management and control of sites of historic interest; the maintenance and preservation of Aboriginal law and custom. However, monitoring of sacred sites in the...area by the LGC does not appear to specifically fall under the umbrella of the Scheme.

Comments made by Mr B indicated that, *"the...people have got very strong spiritual ties with the whole...area because it is the...people that have been basically looking after that area; holding the ceremonial law."*

However, Mr B accepted that the area did not fall under the LGC's area of responsibility and that Council was not required to monitor any sacred sites in that land. In this respect, I note that the evidence provided by the responsible Departmental 'field officer', Mr I also indicates that the monitoring of sacred sites

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<sup>4</sup> In the LGC's letter to me dated 21 October 2004, it stated, among other things, that *"The Council Clerk has informed that the vehicle was put in [Mr D's] name because [Mr A] was not in the community. Mr E did not at that time have a drivers licence"*.

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wasn't within Council's 'normal' area of responsibility. As a result, the evidence indicates that the vehicle was to be used by the Traditional Owners to monitor sacred sites within an area which fell outside the LGC's specific area of responsibility as provided under the Scheme.

In this regard, the evidence to date is unclear as to whether the original vehicle was in fact used, in the main, to monitor sacred sites in the area. Council members interviewed to date have indicated that in the dry season, the vehicle was used to go to another community and often remained there. One council member stated that bar one site, the sacred sites in the area were inaccessible by vehicle during the wet season. Another council member alleged that the vehicle had been used for entirely unrelated purposes. During interview I was also advised that the vehicle in question had been 'traded in' by Mr D for a larger vehicle, as it couldn't accommodate Mr D's family.

### Department's response

The Department made the following comments in relation to this section of my report:

*You have put a view that is essentially that, while the Council has functions under which it could legitimately carry out the role for which the grant was provided, the carriage of those functions outside the council area in the wider...area does not appear to be covered. I would note that the offer of a grant was made for monitoring of sites and country. There was no mention in the offer about the monitoring of sites and country in the...area.*

*You should be aware that councils such as ... routinely carry out a range of functions outside their council area. Such functions are normally to do with outstation or homeland support, road maintenance and housing construction and maintenance. Monitoring of sites and country would be a similar type of function. This provision is often honoured in the breach and is a regular source of comment by the compliance process...has no such approval.*

*...comment about the monitoring of sites and country not being a 'normal' area of council responsibility is quite correct. It is also correct, however, that the...Council has the power to carry out such a function and could reasonably be expected to have been carrying out that function by its constituents.*

*With regard to your comments about the use of the vehicle, I would note that the Department has not capacity to require that the vehicle*

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*continue to be utilised for its original purpose forever. There is power...to prevent a vehicle purchased with funds that were provided under a grant from being sold or exchanged. There is also power to audit whether or not the Council is carrying out those of its functions it decides to carry out in a proper manner. In the normal course, this would be the mechanism used to ensure that...is, in fact, engaged in the monitoring of sites and country – and this is a matter that will be taken up by the Department when your report is finalised.*

While I appreciate the reality that the LGC may well undertake a range of functions outside their council area, I feel that I must make the following observations about the case in point:

- In light of the fact that neither the Department nor the LGC has been able to provide this Office with the formal letter of offer which was allegedly sent to Council on 18 June 2002, I cannot accept the Department's assertion as to the content of the offer. In the circumstances, the details of the offer, and how it was communicated, remain uncertain.
- If the Department is referring to the Minister's decision to approve the grant to the LGC for the purchase of a vehicle "to allow the Council to monitor country and sites", then I accept this statement as a matter of fact. That aside, it must be acknowledged that the available evidence is such that a fair minded lay observer would reach the conclusion that the primary purpose of the vehicle was to monitor country and sites in the...area. Indeed, in the absence of any information to the contrary, the trigger for the SPG in question appears to be the formal request for financial assistance made by way of personal submission by 3 members of the community, who requested a vehicle for such a purpose.

Moreover, from the outset it appears that the LGC did not in any way consider the vehicle to be within their realm of responsibility; rather, Council members viewed and treated the vehicle as the property, or perhaps more appropriately, the responsibility of 3 individuals who they knew to be traditional owners of the...land parcel, and who they knew had requested it to monitor sacred sites in and around this area.

- While I appreciate the thrust of the Department's comments about its capacity to require that the vehicle continue to be utilised for its original purpose – which no doubt take into account the practicalities of resourcing issues – given the regulatory role of the Department, it ultimately has responsibility to ensure that the activities, transactions, and overall conduct of councils falls within the confines of applicable laws.



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### **6.2 The Department's position regarding the disposal of the vehicle by the LGC (at the time of preparing my draft report)**

- The Department stated that as a semi autonomous body, the LGC must be responsible for its own actions. In this respect, the Department asserted that:

*...on receipt of the grant and subsequent purchase of an asset it is possible for the grant to be acquitted. The asset then becomes an asset of the council and the department is unable to impose conditions on a council (as a semi-autonomous body) as to how the council utilises its assets.*

- A Departmental officer explained that councils are required to appoint a registered company auditor to audit the accounts and records of council and to report to the council in relation to the audit. I note that Division 10 of the *Local Government Act* sets out the Council's requirements in this regard.

It was asserted that the LGC's audited financial statements for the financial years 2001-02 and 2002-03 were unqualified. It was claimed that the fact the auditor did not qualify the annual financial statements would appear to indicate that the auditor was satisfied that there was no breach of section 129(4) of the *Local Government Act*.

Significantly, in its letter of 18 February 2004, the Department stated that:

*The disposal of the asset, contrary to the Act (the Local Government Act), is a matter for Council's auditors. The auditor did not comment on this transaction nor did he qualify the audit because of the 'gifting'. Additionally, the auditor failed to report this transaction to the Minister for Local Government pursuant to section 181 of the Local Government Act.*

- In his letter to this Office of 24 September 2003, Mr C acknowledged that Departmental officers failed to advise the LGC that disposal of the vehicle in the manner proposed would be in direct breach of section 129 of the *Local Government Act*. According to Mr C, such disposal should receive the prior approval of the Minister.

In this regard, I note that in the Department's letter of 18 February 2004, it is asserted that:

*Departmental employees have been admonished for their role in this matter. Department compliance procedures have been tightened to ensure repetition does not occur.*

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When questioned as to why the Department had not taken any action or considered taking any action with regards to the \$35,000 - which in effect was gifted by the LGC - Mr G stated that as:

*...the Department provided incorrect advice, in breach of statute I do not believe that it is reasonable for us then to insist that the council carry the can. I believe we did the wrong thing in not providing advice about the Act, and I do not believe that it is a reasonable thing for us to pursue the council....*

In so saying however, Mr G indicated that the “*officers who were involved have made it clear to council that they made a mistake and they should have addressed that...*”

### **6.3 Funding to the LGC for the purchase of another vehicle**

On 10 December 2003, Mr H and Mr I supported the LGC's request for a grant of about \$33,000 (submitted by way of an 'Application for Special Purpose Grant') to be used, among other things, for the purchase of a vehicle. I observed that the LGC's submission listed all other 'special purpose grants' provided by the Department over the previous 5 years, including the “*\$35, 000 vehicle for... T/O's*”.

Mr H indicated that this particular funding request fell under the umbrella of a 'Capital Infrastructure Grant' and “*certainly met the requirements*” and “*was not an unreasonable request*”. However, Mr H indicated that the forms used by community councils to 'apply' for 'capital infrastructure' funding required review as they were confusing.

## **7. OMBUDSMAN'S FINDINGS IN RELATION TO THE ADMINISTRATIVE ACTIONS**

To clearly present my findings regarding the administrative actions that were investigated, I have placed them under the respective umbrellas of the responsible Department and Authority.

It is also important to emphasise at this point, that my findings and comments should not be seen or interpreted as a comment or criticism of the Minister's decision to

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approve the SPG to the LGC on 17 June 2002. The merits of this decision are, of course, entirely a matter for the Minister. In this regard, section 14(5) of the *Ombudsman (NT) Act*, expressly precludes me from questioning the merits of any decision taken personally by the Minister.

However, I feel it is significant that there was no evidence to suggest that the Minister has in any way directed that funds be made available to members of the community in their own right. There is also no evidence to suggest that the Minister, or his Office, was involved in the LGC's decision to 'gift' a council asset.

In the main, my concern was with the Department's involvement in the transaction which appeared, on the face of it, to leave the Minister for Local Government, the LGC and itself exposed to allegations that government monies were used for an inappropriate purpose. Given the serious nature of the perceptions and/or inferences that could be drawn from the transaction in its entirety, it was necessarily dissected and analysed.

Having done so, it must be said that the scenario looks worse than it actually is. As I have alluded to in my analysis below, the Department's decision to grant the Special Purpose Grant to the LGC without an appropriate request from the same was done on poor advice or no advice. This unfortunate and inappropriate launching pad has set the transaction sequence off and the Council and its CEO's responses have worsened the situation to complete, at least at first blush, a highly suspicious transaction.

### **7.1 The Department**

It is important to stress at this point that as part of this report, I have primarily identified deficiencies in the Departments administrative actions relating to its involvement in the transaction in question. It would not be appropriate to suggest that any one officer of the Department is individually accountable for the particular failings I have identified in this regard. The responsibility lies with the Department collectively and my recommendations are focused at that specific level of deficiency in their administration of this matter.

#### **(a) The decision by the Executive Director, LGRD in offering the SPG totalling \$35000 to the LGC for the purchase of a 4WD vehicle.**

As noted in the evidence set out above, it is unclear as to which Departmental officer made the offer to the LGC regarding the SPG in question or how it was communicated. In any event, I accept that an offer was made to the LGC shortly after the Minister's decision to allocate these funds.



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In this respect, I make the observation that the available information clearly indicates that there had, in fact, been no application for a grant by the Council (either formally or informally). Indeed, there is no record of the LGC having considered such a request or even authorising a submission to be made to the Minister regarding the provision of funding. The information available to me suggests that the application to the Minister was made by 3 private citizens, one of whom was also an elected member of Council. The role of Mr B in being present at the meeting on 6 June appears to have been in a private capacity, not in the capacity as the CEO of the Council. That being the case, there is a possibility that the CEO's presence and Mr A's position on Council caused the Minister to link the request for a vehicle to the Council and such a view is consistent with the request for Mr B to assist the parties in writing to the Minister.

Another possible explanation is that the Minister, having been approached by people concerned about the monitoring of sites and country, determined that a mechanism for achieving this was to have the council take on its responsibility to carry out specific functions.

That aside, it should be noted that information obtained during the course of my investigation caused a shift in focus away from the Department's action in offering the SPG, to the issue of whether the Department had provided appropriate or considered advice to the Minister regarding his proposal to allocate funds to the LGC.

Within this context, I have considered the following:

- it appears that between 5 June 2002 (the time of the initial notification of the Minister's intention to Mr G) and 17 June 2002 (the Minister's final approval of the SPG in question), the Department had a reasonable opportunity to properly consider and advise on the Minister's proposed allocation of grant money to the LGC. Such action would have allowed the Minister to make an informed and considered decision;
- there does not appear to be any evidence to suggest that Mr G's verbal advice to the Minister on or about 5 June 2002 had been based on any appropriate assessment of the proposal against any relevant SPG 'criteria'/considerations. In this regard, I note that Mr G stated:

*...he [the Minister] thought that something should be provided to them and at the point I made the point that it was possible in my view to provide that sort of money to a Council, that it was not all that normal for council's to receive money to monitor sites and country but that if fell within the functions of that particular council.*

- there is no evidence that the Minister's proposal was assessed by the Department, at any stage, against any 'special purpose criteria' (or any other

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relevant considerations), or that the Department explored its viability with the Council before

17 June 2002.

I would add that if the Department had done so, it is highly likely that it might have ascertained that the request for financial assistance was made by way of a personal submission by 3 members of the community who were seeking a vehicle for the monitoring of sacred sites within the area. The important point here is that the Department, through appropriate enquiries, would have discovered that the LGC had not requested funding for the purchase of a vehicle to monitor country and sites, nor had the means to service and maintain such a vehicle.

Put simply, the LGC had no plans, and had formulated no proposal, to carry out the function for which the vehicle was provided to them. Armed with this knowledge, the Department might have been in a much better position to make the necessary analysis and consequently provide the Minister with adequate advice as to the merits of his proposal.

I would also observe here that the monitoring of sacred sites in the area by the LGC does not appear to specifically fall under the umbrella of the LGC's *Community Government Scheme*. This is also consistent with statements provided by Mr B and Mr I to that effect.

- given its responsibility in relation to the promotion of local government and with ensuring the equitable distribution of funding, the Department's apparent failure to consider and properly advise the Minister, potentially exposed itself, the LGC and the Minister to allegations that government monies were used for an inappropriate purpose (ie for the personal benefit of three members of the community).

At this point, I note comments made by the Department in response to my draft report:

*I would....note the Department is of the view that advice necessary for the Minister to make a decision was provided. The allegations to which you refer are only available through the illegal action of the Council in gifting the vehicle. They do not arise in the provision of the grant.*

While I acknowledge the reality that applications for funding might in fact be directly made to the Minister for his consideration, I am of the view that the Department is obliged to act independently to ensure that the Minister's decisions, regarding how public monies should be expended, are achievable, viable, and lawfully implemented. It necessarily follows that the Department should have advised the Minister that the appropriateness of providing funding to



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LGC needed to be properly examined and assessed before giving effect to his desired outcome.

On this basis, I reject the Department's assertion that advice necessary for the Minister to make a decision was provided.

**As a result, I am of the opinion that the Department's actions, or more correctly, its lack of action, in not providing the Minister with appropriate or considered advice in relation to the provision of funding to the LGC for the purchase of a 4WD vehicle to monitor country and sites, was unreasonable, pursuant to section 26(1)(b) of the *Ombudsman (Northern Territory) Act*.**

**I am of the further opinion, pursuant to section 26(1)(g) of my Act, that the Department's actions were wrong in the circumstances.**

It is important to note that I am not necessarily suggesting that the Minister would have reached a different conclusion based on his consideration of any Departmental assessment; rather, it would have demonstrated that:

- the Department, in accordance with good administrative practice, had taken into account all of the relevant information; and
- its actions had been properly responsive and procedurally sound.

