

EASTERN REGIONAL LIBRARIES – TRANSITION TO A BENEFICIAL ENTERPRISE

Report Author: Manager Creative & Connected Communities

Responsible Officer: Jane Price, Director Communities

Ward(s) affected: All Wards

The author(s) of this report and the Responsible Officer consider that the report complies with the overarching governance principles and supporting principles set out in the Local Government Act 2020.

CONFIDENTIALITY

This item is to be considered at a Council meeting that is open to the public.

SUMMARY

Following the introduction of the *Local Government Act 2020* and requirement for Regional Library Corporations (RLCs) to be wound up in accordance with section 330(4) and a beneficial enterprise established in accordance with section 110, at Council Forum in August 2021 Councillors requested officers:

- Write to the CEO of Eastern Regional Library Corporation (ERLC) to provide in principle support to progress to the establishment of a New Library Corporation (NLC) under section 110 of the 2020 Act;
- Engage appropriate legal services to undertake a review of the NLC and prepare a risk assessment in accordance with section 111 of the 2020 Act; and
- Subject to the legal review, and officer's consideration of proposed future arrangements, prepare a report for consideration of Council to endorse participation in the NLC in accordance with section 110 of the 2020 Act.

Legal services were engaged and provided with the draft constitution, risk assessment and draft transfer of business agreement for review. Legal services advised that the draft constitution, risk assessment and draft transfer of business agreement accord with section 110 of the Local Government Act 2020 and they are satisfied that what is proposed will meet the requirements of section 111.

Based on external legal advice and officer review of documentation Council has met, and will continue to meet, the requirements pursuant to section 110(1) and section 111 of the Local Government Act 2020.

Council has:

- 1) Assessed the total investment involved and the total risk exposure and ensured that its total risk exposure does not exceed its total investment;
- 2) Ensured that the corporation is a limited corporation;

- 3) Ensured through the company's Constitution and the Your Library Agreement:
- a) risk management arrangements have been established;
 - b) regular performance monitoring and reporting arrangements in relation to the beneficial enterprise are implemented;
 - c) any changes to the operation or purpose of the beneficial enterprise are reported to Council;
 - d) risks associated with any changes to the operation or purpose of the beneficial enterprise are identified and managed; and
 - e) a report on the operations and performance of the beneficial enterprise will be included in its annual report.

In line with the draft constitution section 18.1, each member Council is required to appoint two Board members (Directors) to the NLC.

RECOMMENDATION

That Council

- 1. Note the proposal that the Eastern Regional Library Corporation be wound up in accordance with section 330(4) of the Local Government Act 2020 and a Beneficial Enterprise be established in accordance with Section 110 of the Local Government Act 2020 to deliver library services on behalf of the Yarra Ranges, Knox and Maroondah City Councils.**
- 2. Note that officers have assessed the proposal to participate in a beneficial enterprise and are satisfied that Council has met, and can continue to meet, the requirements of sections 110(1) and 111 of the Local Government Act 2020.**
- 3. Note the risk assessment, management and mitigation strategies to address these risks set out in attachment two.**
- 4. Pursuant to section 110(1) of the Local Government Act 2020, resolve to participate in the formation of, and become a founding member of, Your Library Ltd (a public company limited by guarantee) on the terms of the Your Library Ltd Constitution as set out in Attachment one and:**
 - (a) Appoints the following two natural persons as the inaugural Directors of Your Library Ltd.**
 - i. Name 1: Councillor Jim Child**
 - ii. Name 2: Councillor Andrew Fullagar**
 - (b) Appoints the following natural person as its Corporate Representative.**
 - i. Position: Manager Creative & Connected Communities**
- 5. Note that the Eastern Regional Library Corporation will continue to provide library services under the current model, while officers from the member Councils and Eastern Regional Library Corporation negotiate**

and finalise the terms of the Your Library Agreement which will govern the relationship between the Member Councils and Your Library Limited.

RELATED COUNCIL DECISIONS

There are no related Council decisions relevant to this item.

DISCUSSION

Purpose and Background

Council's original participation started in 1996 with the establishment of ERL by the Member Councils in accordance with section 196 of the Local Government Act 1989. The Board of ERL governs the Corporation in accordance with the relevant provisions of the Local Government Act 1989, the Regional Library Agreement and other adopted policies and procedures. The agreement was reviewed and renewed in 1999 and 2009.

The Board is made up of two nominated Councillors from each of the Member Councils. The day-to-day management of the Corporation is the responsibility of the ERLC CEO, supported by their Corporate Management Team.

ERL member councils comprise Yarra Ranges Council, Knox City Council and Maroondah City Council. Equity holdings were set in line with the services provided, number of facilities and associated activities for each council. Yarra Ranges Council has the largest share in equity of 38.72%. This has been maintained since inception.

Under the Local Government Act 2020, two or more councils may form an RLC, which is a separate legal entity to its