My main concern in the circumstances is that the apparent failure to take appropriate action in this case, has the potential to adversely affect public confidence in the integrity of the Department's administration of its local government funding program.

Indeed, on the basis of the available evidence, it is reasonably open to suggest that the Department's failure to provide appropriate assistance/advice to its Minister with this particular proposal, resulted in the approval of a specific grant to a Council for the purchase of a vehicle it had not requested nor had the resources to maintain.

The Council's subsequent decisions in relation to how it treated and disposed of that vehicle may be viewed in their totality as, ultimately, a misuse and misapplication of public money by the LGC.

I make the comment that the available evidence is unclear as to whether this case is an isolated one, or whether other recipients of SPGs have also not undergone proper Departmental evaluation. In this regard, I note that during his interview, Mr G acknowledged that, "*the process in previous, in many years, has been sloppy in that [needs based funding] applications come from councils. They float in at various points of the year...*".





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Of particular concern to me was Mr G's assertion that, *"it is not at all unusual for a submission to be made direct to the Minister and for it not to hit the department for analysis."*

To this end, it is imperative, from a good governance and a proper administration viewpoint, that the Department has appropriate mechanisms in place to ensure that it provides the Minister with accurate and considered advice to allow him to make an informed decision. In this respect, it must be accepted that the Department's apparent practice of accepting applications for needs based grants late in the financial year, adversely affects the manner in which those applications are processed and indeed it seems to me that it impedes proper scrutiny.

Additionally, I was unable to find any documentary evidence to assist me to determine whether the Department had given any prior analysis to the \$6000 provided to 'S' in June 2002, under the umbrella of a SPG. That said, Mr G stated that he had a *"fairly substantial discussion with the Minister"* about that particular matter. I did not explore the details surrounding this discussion as part of my general investigation.

In so saying, however, the fact that the responsible officer for the administration of the local government grants program, Mr F, has stated that he, *"was not aware or privy to the basis on which the Minister approved this grant"*. This is, to my mind, sufficient grounds to become concerned as to whether the Department has adequate or appropriate procedures in place to ensure that the Minister is made aware of all relevant factors prior to making his decision.

In my draft report, I recommended that the Department establish and implement an appropriate protocol with the Minister to facilitate the sharing of relevant information in all instances where a community government organisation applied for 'needs based funding' under the Local Government Funding Program.

The Department made the following comments in its response to this recommendation:

*There are arrangements already in place with grants applications that are made. These are currently contained in a number of procedural documents to do with management of Ministerial correspondence and submissions and arrangements relating to the provision of recommendations on Special Purpose Grants.*

*While I do not accept most of your foundation for this recommendation, I do agree that it would be appropriate to properly articulate in one document the process for consideration of Special Purpose Grants made from the needs based funding pool. This has been done and a*



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*proposal has been put to the Minister for his consideration. I would be prepared to provide a copy of this to you for your information should the Minister agree.*

While the Department appears to disagree with the basis for my recommendation, I am pleased to note that the Department has already taken action which is in line with its purpose. Subject to the Minister's approval, I look forward to receiving a copy of the proposal.

As such I am of the opinion that action should be taken in accordance with the following recommendation which I made pursuant to section 26(2) of my Act:

### **RECOMMENDATION 1:**

**I recommended that the Department establish and implement an appropriate protocol with the Minister to facilitate the sharing of relevant information in all instances where a community government organisation applies for 'needs based funding' under the Local Government Funding Program.**

**I requested that the Department formally report to me within 1 month of the date of my report to the Department as to the action it has taken under the banner of this recommendation.**

Having outlined my concerns about the Department's lack of action before its offer of funding to the LGC, I turn now to consider its actions shortly after approaching the Council with this offer. Specifically, I refer to the Department's processing of the letter from Mr B and Mr K which indicated that the LGC had, "*passed a resolution*" on 19 June 2002, accepting the SPG totalling \$35,000.

In this respect, it is of serious concern to me that the Department accepted and acted upon a letter (a legal document which purported to formally accept the grant on behalf of Council despite Council not having so determined) which it had reasonable grounds to believe was false in its particulars.<sup>5</sup>

I remain concerned that it appeared the Department did not immediately address this issue at the time it was brought to their attention (19 June 2002), or at least to have followed this up at a later date to ensure that the LGC had in fact determined to accept the grant in question. In my view, the Department's failure to take appropriate steps to verify the information in the correspondence again exposed the

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<sup>5</sup> This should have been realised when Mr B faxed the LGC's letter of acceptance to Mr H on 19 June 2002 with the following message: "*[Mr H] – this will go thro' Council tonight...*"

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Minister, the LGC and itself to allegations of impropriety, and raises questions about the integrity of the Department's administrative practices/procedures.

Appropriate inquiries at this stage might also have alerted the Department to the fact that members of Council felt that they had been placed in an awkward situation by the offer of the grant, and for reasons relating to kinship ties and cultural factors felt obliged to accept the grant. This was despite misgivings about it and the fact that Council had never: sought the grant, considered the purpose for which the grant was offered, and examined its viability and appropriateness as a council service.

Indeed, the Department's actions in this particular instance raises the question of whether this was an isolated case or whether other 'late' applications by local governing bodies are treated with a similar lack of scrutiny. Expediency and time constraints appear to have over-ridden the Department's primary responsibility to ensure that the grant process was properly administered and adhered to.

That said, I accept that the officer(s) involved may feel they acted in good faith and certainly with no intent to act contrary to the best interests of the Department and the public interest. My basis for this comment is that the timing of the grant was very near to the closing of the financial year and appears to have contributed to an element of undue haste in the processing of the Minister's decision in order to meet accounting and financial deadlines.

In this regard, I note comments made by the LGC in its response to my draft report:

*We have been informed by the Council Clerk that the hurry by the Department to get the Letter of Acceptance signed was because it was close off time for Government spending before the June 30<sup>th</sup> and start of new financial year.*

However, it must be said that public officials have an onerous responsibility to act with integrity, in the public interest, and in accordance with the highest ethical, fidelity standards and accountability. Indeed, they should avoid any conduct which could suggest or give the perception of any departure from this.

I also make the general comment that public officials cannot be excused from responsibility and accountability for their actions on the basis of ignorance, naivety, poor judgment, poor consultation and a lack of awareness of the statutory obligations applicable. These factors may explain and, in some cases, mitigate the actions taken but they do not excuse.

### Department's comments

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The Department made the following comments in its response to this area of my draft report:

*I am also intrigued about the basis for your assertion that the Department should have formed a view on 19 June 2002 that there would not be a Council meeting that night, following advice from the CEO that this would occur.*

*Further, I take issue with the proposition that the Department has failed in its duty by not verifying advice providing by a long serving CEO. If your proposition was to be taken seriously, and given the amount of correspondence that flows between Councils and the Department, we would be in a constant state of chasing our respective tails. Councils are responsible organisations. They make decisions in, at times, difficult situations and they are accountable for those decisions. They are established pursuant to the Local Government Act but are not under the wing of the Department. It is important that we do not continue past paternalistic practices and thus disempower Indigenous communities.*

*You have gone on to develop an argument that the Department might have known that there were kinship issues and cultural factors that put the Council in a position where it was difficult for it to reject the offer of a grant. I would suggest that the situation for the...Council is not fundamentally different to situations faced by all small councils operating on Aboriginal communities. Kinship and cultural factors are commonplace. Conflict of interest is a constant issue and one that the majority of councils deal with in reasonable manner. There continue to be issues and these continue to be dealt with in a manner that attempts to establish a proper balance between customary requirements and the, often opposing, requirements of sound administrative practice.*

*...You have advanced the proposition that, under extreme time pressure, the Department might have failed to deal appropriately with other grants bids. I would offer a response to this proposition in two parts. First, there is absolutely no evidence offered for the proposition. You have sought to sustain your proposition based on an investigation we would assert has not been adequate of the process and outcome of one decision. Secondly, against your proposition stands clear, objective evidence from a series of audits, both internal and external, of the handling of an extensive grants program that frequently operates under pressure.*



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My concerns with the Department's reply are that:

- With respect, I did not make an assertion that the Department should have formed a view on 19 June 2002 that there would not be a Council meeting that night. This interpretation of my comments is inaccurate.

My point is that the document which purported to formally accept the grant on behalf of Council contained false information (ie that Council had met on 19 June 2002 and passed a resolution to accept the SPG). Mr B's indication on the facsimile cover sheet that Council would meet that night should have alerted the Department to this fact.

The issue here is the Department appears to have accepted and acted on the basis of this letter without raising any concerns. In my view, the letter of acceptance should have been 'flagged' for follow up action at the very least.

- I have no difficulty accepting the arguments that Council's are accountable for their decisions and that the Department not continue past paternalistic practices which disempower Indigenous communities. The legislation which establishes local governing bodies and regulates their activities is designed to ensure, among other things, that Aboriginal communities are provided with the ability to properly manage their own local affairs.

That said, I cannot accept the Department's inference that it was not required to do more in the circumstances when presented with the purported letter of acceptance. In my view, the Department should have been more pro-active in its approach and handling.

My reasoning is straightforward: the Department's overriding responsibility was to ensure the proper and lawful administration of its grants program. In this instance, it is my view that it failed in its duty to do so. Consequently, a grant was provided to a Council which had made no request and did not have the means to maintain the asset purchased with funds. Again, this situation might have been avoided if the Department had made the appropriate inquiries at the relevant time.

- I totally refute the Department's assertion that my investigation has not been adequate of its local government grant program. Extensive evidence was obtained from senior officers within the Department who have responsibility for the administration of this program and direct experience in processing applications from councils for various grants. Moreover, much of the material regarding the Department's grant's program was obtained from its own publications.



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It is also a matter of fact that the SPG in question was processed close to the end of the 2001-2002 financial year. That being the case, and given my view regarding the Department's actions in processing the false 'letter of acceptance' from Mr B and Mr K, it is entirely reasonable and open for me to raise the question of whether this was an isolated case. With respect, my concern is logically grounded on the information obtained to date. The eventual improper gifting of the vehicle by the Council, who at no time viewed this property as its own, underlines why the concern has been raised.

I would also stress here that I am not suggesting the Department has failed to properly scrutinize other 'late' applications by local governing bodies. Such a proposition would indeed require sufficient evidence, and it would be remiss of me to indicate that this has occurred without putting forward an appropriate basis.

- It may well be that against my proposition there is objective evidence from a series of audits, both internal and external, *"of the handling of an extensive grants program that frequently operates under pressure"*. However, it must be acknowledged that, in this particular instance, there were shortcomings in the Department's administrative practices/processes; highlighted by its acceptance and actioning of a significant legal document which was clearly false.

I am also cognisant of information obtained during my investigation which does not appear complimentary to the Department's comments about *"objective evidence from a series of audits"*; specifically, I refer to the following:

(a) Evidence provided by Mr F indicates that an external audit of the LGC's financial statements for the financial years 2001-2002 and 2002-2003 did not result in the auditor commenting or qualifying the audit because of the 'gifting' of the vehicle in question. In this regard, the Department has advised that the *"auditor failed to report this transaction [the gifting] to the Minister for Local Government pursuant to section 181 of the Local Government Act"*

(b) Mr H, Regional Director, LGRD, stated during interview that *"some councils have not"* undergone compliance audits by the LGRD *"for three or four years because we just have not got the staff"*.

**Keeping these concerns in mind, and having measured the Department's actions in relation to this particular issue against accepted principles of good conduct in public administration, I am of the opinion that they were unreasonable, pursuant to section 26(1)(b) of my Act.**

**I am of the further opinion, pursuant to section 26(1)(g), that they were, in all the circumstances wrong.**



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In my draft report, I recommended that the Department advise me as to what mechanism has been established and/or implemented to ensure that information received from local governing bodies about their 'SPG' grant applications is accurate.

The Department's Chief Executive made the following comment in relation to this recommendation:

*In its current form I am unable to accept this recommendation. It appears to me that it is based primarily on the proposition that councils cannot be trusted to provide accurate information. This is not a proposition that can be accepted. The majority of councils provide accurate information in grant applications. They are perhaps assisted in their decision to provide accurate information by their knowledge that the Department holds extensive general information about communities and about the financial affairs of councils. This is, indeed, essential to our business.*

*Perhaps if you could be more clear about what other information we should check it may be possible for us to accept the recommendation.*

At the outset, I wish to make it clear that my recommendation is not based primarily on the proposition that councils cannot be trusted to provide accurate information. With respect, I can find no basis as to how this conclusion has been reached. That aside, I find it somewhat disappointing that the Department appears to have adopted a position which suggests that the veracity of information received from councils about their grant applications is a matter of 'trust'.

I do acknowledge, however, that good working relationships and a certain degree of trust, between the Department and regulated local governing bodies, are often necessary and important factors if the social and economic objectives of the *Local Government Act* are to be achieved.

While I am prepared to accept the Department's statement that the majority of councils provide accurate information in grant applications, it must be realised that in this instance, there was no grant application *per se* from the LGC. Moreover, it is now a matter of factual history that the details contained in the specific letter of acceptance from Mr B and Mr K were inaccurate.

That said, I am of the firm view that the Department is under an obligation to expose SPG grant applications to an adequate level of probity. This, of course, means that the Department should ensure it has appropriate processes/practices in place which are designed to properly evaluate SPG applications against the background of relevant general and financial information it holds regarding councils.

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The case in point also serves as an example that correspondence from council staff which purports to accept offers of special purpose grants, be subjected to a closer level of scrutiny before release of any public funds. This would be consistent with the Department's duty to ensure that its local government grant program is properly and lawfully administered.

Keeping in mind these comments, I have determined not to substantially amend my original recommendation. To do otherwise may effectively narrow the scope of my recommendation and defeat its broad objective; which is designed to prompt a measured review of the Department's mechanism(s) for verifying data received from councils relating to their SPG applications (including formal acceptances of such grants) and ultimately the accuracy of the information.

As a result, I am of the opinion that action should be taken in accordance with the following recommendation which I made pursuant to section 26(2) of my Act:

### RECOMMENDATION 2:

I recommended that the Department report to me to advise on what mechanisms are in place or will be implemented to ensure that information received from local governing bodies about their 'SPG' grant applications, including formal acceptances of such grants, is accurate.

**(b) The administrative action by employee(s) of the LGRD in failing to provide advice to the LGC that disposal of the vehicle in question would be a breach of s129 of the *Local Government Act*;**

and

**(c) The advice provided to the LGC by employee(s) of the LGRD in relation to the handling/treatment of the vehicle in question.**

In relation to these issues, I note that the Department has indicated to me that its officers made a "mistake" in their advice to Mr B and Mr K about the disposal of Council owned property. In correspondence dated 24 September 2003, the Department stated that its officers failed to advise the LGC that disposal of the vehicle by way of gift would be in direct breach of section 129 of the *Local Government Act*. The Department advised that "such disposal should receive the prior approval of the Minister".





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With this mind, my investigation into this area was designed to establish from which Departmental level/position the relevant advice was given and the exact nature of the discussions that occurred on 19 August 2002, between Departmental officers and the LGC's representatives. This was undertaken to determine the nature of the Department's deficiency and the extent to which it existed within the Department in order to develop an appropriate recommendation to address the same.

Unfortunately, the evidence provided by the officers involved in the meeting did not assist with identifying who actually provided the advice to 'gift' the vehicle to the 'Traditional Owners', nor clarify the exact nature of the discussions which appear to have taken place on 19 August 2002. In this respect, I observe that the officers spoken to during the course of investigation into these issues were generally open and frank as to their knowledge of events. However, I recognise that given the length of time that has lapsed since the events in question occurred, their recollection of the meeting might have been affected.

This is evident in correspondence to me from the then Acting Chief Executive of the Department, dated 18 February 2004 who advised that:

*This issue is clouded. Officers of the Darwin regional office discussed the gifting of the vehicle with Council officers as an appropriate means of administering the purposes for which it was intended. There are no file notes relating to those discussions.*

The failure by Departmental officers to record the meeting in question, especially given its significance, gives me cause for concern in itself. To this extent, I make the general observation that it is a fundamental principle of good public administration that public officials should create and maintain full and accurate records which document their activities and decisions, plus the reasons for those decisions. This is in line with their obligation to ensure any action they take or decisions they make are transparent, accountable and reflect the public interest.

In my draft report I stated that:

*I do not propose making further comment regarding this issue, except to say that it is strongly recommended that the Department take action, if it hasn't done so already, to ensure that its officers are fully aware of their responsibilities and requirements under the umbrella of good public administration. Taking this action may avoid exposing the Department to possible claims of damages incurred due to the provision of negligent advice.*

The Department made the following comments:

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*You have expressed a concern that no notes were made of the meeting of officers with the Council. This is a matter that is of clear concern to the Department. Action was taken when the matter first came to light to reinforce directions already in place requiring the production of field reports. This action has now been followed up by a significant change to the field reporting system building in a number of elements that should ensure that all field reports are provided, checked and that feedback is provided. These changes were not specifically generated by the mistake that was made with respect to the ... Special Purpose Grant but they will significantly reduce the chance that such a mistake goes unnoticed in the future.*

That aside, I note that the LGC's minutes of meeting of 19 August 2002, stated:

*Council Clerk and [Mr K] had a meeting with [Mr , Mr J and Mr I] Monday 19 August to discuss the best way for Council to hand the vehicle over to the Traditional Owners. Local Government staff suggested that Council give it to them as a 'gift' however they have to change it over to their name at their cost ie pay the stamp duty.*

In light of this evidence, and other information relevant to the meeting of 19 August 2002, it would be reasonable to suggest that Mr B and Mr K were under the mistaken belief – as a result of their discussion with Departmental officers - that they had the Department's 'approval' to dispose of the vehicle by way of gift. This belief appears to have been communicated to the LGC who, in effect, acted upon advice provided by the LGRD by gifting the vehicle to the 'Traditional Owners'.

**Having considered all the available information, I am of the opinion, pursuant to section 26(1)(f) of my Act, that the Department's administrative actions - in failing to provide accurate and/or appropriate advice to the LGC in relation to their handling (and including disposal) of the vehicle – were based wholly or partly on a mistake of law or fact.**

**I am of the further opinion, pursuant to section 26(1)(g) of my Act, that the Department's actions were wrong in the circumstances.**

In reaching these conclusions I was mindful of the fact that the Department's advice was in itself manifestly inappropriate. In this respect, I find it somewhat extraordinary that it could be perceived that a public asset only just purchased should be gifted to private individuals with no clear understanding as to why or how this was to be done.

I am of the further opinion that action should be taken in accordance with the following recommendation which I made pursuant to section 26(2) of my Act:

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## RECOMMENDATION 3:

I recommended that the Department, specifically, the LGRD, instigate an appropriate ongoing training program for all staff to inform them of their

respective obligations and responsibilities under relevant legislation, particularly the *Local Government Act*.

This training program should be designed to establish a proper understanding and awareness of the specific provisions of the *Local Government Act* so that the LGRD's staff can properly inform community government bodies, Government, and other stakeholders, when called upon to provide advice on such matters as disposal of council property, financial administration requirements, and other council responsibilities and functions.

It should also cover basic principles of good administrative conduct thus ensuring good governance. Such training may be able to be provided by the Department's own legal officers.

I am pleased to note that the Department has accepted this recommendation and actioned it. In its response to my draft report the Department stated:

*Action has been taken and further action is underway relating to this recommendation. Recognition of the difficulty and complexity of the task facing Community Development Officers and Regional Offices led to a major organisational change. The Local Government Branch is now specifically responsible for provision of advice on technical matters. The officers of this Branch have a high level of knowledge of legislative and administrative matters and this should avoid the repetition of the mistake made.*

*A Graduate Certificate course for all Community Development Officers has also been developed and is being funded for delivery by the Charles Darwin University. While this course is primarily aimed at building community development skills, it also increases awareness of the roles and responsibilities of departmental officers dealing with remote Indigenous communities.*

*The Department is also implementing a series of targeted courses aimed at Building Better Managers. Modules deal with issues relevant to this matter. Specific modules will be developed to deal with grants administration and good governance.*

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**(d) The administrative action taken by the Department in addressing the actions of its employee(s) and the LGC regarding the transaction in question.**<sup>6</sup>

My investigation into this issue was triggered by the Department's advice to me that the "*mistake (regarding Departmental advice to the LGC) has been brought to the attention of the officer's concerned and the rules relating to the disposal of council property have been reinforced...*"

*Prima facie*, these comments tended to suggest to me that the Department was satisfied that the actions it had taken appropriately addressed the issues in the circumstances. I observed that the Department did not indicate whether any of its officers had raised any of the relevant issues with the LGC, or if they had taken other action to recover (if possible) the vehicle which had been gifted.

Ultimately, my concern at that stage was that the Department had appeared to give, in effect, \$35,000 of the public's money to members of the community, through the LGC, for those persons' sole benefit and purpose. With this in mind, I was not satisfied, at first glance, that the Department's response in addressing this issue was reasonable. Indeed, I was of the view that it appeared further action was required on their part given the seriousness of the implications for the Minister, the LGC and itself, as a result of the transaction.

Shortly after commencing my formal investigation into the transaction, the Department advised me that:

*The Council is a semi autonomous body and is responsible for its own actions. It is in breach of section 129 of the Local Government Act regardless of advice received from departmental officers. Council received a grant to acquire an asset. That asset should have been entered in the Council's asset register. The disposal of the asset, contrary to the Act, is a matter for Council's auditors...*

*Departmental employees have been admonished for their role in this matter. Departmental compliance procedures have been tightened to ensure repetition does not occur...*

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<sup>6</sup> In discussing this issue, I would acknowledge that I have relied on and used parts of a publication by the NSW Ombudsman relating to 'Good Conduct and Administrative Practice'.

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At this point, it is relevant to note that I acknowledge that auditors play an important role in determining and reporting on whether the financial operations of local governing bodies are in accordance with the prescribed requirements of the Act. Indeed, they are by law, required to do so. However, I believe that the functions and responsibilities of an auditor and the Department are distinctly different, in that the Department has an overarching continuing obligation to ensure that councils are in fact properly complying with the relevant laws and that it has in place a responsive enforcement regime, especially where departure from regulation is evident.

Mr G's evidence indicated that it would be unreasonable for the Department to pursue the recovery of the \$35,000 from the LGC in light of the incorrect advice provided by the Department regarding the disposal of the vehicle in question. While I appreciate that Mr G's position may be based on what he believes is fair and ethical in the circumstances, I am not entirely satisfied it is reasonable.

In my view, it was in the public interest that the LGRD examine and consider, at the very least, any possible avenues for the recovery of the money once it had realised its 'mistake'. Indeed, given the fact it was public money that was in effect, gifted, the public interest was paramount. At the very least, I would have expected legal advice to have been obtained as to the options available.

This view stems from the principle that public officials should perform their official functions and duties and exercise any powers or decision-making abilities in ways that promote and preserve the public interest, ie, for the common good.

Staff of the LGRD must determine the public interest as it applies to them by reference to the purposes for which the Division has been established or the functions that it is required or permitted to perform, as expressed through the *Local Government Act* or the objectives set out by Parliament or in any policy document.

It should be noted that the concept of 'public interest' is incapable of precise definition, as there is no single immutable public interest. The meaning of this expression was considered by the Full Court of the Victorian Supreme Court in *Director of Public Prosecutions v Smith* (1991) 1VR52, where Kaye, Fullager and Ormiston JJ made the observation (p.75) that:

*The public interest is a term embracing matters, among other things, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.*

With this in mind, I am of the view that the Department has an obligation to act fairly and reasonably towards members of the public (of the Northern Territory) who have Names (other than the Department of Community Development, Sport and Cultural Affairs) have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.



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suffered detriment arising out of maladministration for which the Department is responsible or contributed to, or could reasonably be considered to be responsible or contributed to.<sup>7</sup>

Therefore, under the banner of 'accountability', the Department was (and still is) required to make appropriate 'amends' for any fault or error as well as take appropriate steps to prevent its re-occurrence in the future.

**Having considered the material available to me at the time of writing my draft report (September 2004) it is my opinion that the Department's responses, or lack thereof, to the actions of its employees and the LGC regarding the transaction in question were inadequate. As a result, I consider these were administrative actions that were unreasonable in terms of section 26(1)(b) of the *Ombudsman (Northern Territory) Act*.**

**Indeed by the completion of my investigation I had formed the view that that the Department appeared to have been dismissive of this serious matter and had created a perception that it was not prepared to ensure proper compliance with the *Local Government Act*.**

In reaching this conclusion, I considered the following factors during the preparation of my draft report:

1. there did not appear to be any evidence to suggest that the Department has considered, or sought, legal or other advice as to the possible avenues for the recovery of the grant money (totalling \$35,000);
2. there did not appear to be any evidence to suggest that the Department had considered section 175(2) of *Local Government Act*, which provides that the Minister may seek the re-payment of a grant paid to a council where he is satisfied that it has not been accounted for or has not been applied to its intended purpose (ie for "*Council to monitor country and sites*");
3. there was no attempt by the Department to examine the transaction and ascertain why Council had accepted a grant for a vehicle it did not want. Nor did the Department consider whether the actions of the CEO had been appropriate in the context of obligations under the *Local Government Act*;
4. no information had been provided by the Department at the relevant time as to how "*Department procedures have been tightened to ensure repetition does not occur*";
5. the material examined tended to suggest that the Department had not made the LGC's staff, its CEO, and its members fully aware of their responsibilities/duties

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<sup>7</sup> In this particular case, the detriment suffered by the public is the improper use of public funds by the LGC, who appear to have acted on the advice of the Department.



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under the *Local Government Act*, the ... *Community Government Scheme*, and other associated legislation; and

6. there was evidence to suggest that following the LGC's gifting of the vehicle, in August 2002, it was used for purposes other than monitoring sacred sites in the area. Supporting the notion that public monies were, in effect, improperly used for the benefit and gain of a particular group of ... residents.

I also make the general observation that to facilitate proper compliance with the Act, it is crucial that the Department takes the necessary and appropriate action where maladministration is identified. The level of compliance with regulations is, in part, related to the effectiveness of the Department's enforcement mechanisms.

In this particular instance, it is clear the Minister intended that a SPG be provided to the LGC, not to members of the wider community, for the purchase of a 4WD vehicle to monitor "*country and sites*". That being the case, the Department was under a continuing responsibility, in my view, to ensure that the LGC utilised this funding for its intended purpose and within the confines of the local government regulatory regime.

In this regard, the actions of the LGC in gifting the vehicle indicated a lack of understanding, or awareness, of the requirements and obligations of the *Local Government Act* on the part of its members.

To this extent, the Department, in line with its stated objective of "*provision of specialist advice to local governing bodies and Government*", should have taken immediate action to address this situation when it had realised its 'mistake' regarding the advice provided to the LGC's representatives about the disposal of a Council asset. It was also incumbent on the Department to examine the transaction to ascertain what had happened and to consider any appropriate action.

### Department's comments

In its response to my draft report, the Department made the following comments regarding my discussion and views on this issue:

*...you indicate a view that the Department is satisfied that its actions taken to date on this matter appropriately address all issues. Your view is wrong. The Department has, over a long period, sought to cooperate with the Ombudsman's office. In that context we avoid intervention in matters that we are aware are being dealt with by your Office. We particularly avoid situations in which there could be seen to be a duplication of investigative effort. We have been of the strong opinion that you shared our view that this arrangement makes sense. In this case, in particular, where the actions of the Department are clearly*

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*under question it seemed to us more important than ever that we not move on issues until you had the chance to properly conclude your inquiries and analysis.*

*As you will recall, the Department waited while your examination of recent events in relation to the [named council] concluded. In so doing, the Department was unable to meet the deadline for commencement of action against those who had apparently breached the law.*

*We had considered that we had made it clear in earlier material and discussions that further action by the Department would follow your report. It was also our view that to propose an extensive course of action before you had reached conclusions would not be appropriate.*

### My comment

In the response to the draft report the Department appears to indicate that it had not considered taking any action because of the pending investigation by my office. I observe that the Department suggests that I am wrong in my comments because I am undertaking an investigation into the matter and the Department was therefore waiting for the outcome of my investigation before determining whether or not they should take any action.

The Department also alludes to a prior investigation by my office involving another council. In what I consider to be an ill considered and inappropriate comment, the Department notes that because of the delays in my investigation they were subsequently unable to take regulatory action under the *Local Government Act*. This is because of time limits under the *Local Government Act* having expired for irregular action.

With all due respect to the Department, such an argument is illogical and misconceived. My role was to investigate complaints of an administrative nature concerning the actions of the council. In that case, I received a complaint from a member of the public about the actions of that council and the nature of the complaint was in fact disclosed publicly. The information upon which I based my investigation in that case was known to the Department, but the Department chose not to take any action under the *Local Government Act* because of my pending investigation.

Importantly, this was not something which I specifically asked for nor was it specifically discussed with me by the Department. The Department is the regulator and it must be mindful of any obligations under relevant legislation.

In the case of the present matter, I would observe the following:

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The transaction upon which this investigation is based took place in or about August 2002. The detail of this transaction was specifically known to the Department at the time in the fact that its officers made an offer to the LGC, received the 'letter of acceptance' from the CEO and Acting President of the LGC; processed the payment of the SPG to Council; and subsequently, on the available evidence, provided advice to the LGC as to the disposal of the vehicle when they indicated they did not wish to retain it. This all took place within a few months and should, of itself, been in my view a catalyst for Departmental inquiry.

These were the events upon which I based my criticism of the Department for failing to act adequately regarding the matter and, indeed, are also the basis for my comments that the Department appeared to be dismissive of its role under the *Local Government Act*. As I have mentioned elsewhere in this report, it transpires that the council had never made any application for the funds and, in my view, the Department did not provide the Minister with appropriate or considered advice in relation to the provision of funding to the LGC for the purchase of a 4WD vehicle to monitor country and sites.

Within a very short time after receiving the money, council met formally (and this is the only occasion in which it met to consider the entire matter up to this time) and determined that it did not have sufficient resources to pay for the upkeep and maintenance of the vehicle.

Council subsequently sought advice from the Department which advice resulted in the vehicle being gifted to private citizens in circumstances which, in my view, are contrary to the proper process of accountability for public monies.

It can be said that *prima facie*, there was clearly evidence available to the Department in regard to the LGC's dealings with the vehicle that it was irregular and required some form of investigation or inquiry. Notwithstanding this, the Department did nothing, and indeed appears to have condoned the actions of council despite it, in my view, being contrary to the provisions of the *Local Government Act* in a number of ways which I have stated elsewhere in my report.

It is inappropriate for a government department with regulatory responsibility to refrain from that role by suggesting that an investigation by my office in some way prevented them from taking appropriate regulatory action. An investigation by my office is an entirely different process and should never be seen as a basis for deferring regulatory action under relevant legislation which is the subject of statutory time limits. At no time have I indicated that such a process is appropriate and at no time have I asked that such occur.

In accordance with good administrative practice, the Department is required to conduct a proper assessment of the issues within a reasonable period and determine whether or not it should take regulatory action. If it considers there is a need for

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such action then it must do so in accordance with its mandate and the relevant legislation. I reject any criticism as to my actions and investigation in this regard.

It needs to be understood that this particular investigation arose as a result of a specific complaint made to my office on unrelated matters. During the course of considering that complaint, certain information was disclosed to my Office by the LGC which later formed the grounds for my 'Own Motion' investigation.

What also needs to be realised in the context of this investigation is that it in fact commenced more than 12 months after the transaction in question and at a time when the statutory time limit under the relevant local government legislation would most likely have already expired. At the time I commenced my investigation, as far as the department was concerned, the matter was closed and had been, in their apparent view, adequately dealt with.

Relevantly, having reviewed previous correspondence provided by the Department in relation to my investigation, I have been unable to find any indication that it proposed taking any further action regarding this matter. Indeed, I would be surprised if they could now do so given the passage of time. This is the main basis of my criticism. Therefore any suggestion that the Department was awaiting the outcome of my report in terms of their response to the draft report is quite irrelevant, misleading in my view, and incorrect.

### Recommendations and the Department's responses

In the earlier draft of this report I made the following recommendations:

1. *It is recommended that the Department obtain legal or other advice as to the possible avenues for the recovery of the grant money. This should necessarily include consideration of whether section 175(2) of the Local Government Act is an appropriate mechanism in the circumstances.*

The Department made the following comments in relation to this recommendation:

*This recommendation is accepted as far as it goes. The Department will actively pursue all courses of action available to it to deal with the issues that have been raised.*

I am pleased to note that the Department has accepted my recommendation and I look forward to receiving advice as to the Department's proposed course of action in due course.

2. *It is recommended that the Department formally report to me - within 1 month of the date of the Final Report - detailing the initiatives in relation*

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*to the 'compliance procedures' which have been implemented to ensure that 'repetition' of the events in question does not occur in the future.*

The Department made the following comments in relation to this recommendation:

*A compliance audit on...has been conducted. The report on this is now being finalised and will provide part of the foundation for further action.*

*...at a wider level, the Department's processes for provision of technical advice to councils on matters of process and procedure were changed in mid-2002. A substantial reorganisation of the Division occurred that removes the role of direct advice on technical matters from community development officers placing that role with a specialist team, recruited and trained for the purpose. On the one hand, this ensures that the majority of officers of the Division have now moved away from a direct advisory and support role to a role focused on community development. On the other hand it provides greater capacity to ensure that the advice that councils do receive is more consistent, accurate and appropriate.*

I would observe that the Department's response is very positive and appears to address my recommendation. As a result, I do not propose to pursue my original recommendation. I look forward to receiving advice from the Department as to the specific action(s) it proposes to take as a result of the finalised 'compliance audit' report on the LGC.

- It is recommended that the Department implement an appropriate ongoing training process to familiarise the LGC's staff, its CEO and members of Council with the requirements and obligations of the Local Government Act and associated legislation.*

*In this regard, when any new staff or members are elected to Council there should be a process of induction that includes specific education and training in respect to the Local Government Act and its requirements. Indeed, two of the most important factors in ensuring compliance with this legislation is that affected parties both understand and accept their regulatory obligations. Thus, it is important that any induction course be formulated in a manner which effectively communicates these obligations.*

*It is important that Council members should also receive training as regards the nature of their responsibilities arising from the position they hold. Such training should place emphasis on how to make decisions that reflect the community's interest and their fiduciary responsibilities as elected members.*

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The Department made the following comments in relation to this recommendation:

- *It is of importance in the establishment of more effective governance structures at the regional and local level in the Territory that the bodies charged with that responsibility are held properly accountable both by their constituency and funding agencies for their actions. Responses to issues that arise that excuse or transfer responsibility for actions whether to government agencies or elsewhere must be avoided. In this context, it is quite clearly the responsibility of the organisation to recognise its training needs and to put in place strategies to address those needs.*

*You should be aware that extensive training programs have been delivered at considerable cost in the past. Such training has had limited success due partly at least to the lack of appreciation of the need for the training by the targets of the programs, hence the view that there must first be recognition of need on the part of councillors.*

- *A primary driver in the development and implementation of the Building Stronger Regions-Stronger Futures strategy has been, and remains, the need to develop more competent, effective and ethical councils and staff. The strategy, which is now achieving outcomes in key areas, will progressively see the replacement of the current small, poorly resourced councils with larger councils with greater capacity to operate effectively within the administrative environment that now exists.*
- *The Department took the decision early in 2002 to provide significant funding to LGANT to assist the organisation to provide training to elected members. In the past, a mix of arrangements had been in place, including direct delivery of training by departmental officers. LGANT, as the peak representative body for elected members of councils is ideally placed to facilitate such training. I trust that you will appreciate that there is a certain logical difficulty in one level of government training another level of government in how to do its job.*
- *Amendments to the Local Government Act enacted earlier this year have inserted into the Act statements of the role expected of presiding members – section 14B – role of members – section 14A – and the role of the CEO – section 142A.*

*These provisions were inserted to address issues such as those you refer to. They are intended to provide a clear legislative expression of*

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*the principles that the Parliament requires to be followed by the participation in the local government sphere.*

Though I appreciate the thrust of the Department's comments on the whole, I do not feel that they are of such a nature as to warrant a revision of my original recommendation. Indeed, I maintain that this particular recommendation is entirely appropriate in the circumstances.

To this end, the factors which were influential in reaching my decision are:

- The Department, within the context of its regulatory role, has a duty to educate local government organisations as to their regulatory obligations pursuant to the *Local Government Act* and associated legislation. This is particularly so where it identifies obvious gaps in these organisations' understanding and knowledge.

Fundamentally, it should be realised that if the Department is to ensure compliance to the relevant laws and requirements, it must assist the members of these bodies in developing awareness and appreciation of their respective functions and obligations.

Keeping this in mind, I agree that councils have an important responsibility to recognise their training needs and to put in place strategies to address those needs. In this respect, I accept that a CEO of a council would be primarily responsible for this and the failure of Mr B to appreciate obligations under the *Local Government Act* is a glaring feature of this matter. However, I do not accept any notion that this responsibility does not extend to the Department given its regulatory functions.

- No specific reference is made in the Department's comments about the potential affect or consequences of the 'Building Stronger Regions – Stronger Futures' strategy on the present local government arrangements for the ... community. I would observe that while the Department's explanation of the "*primary driver*" underlying this strategy is helpful from a general knowledge point of view, the comments are so broad that they offer no assistance with determining whether the Government's initiatives will improve, or even impact, on the LGC in any way, if at all.
- While I acknowledge that my original recommendation might not have made it entirely clear, it was not my intention to suggest that the Department necessary take direct responsibility for the delivery of training to the LGC's staff, its CEO and elected members. Rather, that the Department, under its regulatory banner, should facilitate or promote an appropriate ongoing training process given its knowledge of LGC's serious maladministration regarding their general handling of council owned property. I have amended my original recommendation to properly reflect my comments.

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If the Department remains of the view that LGANT is best placed to provide training to elected members of the LGC and its staff, then the Department must satisfy itself (given its “*significant funding*” to LGANT) that the training programs offered are geared to equip councillors and staff with, among other things, the necessary knowledge of the *Local Government Act* and an awareness of the responsibilities arising from the position they hold.

That aside, I would make the comment that I have difficulty accepting the Department’s position that “*there is a certain logical difficulty in one level of government training another level of government in how to do its job*”. With all due respect, I am of the view that this argument is simplistic and fails to take fully appreciate the Department’s obligations under its regulatory role towards those organisations it monitors and assists.

- I am not aware of any information, nor has any been provided to my Office by the Department or the LGC, which would indicate that members of the LGC or any of its staff have undertaken any relevant training programs in the past.

Keeping in mind the above comments, I am of the opinion that action should be taken in accordance with the following recommendations which I made pursuant to section 26(2) of my Act:

#### **RECOMMENDATION 4:**

**I recommended that the Department obtain legal or other advice as to the possible avenues for the recovery of the grant money. This should necessarily include consideration of whether section 175(2) of the *Local Government Act* is an appropriate mechanism in the circumstances.**

#### **RECOMMENDATION 5:**

**I recommended that the Department formally report to me – within 1 month of the date of this report – as to the specific action(s) it proposes to take as a result of the finalised ‘compliance audit’ report on the LGC.**

#### **RECOMMENDATION 6:**

**I recommended that the Department facilitate or promote an appropriate ongoing training process to familiarise the LGC’s staff, its CEO and members of Council with the requirements and obligations of the *Local Government Act* and associated legislation.**



In this regard, when any new staff or members are elected to Council there should be a process of induction that includes specific education and training in respect to the *Local Government Act* and its requirements. Indeed, two of the most important factors in ensuring compliance with this legislation is that affected parties both understand and accept their regulatory obligations. Thus, it is important that any induction course be formulated in a manner which effectively communicates these obligations.

It is important that Council members should also receive training as regards the nature of their responsibilities arising from the position they hold. Such training should place emphasis on how to make decisions that reflect the community's interest and their fiduciary responsibilities as elected members.

It is also crucial to ensure that the CEO is appropriately qualified, trained and cognizant of statutory obligations.

## 7.2 The LGC

(e) The decision by the LGC in accepting the offer by the Executive Director LGRD.

My investigation into this issue disclosed evidence which clearly indicated that there had been no formal decision by the LGC on 19 June 2002, to accept the SPG from the Department for the purpose of buying a 4WD vehicle. This representation was made by the CEO, Mr B and the then Acting President of the LGC, Mr K in correspondence dated 19 June 2002 under the LGC letterhead.

In an interview with my officers, Mr B agrees that the LGC did not meet on 19 June 2002, nor make any decision as to the acceptance of the SPG. Mr B also agreed that the letter was not a true statement and that he had no authority to do so without the backing of the LGC itself. On the other hand, Mr K, who is still is a member of the LGC, stated that he signed the letter during a LGC meeting which occurred on 19 June 2002, *"in front of the rest of the council"*.

I make the observation that there is no evidence to support Mr K's assertion. That said, I recognise that during his interview, he was open and frank as to his knowledge of events and so it may be the case that his recollection of this specific event has been affected by the length of time that has lapsed since the signing of the letter.



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It is relevant to note that Mr B's evidence suggested that despite the lack of a formal resolution by the LGC, he and Mr K were only formally communicating a decision which had already been made by Council informally and prior to 19 June 2002 - to accept the grant on behalf of the 'Traditional Owners'. The inference being that he was not acting outside the wishes or intentions of Council. To this extent, Mr B indicated that he had informally discussed with council members, the risks or issues associated with accepting the vehicle. In his words, *"everyone knew that this vehicle was coming"*.

While that might have been the case, I cannot accept any assertions or inferences that their actions were, due to some undocumented and undemonstrated community knowledge and determination, in accordance with their duties and obligations under the *Local Government Act*. In this respect, I refer to section 14A of the Act which outlines the role of elected members, and sections 142 and 142A which describes the responsibilities of the CEO (Attachment "A")

Additionally, Mr B was of the belief that the LGC and he were put in a position where they were unable to refuse to accept the SPG:

*When you've got Minister's people saying to you – well, not to me personally – but, you know, that they are making available money for a vehicle for the TOs – if I personally said to the Minister, "no, no, no, don't give the vehicle, don't give the vehicle to the TOs"; can you imagine – like you wouldn't because you've probably never lived or worked in an Aboriginal community – that would've caused enormous conflicts in the community about the Council Clerk, the white person not supporting the TOs. And, like, as I said you wouldn't even be able to imagine the conflicts that that would cause. If council themselves had said, "no, we're not going to accept the vehicle"; same thing, it would've caused conflicts with TOs, conflicts with family, conflicts with the Minister.*

To my mind, these comments tend to suggest that Mr B did not fully appreciate his professional role as a public officer. While I acknowledge the reality that Mr B, as CEO of the LGC, may have had to take into account cultural factors in reaching a decision about the funding offer, his overriding responsibility, pursuant to sections 142(2)(b) and 142A(2)(c) of the *Local Government Act*, was to protect Council by ensuring that it had been provided with adequate and appropriate information regarding the offer, and that any subsequent actions/decisions were lawful.

At this point I would note that in its response to my draft report, the LGC explained that:

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*...the Council Clerk and the Acting Chairperson were put in an uncompromising position by the Department by requesting that the Letter of Acceptance be signed straight away and faxed back straight away to fit in with close of Government spending...*

*...the Council Clerk and the Acting Chairman were both placed in an uncompromising position of having to sign a Letter of Acceptance and fax back straight away and therefore not follow procedures of going through Council.*

While I appreciate that the 'letter of acceptance' might have been signed within an atmosphere of urgency - given that the timing of the grant was very near to the closing of the financial year - I do not accept the thrust of the Council's submissions.

Chief Executive Officers and elected members of councils are public officers and as such have a duty to ensure that any action they take or decisions they make are transparent, accountable and reflect the public interest. In my view, the Council's submissions demonstrate a failure to appreciate the significance and onerous nature of the duties and responsibilities of public officers.

In this respect, it is significant that Mr B was aware that the SPG offer by the Department had not been triggered by a specific request or formal application from the LGC (but by the 'Traditional Owners') and that Council would ultimately possess an asset which it had not budgeted to service and maintain.

That being the case, it is my view that Mr B failed in his duties, under the Act, to provide Council with an opportunity to properly consider the offer and to inform them of any risks associated with its acceptance. Indeed, it is evident that Mr B did not have any lawful basis, or Council approval, to accept the SPG on behalf of Council.

I note that it also appears that Mr K did not understand, or was not aware of, her responsibilities/duties as an elected member of Council:

*...because I'm a member of the council I couldn't say yes or no, like – because if we wouldn't have accepted this offer we would have been in – there would have been a lot of conflict in the community and we would have had probably the minister on to us because as a council we didn't do our duty as a council to provide for our traditional owners...*

While I did not, as part of my investigation, examine the merits of their position - that they and the LGC had in effect 'no choice' but to accept the SPG - the reality is that their actions have adversely affected the integrity, transparency, and accountability of the LGC's entire decision making process. In addition, they also reflect poorly on



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the CEO and are even more surprising given his stated previous experience in the management of local government bodies.

That said, I accept that it may be argued that the LGC by inference or implication had accepted the SPG during its meeting of 25 June 2002, in which it advised Mr A that it would not be “*responsible for any financial cost or running cost for the vehicle*”.

In this respect, I note comments made by the LGC in its response to my draft report:

*The fact that the Letter of Acceptance did not go through Council at that meeting was we believe an oversight because the discussion about how the vehicle was going to be looked after became the main focus of the SPG discussion.*

However, the concern remains that there is no documentary evidence to indicate that the members of the LGC collectively turned their mind to consider the SPG or indeed whether it was appropriate and/or feasible to accept it in all the circumstances.

Of significant concern to me is Mr B's statement to the effect “*that it is not an uncommon thing*” for him to make decisions on behalf of council which are then “*put through retrospectively...especially if there is, like, deadlines for getting money released and things..*”

If this is an accurate description of the manner in which the CEO and the LGC approach the Government's funding process, albeit from time to time, then this appears to be inconsistent with one of the primary intentions of the *Local Government Act* which is to promote and encourage self-governance of Aboriginal communities by elected representatives.

Similarly, this practice appears to challenge the ethos of the ... *Community Government Scheme* and renders ineffective the Scheme's control and accountability mechanisms for Council. With this in mind, I have difficulty accepting that this is an appropriate practice for councils dealing with public funds.

Elected members of the LGC are public officers and are responsible for making decisions relating to the use of Council's property and public money which is provided to them. As such, their responsibilities can be equated to the fiduciary responsibility owned by a company director in terms of decisions made in respect to a company's assets or in the acquisition of such assets.

Council members cannot abrogate their responsibility to properly inform themselves and to inquire in regard to any matters upon which they are required to make decisions. They need to be assured that the decisions they make reflect appropriate



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probity and can be justified in terms of their responsibilities as elected officials. Ultimately they must act and be seen to act in the public interest.

That said, I acknowledge the reality that councils like other public organisations, normally implement processes or make arrangements with a view to streamlining their administrative practices and improving the manner in which they carry out their business. Delegations of power are relevant in this regard. In relation to this issue, the Department has made the following comments:

*It is not yet clear...whether the ... Council has a formal delegation in place or whether it is operating on long standing practice. The former is clearly an acceptable exercise of its power and given that 95% of the funds of the Council flow through grants programs, a sensible process. If the latter is the case then the matter needs to be addressed and this will be a matter we will pursue.*

While I am pleased to note that the Department has indicated it will be pursuing this matter, questions surrounding any formal delegations by the LGC were not crucial considerations in formulating my opinion about Mr B's actions in this instance. In this regard, it is important to understand that Mr B had been clearly aware of where the request for funding had originated and that the council had not budgeted to service and maintain a significant asset.

In light of the comments set out above, I am of the following opinions:

- 1. In relation to the decisions by the CEO to sign the formal acceptance on behalf of the LGC and then communicate the same to the Department on 19 June 2002, without Council's authority or knowledge, I am of the opinion, pursuant to section 26(1)(a) of my Act, that the CEO's administrative actions appear to have been taken contrary to law, namely, that they contravened or failed to comply with sections 142 and 142A of the *Local Government Act*.**
- 2. I am of the further opinion, pursuant to section 26(1)(g) of my Act, that the administrative actions of the CEO (as described above) were in all the circumstances wrong,**

In reaching these conclusions, I have considered the fact that the CEO knowingly made a statement which was untrue and used as a basis to secure government funding for the LGC. In this respect, it should be noted that my investigation has not considered the question of whether the CEO's actions constituted a criminal offence under the *Criminal Code Act* as this is outside the scope of my role under the *Ombudsman (Northern Territory) Act*.



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3. In relation to the decision by Mr K to sign the formal acceptance on behalf of the LGC, without Council's authority or knowledge, I am of the opinion, pursuant to section 26(1)(a) of my Act, that this was an administrative action which appears to have been taken contrary to law, namely, that it contravened or failed to comply with section 14A of the *Local Government Act*.
4. I am of the further opinion that the administrative action of Mr K, as an elected member of Council, was wrong within the terms of section 26(1)(g) of my Act.

In reaching these conclusions, I have considered the fact that Mr K appears to have knowingly signed a statement that was untrue and to be used as a basis to secure government funding for the LGC. Again, I have not considered the question of whether Mr K's action constituted a criminal offence under the *Criminal Code Act* as this is outside the scope of my responsibilities under my Act.

I make the observation that it is reasonably open to conclude that Mr K had a conflict of interest in regard to the vehicle in question (arising through her personal relationship and family ties with Mr A, Mr D and Mr E) which might have improperly influenced, or be perceived to have, the performance of his official duties and responsibilities for the personal benefit of the members of his family. Ultimately, his actions adversely affected the integrity of the LGC.

Consequently, I am of the further opinion that action should be taken in accordance with the following recommendation which I made pursuant to section 26(2) of my Act:

### **RECOMMENDATION 7:**

**I recommended that the LGC consider my comments and findings and, after consultation with the LGRD, report to me within 1 month of the date of the Final Report, as to what action it is proposes to take, or has taken, in response.**

**Furthermore I strongly urge the LGC to also take this opportunity to consider and raise with the Department its specific training and educational requirements.**

(f) The decision by the LGC in 'gifting' the vehicle to Mr D.

The information viewed by me in relation to this issue indicates that although the vehicle in question was registered in Mr D's name, it is clear that the intended

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beneficiaries of the 'gift' also included Mr E and Mr A (a member of the LGC at the relevant time).

With that background in mind, and given the fact that the LGC had disposed of its property within a very short period of its acquisition, the focus of my investigation was in relation to two areas:

- (i) the lawfulness of the transaction; and
- (ii) whether any actual or perceived conflict of interest issues emerged.

I will now comment on each in turn:

### **(i) lawfulness**

As already mentioned in this report, the Department's position is that the LGC's gifting of the vehicle was in breach of section 129 of the *Local Government Act*. While I do not necessarily disagree with the Department's analysis of the transaction, I do make the comment that it is not entirely clear to me, without firm legal opinion on the matter, whether the LGC's actions were "*in direct breach*" of section 129 of the *Local Government Act*. In this regard, I note that section 129 relevantly provides:

#### *129. Property*

##### *(1) A council may –*

*(a) purchase or otherwise acquire real or personal property for the public benefit of its council area and for the purpose of performing its functions;*

....

*(3) A council may sell or exchange real or personal property acquired by it except where the sale or exchange is inconsistent with a trust under, or a purpose for which the property was acquired.*

*(4) Notwithstanding subsection (3), a council shall not, without the prior consent in writing of the Minister, sell or exchange real or personal property acquired by it by grant or gift by the Territory or with the assistance of a monetary grant or subsidy from the Territory specifically for the purposes of the acquisition (my emphasis).*

Based on the available evidence, I make the observation that the LGC did not appear to "*sell or exchange*" the vehicle, but disposed of it by way of a 'gift'. Equally I would observe that it is totally contrary to principles of good governance (and indeed the intent of legislation) that a valuable asset of Council and thus the Community as a

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whole, be gifted to a specific individual thereby depriving council of any real value in terms of the asset.

There would be, I suggest, a legal obligation on Council to ensure public property is only disposed of properly and in an accountable process. More importantly from my perspective, this action potentially prejudiced any future requests or applications by council for grants or funding.

In so saying, it would be reasonable to assume that Parliament's intention in relation to section 129(4) of the *Local Government Act* was that community councils should not

relinquish ownership of their (public) property, for consideration or otherwise, without the prior approval of the Minister and then only in exceptional circumstances which are transparent and would meet public expectations of an appropriate purpose.

In my view, this interpretation would be consistent with the long standing fundamental principle that 'public officials', including elected members, in the course of performing their official duties must act in an open, transparent and accountable manner. Particularly when dealing with public property and public funds.

As a result, it could be strongly argued, on the balance of probabilities, that the LGC did indeed breach that provision by not seeking the Minister's prior approval for the disposal of the vehicle.

**It is my opinion, pursuant to section 26(1)(a) of my Act, that the LGC's decision to dispose of the vehicle by way of gift to Mr D, Mr E and Mr A, was an administrative action which appears to have been taken contrary to law, namely, section 129(4) of the *Local Government Act*.**

**I am of the further opinion, pursuant to section 26(1)(g) of my Act, that the gifting of the LGC's 4WD vehicle to private citizens of the community, for their own use and benefit, amounted to an administrative action which was in all the circumstances wrong.**

In reaching these conclusions, I was mindful of the fact that the LGC appears to have acted on deficient Departmental advice in relation to the 4WD vehicle.

That said however, the basis for my view stems from the fact that the LGC is a separate, semi-autonomous legal entity, whose members are collectively required to perform their official functions and duties in the public interest (including the community's interest) and in accordance with Council's 'constitution' the relevant local government legislation.

In this respect, I could not find any documented evidence to suggest that the LGC, as the legal body charged with the responsibility for making decisions of this nature *Names (other than the Department of Community Development, Sport and Cultural Affairs) have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.*



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under the LGC's *Community Government Scheme*, specifically turned its mind to consider any of the relevant issues before deciding to gift a council asset.

### **RECOMMENDATION 8:**

**I recommended that the LGC consider my comments and findings and, after consultation with the LGRD, report to me - within 1 month of the date of my final report - as to what action it is proposes to take, or has taken, in response.**

### ***(ii) conflict of interest issues***

My investigation into the disposal of the council owned vehicle, in August 2002, revealed that at the relevant time there were members of the LGC who might have had a real or perceived conflict of interest in relation to the transaction in question. In this respect, I note that:

- In his interview, Mr K stated that he had been married to the parent of the beneficiaries of the gift (Mr A, Mr E, Mr D) and that they were "*family*". As previously mentioned, Mr K was one of two signatories on the LGC's formal acceptance letter dated 19 June 2002 which secured the SPG totalling \$35,000 for the LGC.

The LGC's minutes of meeting for 25 June 2002, record that Mr K was present during discussions relating to the future financial responsibility (running costs) for the vehicle in question.

Also, the LGC's minutes of meeting of 19 August 2002, indicated that Mr K was present at this meeting in which it was determined to dispose of the vehicle by gift.

- Mr T is also closely related to the beneficiaries of the gift. The LGC's minutes of meeting for 25 June 2002, indicate that Mr T was present during discussions relating to the future financial responsibility (running costs) for the vehicle in question. Furthermore, the LGC's minutes of meeting of 19 August 2002, indicate that Mr T was present at this meeting in which it was determined to dispose of the vehicle by gift.
- Mr A was one of the intended beneficiaries of the gift. The LGC's minutes of meeting of 19 August 2002 indicate that he was not present at this meeting in which it was determined to gift the vehicle to him and his siblings

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However, the LGC's minutes of meeting of 25 June 2002, indicate that Mr A was "Acting chairperson" at this meeting in which the LGC determined that the financial responsibility for the 'running costs' of the vehicle would be passed to Mr A and the 2 other beneficiaries. The nature and extent of his involvement in this decision is not clear.

It is relevant to note that although the SPG in question had been deposited in the Council's trust account by that stage, the vehicle had yet to be purchased. That said, it appears that even at this early stage, the LGC had effectively determined to distance itself from the control and responsibility of its own future asset and improperly placed this onus on 3 members of the community.

As indicated earlier in this report, Mr A, along with Mr D and Mr E, had in their capacity as 'Traditional Land Owners', initially requested a 4WD vehicle, from the

Minister for Local Government, for the monitoring of sacred sites within the area. The information to date indicates that this request was the initial trigger for the Department's subsequent offer to the LGC for a SPG totalling \$35000, after having obtained Ministerial approval.

- It is unclear how many other members of the LGC were related to the beneficiaries, through blood or marriage, at the time of the gifting of the vehicle.

Before turning my attention to the question of whether a conflict of interest situation existed in relation to each of those persons mentioned above, I believe it is relevant to set out 'general principles' regarding conflicts of interest, and what constitutes good administrative conduct under the relevant legislation and policy regarding the same.

### **General Principles<sup>8</sup>**

#### The meaning of the term 'conflict of interest'

The term 'conflict of interest' refers to a situation where a conflict arises between public duty and private interest which could influence the performance of official duties and responsibilities. Such conflict generally involves opposing principles or incompatible wishes or needs.

Conflicts of interests can involve pecuniary interests (ie, financial interests or other material benefits or costs) or non-pecuniary interests (eg, political, religious, recreational, family or other interests). They can involve the interests of the public official, members of the official's immediate family or relatives (where these interests

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<sup>8</sup> In discussing this issue, I would acknowledge that I have relied on and used parts of a publication by the NSW Ombudsman relating to 'Good Conduct and Administrative Practice'. Names (other than the Department of Community Development, Sport and Cultural Affairs) have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.





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are known), business partners or associates, or friends. Enmity as well as friendship can give rise to an actual or perceived conflict of interest.

It matters little whether a conflict of interest is actual or merely a conflict that could be reasonably perceived to exist by a third party. Both circumstances negatively impact on public confidence and the integrity of the system or of a Council.

A real or reasonably perceived conflict may exist even if a public official is not the ultimate decision-maker. For example, it may be that as a result of the official's conflict of interest, there has been a failure to collect all relevant facts or ask the necessary questions, or otherwise to carry out a proper investigation or assessment of the facts on which the ultimate decision was based.

### Avoiding conflicts of interest

**The principle is that public officials or elected members should avoid situations in which their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties and the public interest.** Public officials should not allow the pursuit of private interests to interfere with the proper discharge of their public duties.

### Disclosure of conflicts of interest

Decision makers, and people advising or reporting to decision makers, should promptly, fully and appropriately disclose any real or potential conflict of interest they may have or they may be aware of in regard to a matter under consideration. Where the real, potential or reasonably perceived conflict involves the interests of a public official's or an elected member's family or friends, those interests should be disclosed to the extent they are known to the public official or elected member.

Public officials or elected members should also bring to notice any circumstances that could result in a third party reasonably perceiving a conflict of interest to exist (ie, wherever there would be a reasonable apprehension that an official may not bring an impartial and unprejudiced mind to the making of a decision due to an actual or perceived conflict of interest or bias).

It is the responsibility of public officials or elected members to make such disclosure whether or not there is a statutory requirement to do so. In this regard codes of conduct and/or conflict of interest policies adopted by agencies should require their employees to disclose relevant interests and circumstances. These policies should additionally make it clear that, depending on the circumstances, such disclosures may not of themselves be sufficient to resolve the actual, potential or reasonably perceived conflict.

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Such disclosures must be made at the first available opportunity to an appropriate senior officer of the Council or, in the case of an elected member, to the CEO or the presiding officer for a decision as to what action should be taken to avoid or manage the conflict.

### **What constitutes good administrative conduct in regard to conflicts of interest**

#### ❖ *The Local Government Act*

Within the current *Local Government Act* there are specific provisions defining the role of elected members of Council. In this regard, section 14A of the Act states:

- (1) *The role of a member, as a member of the Council, is –*
  - (a) *to direct and control the affairs of Council in accordance with the Act;*
  - (b) *to ensure the most effective and efficient allocation of the Council's resources for the benefit of the Council area;*
  - (c) *to participate in the deliberations of the Council and its community activities;*
  - (d) *to ensure the Council's adopted policies and objectives are appropriate and kept under review; and*
  - (e) *to review the performance of the Council and its business plans, revenue policies and delivery of services.*
  
- (2) *The role of a member, as a person elected to represent the community, is -*
  - (a) *to represent the interests of the residents and ratepayers of the Council area;*
  - (b) *to provide leadership and guidance to the community; and*
  - (c) *to facilitate communication between the community and the Council.*
  
- (3) *A member has no direct authority over an officer or employee of the Council in relation to the way in which the officer or employee performs his or her duties.*

With this role in mind, I note that the primary provision relating to conflict of interest matters is section 20 of the *Local Government Act* which deals with the interests of members of Councils or Committees, and sets out the circumstances where a member of a Council who 'has an interest or possible interest in a matter before the Council or Committee' should declare the interest or possible interest to the Council.

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Importantly, section 20(1) of the *Local Government Act* specifies that the conflict of interest must be declared and dealt with before the matter is discussed or debated by Council or a Committee of Council. Section 20(2) defines the circumstances in which a member has an interest in a matter, however these are not exhaustive.

Section 21 of the *Local Government Act* sets out the action that needs to be taken after a disclosure of a conflict of interest and, in particular, requires that the declaration of the conflict of interest be recorded in the minutes of any meeting and that a register of interest be kept for that purpose.

Section 21(2) provides, other than in certain circumstances, that a member who has declared an interest or possible interest cannot remain at the meeting during consideration or discussion of or taking of a vote on a question in relation to the matter for which the declaration of interest has occurred.

Section 22 of the *Local Government Act* specifically provides that it is an offence to fail to comply with or contravene section 20(1) or section 21(2) of the Act and also provides that where a member has taken part in a discussion or voted on any matter in which the member has an interest, then the vote and any consequential resolution of the Council may be declared void by a tribunal on application by an aggrieved person.

At this point, it should be noted that I have considered the LGC's actions (in relation to the gifting of the 4WD vehicle) against the current provisions of the Act dealing with conflicts of interest, and the law which applied during the relevant period (June-August 2). In this regard, I would observe that certain amendments to these provisions commenced in June 2004 which were intended to clarify and improve the procedures for declaring an interest. Critically, they did not lessen the duty imposed upon members to declare an interest, or possible interest, in a matter under discussion.

❖ *The Local Government Northern Territory Model Code of Conduct for elected members and staff*

I am aware that the Local Government Association Northern Territory has adopted a Model Code of Conduct ('the Code') to provide elected members and staff of councils with guidelines for an acceptable standard of professional conduct. The Association recommended it to Councils for adoption as their Council code.

The Code at sections 6, 7 and 8 specifically deals with the aspects of conflicts of interest and disclosure of information, personal benefit pertaining to elected members and staff, and conduct of members of staff respectively.

At sections 11, 12 and 13 of the Code reference is made to monitoring compliance of elected members with the standards of conduct set out within the Code. It is

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stated that the Code should be promoted to the local community and displayed in a prominent position at the offices of the council and, finally, it is recommended that councils adopt the Code of conduct for the elected members and staff and provide a copy to guide all members and officers.

Having viewed the Code, I fully support this recommendation.

I am pleased to note that documentation provided by Mr B to my Office on 17 January 2005 shows that the current members of the LGC adopted this Code on 20 October 2004.

That being the case, it is extremely important, in my view, that the Code be integrated into any performance management strategy set up by Council and that there should be ongoing education and training with respect to awareness and knowledge of the requirements of the code of conduct.

It should also be a key aspect of induction for any new staff or members of Council and individual members of staff or elected members of Council should be required to sign an appropriate acknowledgment that they have received a copy of the relevant code of conduct, that they have read it and understand its contents and that they are aware of their obligation to comply with the standards of conduct set out within the code and that they will carry out all their duties and responsibilities in accordance with the code.

### ❖ *Managing Conflicts of Interest in the Public Service – The OECD Guidelines*

These guidelines have recently been developed by the OECD and provide a detailed analysis of why there is a need to manage conflict of interest issues within the public service and how that process can occur. The guidelines which have been developed provide a suitable starting point for any consideration of how to address within a public organisation, including councils, these important and fundamental issues.

Whilst I support the recommendation that Councils should implement a code of conduct, that in itself will not be effective if an organisation does not put in place an overall policy framework which will deal with the issue.

The OECD Guidelines define a conflict of interest as:

*A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private capacity interests which could improperly influence the performance of their official duties and responsibilities.*



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This definition of conflict of interest recognises that public officials have legitimate interests which arise out of their capacity as private citizens and therefore conflicts of interest cannot simply be avoided or prohibited and must be defined, identified and managed.

The guidelines also note that an 'apparent' conflict of interest can be said to exist where it appears:

*'that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case. A potential conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (ie conflicting) official responsibilities in the future.'*

The guidelines also note that the definition of 'private interests':

*'is not limited to financial pecuniary interests, or those interests which generate a direct personal benefit to the public official. A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations, associations, and family interests, if those interests could reasonably be considered likely to improperly influence the official's performance of their duties.'*

The guidelines under the heading 'Serving the Public Interest' state:

- *'Public officials should dispose of, or restrict the operation of private interests that could compromise official decisions in which they participate. Where this is not feasible, a public official should abstain from involvement in official decisions which could be compromised by their private-capacity interests and affiliations.'*
- *'Public officials should avoid private-capacity action which could derive an improper advantage from 'inside information' obtained in the course of official duties, where the information is not generally available to the public, and are required not to misuse their position and government resources for private gain.'*

Under the heading 'Supporting Transparency and Scrutiny' the guidelines state:

- *'Public Officials, private interests and affiliations that could compromise the disinterested performance of public duties should be disclosed appropriately, to enable adequate control and management of a resolution.'*



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- *Public organisations and officials should ensure consistency and an appropriate degree of openness in the process of resolving or managing a conflict of interest situation.*

Under the heading 'Promoting Individual Responsibility and Personal Example' the guidelines state:

- *Public officials are expected to act at all times so that their integrity serves as an example to other public officials and the public.*
- *Public officials should accept responsibility for identifying resolving conflict in favour of the public interest when a conflict does arise.*
- *Public officials and public organisations are expected to demonstrate their commitment to integrity and professionalism through their application of effective conflict of interest policy and practice.*

Under the heading 'Engendering an Organisational Culture which is Intolerant of Conflicts of Interest' the guidelines state:

- *'Public organisations should provide and implement adequate management policies, processes and practices in the working environment to encourage the effective control and management of conflict of interest situations.*
- *Organisational practices should encourage public officials to disclose and discuss conflict of interest matters, and provide reasonable measures to protect disclosures from misuse by others.*
- *Public organisations should create and sustain a culture of open communication and dialogue concerning integrity and its promotion.*
- *Public organisations should provide guidance and training to promote understanding and dynamic evolution of the public organisation's established rules and practices, and their application to the working environment.'*

The guidelines state in regard to 'Transparency of decision-making' as follows:

*Registrations and declarations of private interest, as well as the arrangements for resolving conflicts, should be clearly recorded in formal documents, to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed. Further disclosure of information about a conflict of interest may also be appropriate in supporting the overall policy objective, for example, by demonstrating how the disclosure of a specific conflict of interest was recorded and considered in the minutes of a relevant meeting.*

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The guidelines also indicate that organisations need to take responsibility for the effective application of any conflict of interest policy. The guidelines state, in the context of individual cases that:

*Managers must be prepared to exercise judgment when dealing with a disclosure of private interests. In particular, they should consider carefully the larger question of whether a reasonable person who is in possession of the relevant facts would be likely to think that the organisation's integrity was at risk from an unresolved conflict of interest. When determining the most appropriate solution to resolve and manage the actual conflict situation, managers should weigh the interests of the organisation, the public interest, and the legitimate interests of employees as well as other factors – including in specific cases, the level and type of position held by the public official concerned and the nature of the conflict.*

### **Comments on the LGC's actions in relation to the 4WD vehicle**

I turn now to consider the LGC's actions regarding the 4WD vehicle, in the context of the information set out above:

Information provided by LGC members interviewed tended to suggest that the CEO and the Council members at the relevant time (ie June-August 2002), knew each other very well and were aware of the relationships between certain council members and the intended beneficiaries of the LGC's gift (one of whom was a Council member).

Specifically, they were aware that Mr K, and Mr T had a very close family connection to Mr A, Mr D and Mr E (Traditional Land Owners).

Evidence provided by the CEO and members of the LGC under Oath or Affirmation, indicated that they and other council members were clearly aware that the SPG offer to the Council from the Department, to purchase a 4WD vehicle, had been triggered by a specific request from the 'Traditional Land Owners' for a vehicle to monitor sacred sites within the area, as opposed to a request by Council.

With that in mind, I was unable to find any evidence to indicate that the CEO or any member of the LGC who was present at the relevant discussions of 25 June 2002 and 19 August 2002, raised, or gave any consideration to conflict of interest issues during their consideration of matters associated with the grant/vehicle in question.

This is particularly concerning given that the information to date indicates that a significant portion of the LGC's membership had a real or a perceived conflict of

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interest when matters relevant to the grant/4WD vehicle were raised for discussion and determination by the LGC on 25 June 2002 and 19 August 2002.

In so saying, I accept that a member can and will at times pursue personal interests that may be in conflict with Council's interests and the member's public office. The crux of the issue is that there be proper policies and processes in place to ensure such conflicts of interest real or perceived, are formally identified and are recognised by members and employees alike as significant matters and are properly managed. I could find no evidence to suggest that there were such policies or processes in place.

I note that section 142 of the *Local Government Act* clearly imposes an obligation on the CEO to give effect to the Act and all other Acts in relation to duties imposed on Council. Section 142 in my view, recognises the obvious distinction in the nature of the roles of an elected members and the CEO.

In this regard, section 20 of the Act imposes duties on the council members where conflicts of interest arise, and to this extent, the primary responsibility to act under section 20 rests with the member who has the potential conflict. At this point it should be emphasised that an elected member is more often than not a person with another occupation or business and their time spent carrying out public functions is but a small part of their daily lives and activities. In contrast, the CEO is employed by Council as its day to day manager and is required to utilise appropriate skills, knowledge and expertise on behalf of Council. This includes ensuring statutory obligations are complied with.

Another aspect of the CEO's responsibilities is the need for Council's processes to reflect the objective of the *Local Government Act* and to promote a proper culture of disclosure. In this respect, I note that section 21 of the Act refers to the action that needs to be taken, including recording a matter in the minutes of a meeting and recording it in a register of interests.

In the LGC's case, its CEO has recently advised my Office that such a register has been separately maintained since May 2000. I would note here, that although I have not sighted the register itself, I am prepared to accept, on the basis of the documentation provided to me by Mr B,<sup>9</sup> that one has been established in some form. In this respect, I would remind Council that this Register must be kept in the form prescribed under regulation 11 of the *Local Government (Administration) Regulations*.<sup>10</sup>

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<sup>9</sup> This documentation, provided on the 17 and 18 January 2005, includes copies of extracts of relevant 'minutes of meetings' which have been recorded in the Register, and copy of the front cover of the Register. According to this information, the first entry was made on 14 March 2001.

<sup>10</sup> This regulation requires that the register contain: the name of the member; the date and type of meeting at which the meeting was or was to be dealt with; particulars of the matter; and the minute number or other meeting reference of the matter. Entries must be in chronological order.

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Critically, I would observe that the Council has not provided my Office with any material from that Register which would indicate that any conflicts of interest were declared or disclosed by any member relating to matters before Council concerning the 4WD vehicle.

In addition, the LGC did not appear to have adequate procedures that any conflicts of interest be advised or disclosed prior to a meeting taking place. I note that in the LGC's 'Agenda' for the meeting of 25 June 2002, there was a reminder that:

*Council members to go through the agenda and if there is anything to be discussed that affects them or their spouse directly then they need to declare it before the meeting starts.*

In this regard, this statement does not appear, in my view, to properly reflect the obligation placed on members under the section 20 of the *Local Government Act*, to disclose their interest or possible interest in a matter before Council.

There was not, in my view, sufficient promotion of a culture of disclosure and this is evidenced by the failure to comply with the Act and such poor administrative practice has left the Council exposed to allegations of impropriety regarding its handling/management of council owned property (ie the vehicle) in this instance.

I would also make the observation that good administrative practice and professional responsibility as a public officer would dictate that where a CEO was aware that there may be personal interests that would prejudice or taint the actions and decisions of Council, they would act in Council's best interest and the public interest to ensure those issues are addressed.

In this respect, I note that there was at least one member of the LGC who appeared to have their personal relationship with the beneficiaries of the Council's gift at the forefront of their mind:

*Well, I'm related very closely to those kids, like [Mr D], because I couldn't – because I'm a member of the Council I couldn't say yes or no, like – because if we wouldn't have accepted this offer we would have been in –there would have been a lot of conflict in the community and we would have had probably the Minister on to us because as a Council we didn't do our duty as a Council to provide for our traditional owners. Probably that was one of the reasons why we didn't – we passed this as a resolution of the Council at that meeting at that time.*

Generally speaking, it does not appear that the CEO took any specific steps to address any conflict of interest issues formally with any of the members who had, or may have had, a 'personal interest' in the council owned vehicle. Nor did he put in Names (other than the Department of Community Development, Sport and Cultural Affairs) have been removed to protect privacy. Identifying letters are assigned in alphabetical order and bear no relationship to the person's actual name.



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place any specific protocols to ensure that those persons were not involved in any matters pertaining to the vehicle in question.

Critically, it does not appear that the CEO saw any difficulty in those persons participating in any of the relevant meetings. As such, it would be reasonably open to an independent observer to conclude that the Council's actions regarding the vehicle in question were inappropriate and/or undermined by the fact there were Council members present at the relevant meetings with personal interests and/or personal relationships in the subject matter.

In my view, Mr B, as CEO, should have acted directly and positively regarding conflict of interest issues with a view to protecting Council. If there was a conflict of interest or a possibility of a conflict of interest it was, in my opinion, necessary for Mr B to ensure that the nature of the conflict was fully explored, properly disclosed and recorded so that it could be managed. How well it would have been managed is speculative at best.

The CEO's prime objective should have been to assess any real or perceived partiality in the LGC's handling of matters relating to the 4WD vehicle, to provide members of Council with appropriate advice and guidance, to protect the integrity of Council, and providing a fair and transparent process for third parties.

Ultimately, it appears that that Mr B was not fully aware of the significance of his own role as CEO, which was to ensure that the LGC carried out its responsibilities in accordance with relevant legislation and, more specifically to ensure members of Council did not allow their personal interests or relationships to compromise the integrity of Council.

This is made apparent in her response, during interview, where Mr B stated that he didn't believe that the Council's decision making process had been affected by Mr A's presence. However, I would observe that Mr B had earlier acknowledged to my officers that he had to be "very careful" in informally advising LGC members of any risks or issues associated with 'accepting' the vehicle, because "[Mr A] was also on Council as well".

In my view, this statement underlines the importance of identifying and properly managing any conflict of interest issues in order to ensure that a public body's decision making process is not tainted by perceptions that it did not act transparently, fair and reasonably.

I consider that the CEO should have, at the meeting of 25 June 2002, at the very latest:

- formally questioned members of the LGC as to whether they had a conflict of interest in regard to the vehicle in question;

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- informed members of Council of the possible conflict and the need to manage it in accordance with legislative obligations and ensured this process was noted in minutes of the relevant meeting; and
  - requested that those members with an interest to not take part or be involved in any deliberations relating to the 4WD vehicle until such time as advice/guidance was obtained from the Department, or another appropriate organisation, as to how to best proceed in the circumstances.

It should be noted that I am not suggesting that the LGC would have ultimately reached a different decision concerning the 4WD vehicle if the CEO had taken the actions I have identified above; rather, they would have demonstrated that:

- members of Council, in accordance with good administrative practice, did bring an impartial and unprejudiced mind to the decision making table;
- the actions of the CEO and the LGC had been lawful, properly responsive and procedurally sound.

My comments above do not detract from the Council members overriding individual responsibility and obligation to act appropriately and to declare the conflict of interest they might have had. However, in them failing to do so, there was an obligation on the CEO to act and, in my view, he failed to do so despite having sufficient information to justify and, indeed, obligate him doing so.

The difficulty remains, however, that the LGC continued the process of considering issues relating to the financial responsibility and disposal of the 4WD vehicle, in the absence of appropriate declarations of conflict of interests by certain members. This was in my view, a breach of section 20(1) of the *Local Government Act* on the part of those members who had an interest.

The failure to declare their interests, as already noted, tainted the Council's process on 25 June 2002 and, in my view, by the time the 4WD vehicle was gifted to the 'Traditional Owners', Council's actions were so tainted that they were irretrievably flawed.

Fundamentally, the LGC is not able to assert that the manner in which it treated Council owned property was unaffected by improper influences both in reality and from the perception of a reasonable observer.

It is important here to note the impact of section 22(4) of the *Local Government Act* which states:

*Where a member has taken part in a discussion or voted on a matter in which the member has an interest, the vote and a consequential resolution of the Council may be declared void by the tribunal on application by an aggrieved person.*

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The question does arise in regard to the circumstances of the gifting of the 4WD, whether the decision of the LGC on 19 August 2002 was void due to the apparent interests of Mr K and Mr T (Mr A was not present at this Council meeting) and their involvement in the relevant meetings without declaring their interests and absenting themselves.

This is a moot point and one which I do not need to determine in the context of this report. It is sufficient in my view to allude to the possible consequences and to note that there does not appear scope to mount a defence to a breach of section 22(4) in terms of section 22(2)(a) of the Act which provides:

*It is a defence to a prosecution for an offence under subsection (1) if the defendant proves that the defendant did not know that –*

*(a) he or she had an interest in the matter before the council or committee;*

....

### Findings

- 1. I am of the opinion that the CEO of the LGC, Mr B, failed to act appropriately and/or reasonably in regard to formally ascertaining from Mr A, Mr K, Mr T, and other Council members, whether they had a conflict of interest in regards to the Council's 4WD vehicle and to formally advise them and other members of Council of the requirements of sections 20 and 21 of the *Local Government Act*.**

Indeed, there was a specific obligation imposed upon the CEO, pursuant to sections 142(2)(b) and 142A(2)(c) of the *Local Government Act*, and in his capacity as a public officer, to advise those members as to the appropriate action to take regarding to any real or apparent conflict of interest.

**As a result, I am of the view, pursuant to section 26(1)(a) of my Act, that Mr B's failure in this regard amounted to an administrative action which appears to have been taken contrary to law.**

- 2. I am of the further opinion that such administrative action on the part of the CEO was, in all the circumstances, wrong in terms of section 26(1)(g) of the *Ombudsman (Northern Territory) Act*.**
- 3. On a more holistic basis, I am of the opinion that the administrative actions of the LGC in regard to its handling and disposal of the 4WD vehicle (by gift) were, pursuant to section 26(1)(b) of my Act, unreasonable.**

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**4. I am of the further opinion that the administrative actions of the Council, in regard to its general handling and disposal of the vehicle, were wrong in terms of section 26(1)(g) of my Act.**

In reaching this conclusion I have taken into account that the 4WD vehicle had been purchased using public money and was, in accordance with the Minister's express approval, to fall under the umbrella of Council's responsibility and control. That being the case, the LGC had an obligation, in my view, to ensure that the management, use and disposal of council owned property was in the community's best interest. In addition, the Council had an obligation to ensure that its actions fell within the confines of good public administration and conduct.

I was unable to find any evidence to demonstrate that these responsibilities had been met.

### COMMENT

I would make the observation that my findings will, not unexpectedly, cause some considerable angst to members of Council, and the CEO, Mr B. Some will be surprised as to the criticism levelled against them in the circumstances where they might well feel they have acted in good faith and certainly with no intent to act contrary to the best interests of Council and the LGC's community.

In this context, I note that there is evidence to suggest that members of the LGC, including the CEO did not feel that they were in a position to refuse the grant or the gifting of the vehicle, given the express wishes of the Traditional Owners, their cultural respect towards the same and the Minister's approval.

The Department, in its response to the earlier draft of this report, appears to have taken issue with my observation:

*Your comment...again returns to your theme that the Minister in offering a grant had put the Council in a difficult situation. I trust that you will accept, without the provision of further evidence, that my officers have considerable experience, knowledge and expertise in the matters you are discussing. As I noted earlier, all councils in the Territory deal to varying degrees with the issues you have identified at .... Most do so well, while others have difficulties. The shift from a customary based decision making structure to one that must operate according to sound business practice is hard to make – and in many cases rejected. None of this provides any justification for your view that a Minister, or anyone else, should not make a decision because it will be difficult for a council to make.*

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At the outset, I wish to make it clear that I have never expressed the view that the “Minister, or anyone else, should make or not make a decision because it will be difficult for a council to handle”. Moreover, I reject the notion that any part of my report alludes to a theme that the Minister had placed the Council in a difficult situation by offering the grant.

Any inferences which the Department has drawn in this regard do not, in my view, have any reasonable basis. Indeed, I have been particularly careful not to infringe the statutory rule which prohibits me questioning the merits of a decision by the Minister.

That said, it would be irresponsible of me not to recognise, as part of the evidentiary material in this report, the explanation provided by members of the LGC and its CEO for their actions. In this respect, it should be noted that Council’s view on the matter is most clearly conveyed in its response to my draft report:

*We believe that the Council was put in an uncompromising position by the Minister by offering this vehicle to the T/O’s through Council. The Minister and Departmental staff should have explored other options for granting this vehicle.*

I have some difficulty accepting the thrust of this submission. I acknowledge the reality that the LGC, given that its members are drawn from a small and close-knit community, will from time to time be faced with situations where conflict of interest situations or concerns may arise. However, despite these challenges, the LGC has an obligation to ensure that it conducts its business in a manner which is both lawful and in accordance with good administrative practice.

I would observe that these requirements must be achieved and maintained if the LGC *Community Government Scheme* is to be promoted and retain credibility.

Persons holding public office have an onerous responsibility to act with integrity, in the public interest and in accordance with highest ethical, fiduciary and fidelity standards and accountability in the performance of their official duties and functions. They cannot be excused from responsibility and accountability for their actions on the basis of ignorance, naivety, poor judgment, poor consultation and a lack of awareness of the statutory obligations applicable. These factors may explain and, in some cases, mitigate the actions taken but they do not excuse.

In the present case, the consequences for the LGC as a whole were significant and serious:

- Its integrity - that is Council, its members and its processes - has been impugned;
- The actions of Council in gifting its property to three private citizens of the LGC community have been seriously tainted and ultimately, cannot be seen as having

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transparency or having been conducted in an appropriately fair manner (ie without improper influence);

- Subjected to an investigation into its conduct; and
- In that it exposed itself to the possibility of closer scrutiny by the Department regarding its future financial affairs and general day to day operation.

I would also make the observation at this point, that recent comments made by the LGC regarding conflicts of interest are concerning:

*Understand that Conflict of Interest for Council members is to do with the Council member and their husband or wife. We have read Conflict of Interest from Local Government Act. We have read Conflict of Interest statement in Minutes of Meeting held on 14 March 2001 where a Department of Community Development Staff member told Council it is to do with spouse not children or brothers or sisters...*

It should be noted here that I have not examined the veracity of the LGC's assertion regarding the advice provided by an officer of the Department. Given the length of time that has lapsed since the making of the alleged comments, and the Department's recent advice that a substantial reorganisation of the Division occurred in mid-2002, I do not see any meaning or useful outcome being achieved in pursuing this particular issue.

That aside, the LGC's remarks tend to indicate that its current members have a very limited understanding of the types of circumstances or situations in which conflicts of interest may arise.

I am of the opinion that action should be taken in accordance with the following recommendations which I made pursuant to section 26(2) of my Act. I am confident that if my recommendations are accepted and acted upon by the LGC, such issues and problems will be properly identified and managed in the future:

### **RECOMMENDATION 9:**

**The LGC, in consultation with the LGRD, should implement an appropriate ongoing training process to familiarise Council's staff, the CEO and members of Council with the requirements and obligations of the *Local Government Act*. When any new staff are employed or members are elected to Council there should be a process of induction which includes specific education and training in respect to the *Local Government Act* and its requirements.**

### **RECOMMENDATION 10:**

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There should be a complete review of the LGC's policies in regard to the duties and responsibilities of Council staff, the CEO and Council. Consistent with this recommendation Council should:

- ensure that the roles and responsibilities of elected members and staff of Council are adequately identified and set out;
- establish a framework which will see all staff and members of Council aware of the content of any Code of Conduct and their responsibility to comply with it;
- Council should establish a framework which will enable an ongoing assessment as to whether or not staff and members of Council are complying with the Code;
- all staff and members of Council should sign an acknowledgment that they have received a copy of any Code of Conduct, have read it and understood their obligation to comply with it;
- where there is any new member of staff employed or any new member elected to Council the induction process should clearly cover the above.

#### RECOMMENDATION 11:

Consistent with the OECD Guidelines relating to managing conflict of interest issues, I recommended that the LGC prepare and implement, a policy pertaining to the management of conflict of interest situations. Such policy should reflect the relevant legislative obligations applicable under the *Local Government Act* and establish a framework for implementation, which involves all staff, members of Council, organisations, and businesses that do business or have dealings with the Council.

#### RECOMMENDATION 12:

Given my specific findings in regard to the possible contravention or failure to comply with the provisions of the *Local Government Act* in respect to the CEO of the LGC, Mr B, I have forwarded my investigation report to the relevant responsible Minister for Local Government with a recommendation that my findings in regard to the to this matter, and my comments generally, be referred to the relevant agency responsible for the administration of the *Local Government Act* with a view to determining whether any further action is required as against Mr B.

#### RECOMMENDATION 13:





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I recommended that the LGC immediately implement a practice of including on any agenda in respect to a meeting, a statement which highlights to members of Council their need to declare any actual or possible conflict of interest. A statement along the lines of *“Any member of Council who may have a conflict of interest, or a possible conflict of interest in regard to any item of business to be discussed at a Council meeting should declare that conflict of interest to enable Council to manage the conflict and resolve it in accordance with its obligations under the Local Government Act and its policies regarding the same”*.

As an observation, the principle should be that if there is any doubt whatsoever as to whether a member of Council has a conflict of interest, then it should be discussed openly so that it can be identified and, if necessary, managed appropriately.

- (g) The decisions/administrative action taken by the LGC and/or other Community Councils in relation to other SPG (needs based funding).

It is relevant to note that my report has focussed on the actions of both the Department and the LGC in relation to the SPG (needs based) funding which was used, in effect, to purchase a 4WD vehicle for certain Traditional Owners residing in the LGC community.

During the course of my investigation into the events surrounding this transaction, I became concerned that the totality of the information I viewed raised the possibility that the deficiencies identified in this particular case might have also occurred in other situations involving needs based funding.

Comments made by the Department in its response to my draft report, tended to indicate that it did not share my concern:

*You have suggested that the evidence in the ... case indicates that there may be a wider problem. The Division’s grant management arrangements have been recognised for many years as an area where there is the potential for a variety of risks to be faced. The Division, in its various iterations over the years, has been regularly audited both by internal and external auditors. The*

*grants management process has been subjected to review on a number of occasions. During the last 10 years the Division has constructed and implemented a grants management system that is recognised as a leader in the field.*

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While I appreciate that the Department's points are important general considerations to the question of whether the Division and the Department have given proper priority to its grants management and administration responsibilities, they do not, in my view, provide convincing reasons or grounds as to why the possibility I have raised (above) is not a reasonable one.

**Ultimately, my concern was, and still remains, that there may have been other circumstances in which public funds have been improperly used for the gain or benefit of an individual or group of individuals in a remote or regional community.**

Indeed, I would observe that the Department does not refer to any specific information or tender any detailed evidence in its response to my draft report which would diminish this particular concern.

### The reasons for my concern

In the draft report, I set out the factors which formed the basis of my specific concern. I have again outlined these below, and included comments made by the Department where relevant. My intention in doing so is to assist the Department establish the context in which it needs to consider my suggestion about the action the Department should take in the circumstances:

1. Mr G's statement during interview that "*it is not at all unusual for a submission to be made direct to the Minister and for it not to hit the department for analysis*".

In my view, it is particularly important, and indeed valuable, that the Department properly scrutinise applications for funding at this initial stage, especially in light of the fact that it does not appear to be provided with any legislative or other basis through which it can adequately monitor the actual use to which funding has been generally applied after it has been acquitted.

In this regard I note Mr G's comments:

*I guess it is of no real interest to us what the council uses that vehicle for and we have no way of getting them to acquit that in the future. The only thing we can do is say we will give you money to purchase a four wheel drive or to buy a truck or to build a house, or do something and once that specific activity is finished we do not have any- we have no way of sensibly monitoring.*

I also note that Mr H, who I understand is responsible for the management of the Darwin Regional Office (LGRD), has advised that "*some councils have not*"



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undergone 'compliance audits' by the LGRD "*for three or four years because we just have not got the staff*".

This advice is inconsistent with comments made by the Department in its response to my draft report:

*...Mr H would not have knowledge, nor would he be expected to have knowledge, of the overall status of the compliance audit process... With one exception, not ..., all councils in the Darwin Region underwent compliance audits every year for the last 3 years....*

Relevantly, the Department stated that:

*During 2002 the Division underwent a change in structure and focus. A specialist team was created across Central Office and Regions to concentrate on local government, and particularly on compliance and regulation. The new Branch engages in an annual risk assessment process where it considers the situation of every council and funded organisation against a set of criteria designed for the purpose. The risk assessment process is used to prioritise the work of the compliance teams. While, at time, other priorities can obviously impact on the priorities established through this process, the compliance audit process is now meeting its targets in terms of both output and desired outcomes.*

The Department's comments give me cause for concern for two reasons:

- It is reasonably open to suggest that Mr H' understanding - of the status of the compliance audit process in the Darwin region - demonstrates an apparent failure on the part of the Department to ensure that its Darwin Central office and the 'new Branch' pursue a co-ordinated approach to their respective operations, or at the minimum, a sharing of relevant information.
  - If it is the case that all councils in the Darwin Region, with one exception, underwent compliance audits every year for the last 3 years, then it is unclear to me, on the basis of the available evidence, as to why this process did not identify and respond to the irregular LGC transaction.
2. That on 17 June 2002, the Minister for Local Government made a decision to approve \$6000 to 'S'. The evidence indicated that there had been no bid or recommendation in either the first or second round brief to the Minister concerning a possible SPG to this community. Additionally, I am concerned that the Officer responsible for the administration of the local government grants program, Mr F, stated that he was not privy or aware to the basis on which the Minister approved the grant to 'S';

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3. In relation to the transaction in question, it is my view that the distribution of SPG funding to the LGC was not adequately assessed against relevant Departmental guidelines and/or considerations.
4. The Department's grant of \$33,723 in December 2003 to the LGC for the purchase of another vehicle.

In relation to this grant, Mr H indicated that this particular funding request fell under the umbrella of a 'Capital Infrastructure Grant' and "*certainly met the requirements*" and "*was not an unreasonable request*". In so saying however, Mr H indicated the forms used by community councils to apply for 'capital infrastructure' funding required review as they were confusing in that they were headed "*Application for Special Purpose Grant*".

**I would strongly suggest that the Department address this recognised deficiency.**

From the point of view of an independent observer, it appears to be highly questionable, in a general sense, whether it was reasonable or appropriate for the Department to provide public funds to the LGC for the purchase of another vehicle, given that it had allocated funding for the same purpose 18 months earlier.

As a result, in my draft report I stated:

*In this respect, it is unclear to me whether the Department properly considered whether this second vehicle was in fact needed by the LGC or whether the funding should have been approved given the 'gifting' of the first.*

The Department made the following comments in its response:

*The Capital Infrastructure Grant program is one, which has in the past, sought to ensure that councils acquire and maintain at least that minimum level of capital assets reasonably required in the exercise of their functions. The program did not seek to arbitrate on relative need, simply to ensure that councils build and maintain their assets. The amounts offered were calculated on a formula rather than on the specific purpose to which the funds were intended to be put.*

*The program operated using a Special Purpose Grant approach. Councils were informed annually of the amount that had been notionally allocated for provision to them. Councils were then required*



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*to submit a bid detailing their proposals for expenditure. Formal offers of funds were then made to councils for the provision of grants for the purposes agreed. The acquittal of the grants in due course was required.*

*In the particular case of ... and the Capital Infrastructure Grant to which you refer, advice of an amount available was provided. The Council, after considering its priorities advised that its highest priority capital item was a vehicle. The Department reviewed the application and considered factors such as, whether previous grants have been properly acquitted, whether the item(s) proposed will add to the capital infrastructure of the council and whether the council was operating according to financial accountability requirements. These elements being met, an offer of funds was made.*

***I am prepared to concede that the provision of funds for a vehicle after funds previously provided for a vehicle, although for a different purpose, were dealt with wrongly, appears strange to the independent observer and to those without the relevant information*** (my emphasis) *I would suggest, however, that the management of remote communities is a significantly more complex exercise than most independent or uninformed observers would appreciate.*

*The fact that a council makes a mistake, even if that mistake is significant in the circumstances, is not a reason for funding agencies to operate in a vindictive manner and to, thus, seriously affect the ability of a council to deliver services. In this regard, it is worth appreciating that councils are often the only source of services for people and restriction of their ability to operate can have serious and immediate consequences for the living conditions of people. A more sophisticated and strategic approach is required in dealing with councils than simply withdrawing funds.*

I have no difficulty with what the Department has set out in its response. My point is that irrespective of the source pool, the provision of further public funds to the LGC for the purchase of another vehicle in circumstance where a previous vehicle was 'gifted' away, does not reflect very well on the Department's overall management of its local government grant program in the public eye. It also cast doubt as to whether the LGC has the ability to properly handle or fully appreciate its economic resources.

5. The evidence indicates that an external audit of the LGC's financial statements for the financial years 2001-2002 and 2002-2003 did not result in the auditor

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commenting or qualifying the audit because of the 'gifting' of the vehicle in question. In this regard, the Department advised that the *"auditor failed to report this transaction (the gifting) to the Minister for Local Government pursuant to section 181 of the Local Government Act"*.

Given the seriousness of the auditor's omission in this instance, this raises my broader concern that the auditing process (established under Division 10 of the *Local Government Act*) is possibly not identifying suspect or irregular council transactions in other circumstances.

While I recognise that this may not be attributable to the Department or the LGC, it is my view that the Department should be able to reasonably rely on audits conducted, pursuant to the *Local Government Act*, as evidence that councils' financial affairs are consistent with their obligations and responsibilities under the relevant legislation.

In its response to my draft report, the Department made the following comments about my view:

*Your comments...are accepted. The quality of audits has been an issue for the Division. To address these concerns a paper was prepared in 2000 setting out some options for establishment of a better process. Options included the establishment of competent Audit Committees, allocation of the task to the Auditor-General and pre-qualification of auditors by the Department or a professional group. At the time the public reaction was such that the Government did not wish to proceed. A further discussion paper has been prepared with more tightly defined options. This has been discussed with key stakeholders, including the previous Auditor-General, on a confidential basis and was (sic) been approved for release to the Local Government Association of the Northern Territory of the Northern Territory. It is anticipated that this policy consideration will be pursued when all stakeholder views are known.*

I am pleased to observe that the Department's approach to the issue is proactive. I look forward to receiving advice as to the Department's proposed timeframe for reaching a finalised position.

### **Suggested action**

In my draft report I strongly suggested that the Department conduct an independent audit of 'needs based' grants offered and accepted by community government organisations from June 2002 to present.

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To my mind, the purpose of such an audit would be to ensure that these types of grants have been effectively utilised by those communities for proper purposes and within the boundaries of their 'constitution' and/or the *Local Government Act*. In order that the proposed audit achieves a meaningful and useful outcome, it was recommended that consideration be given to the design of an efficient and effective audit model and to its intended scope.

The Department subsequently stated that my suggested course of action would "*appear to be unjustified on the evidence to date*". However, it did agree to "*place the matter before the Department's Audit Committee for consideration and advice*".

While it is, of course, open for the Department to place my proposal before its Audit Committee for consideration and advice, I am not convinced, with all due respect, that this approach goes far enough to quell or properly address my concerns about possible deficiencies in the decisions/actions taken by the LGC and/or other community councils in relation to other SPGs.

Moreover, I reject the Department's inference that my suggested course of action is without a sound basis. As such, I do not resile from my view that an independent audit (of the kind suggested) should be conducted in the circumstances.

In this regard, I am mindful that when viewed as a whole, the transaction in question presents as a most unsatisfactory example of SPGs going to a local government organisation. A combination of errors and looseness presents a transaction which reasonably leads to a perception of illegality. In my opinion, it seems to highlight deficiencies in the understanding of Local Government and Departmental obligations and a serious lack of training as regards those respective bodies rights and responsibilities. Mr B's actions, in particular, evidence lack of training.

Given the nature of the maladministration on the part of both the Department and the LGC which I have identified elsewhere in this report, I do not believe it is unreasonable to speculate that there may be other instances in which public funds have been improperly used by councils. I would stress here that this does not mean I have reached such a conclusion or drawn an inference to this effect.

Similarly, in light of the seriousness of the perceptions and/or inferences that could be drawn from the transaction in its entirety, and its potential to affect or impact on the integrity of the grant management systems of the Department and local government organisations, it is entirely appropriate in my view, to suggest that other SPGs be independently analysed. Indeed, it is in the public interest to do so.

Those being my views, I would strongly recommend that a copy of this report be provided to the Auditor-General for his consideration and advice as to what action, if any, he deems appropriate in the circumstances.

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To my mind, the advantage of taking this approach is that it will effectively protect the Department from criticism that it has not afforded my concern (about whether there are other instances where local government bodies might have misused public funds) proper consideration by an objective and external process which is independent of government.

It would also ensure that an expert opinion has been sought on whether or not the transaction in question leads to any broader concerns about the Department's grant administration process and possible misuse of public funds by community councils.

### 8. CONCLUSION

I would make the observation that inquiries into matters handled by this Office, relating to local government bodies tended to suggest that small council organisations are having difficulty meeting or achieving the operational requirements imposed on them by local government legislation and general principles of good public administration.

The reasoning behind this situation appears to be that these councils lack:

- adequate financial or staffing resources;
- a clear understanding or knowledge of responsibilities/functions under the *Local Government Act*;
- a sufficient number of trained and experienced staff; and
- reasonable levels of operational support and guidance from within the Council organisation as well as from Government in general.

That said, it is my understanding that the Government's *'Building stronger regions-stronger futures'* strategy seeks to address, among other things, these sorts of issues in its reform and development agenda of local government arrangements in the Northern Territory.

As indicated earlier, I fully support any process that upholds the traditional authority of Indigenous Territorians and strengthens the institutions by which they govern their affairs at a local and regional level.





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It must be accepted however, that until Government's initiatives/solutions are fully implemented, community based councils will be faced with enormous challenges in complying with relevant laws, and in protecting and advancing the interests of its constituents.

PETER A BOYCE  
Ombudsman

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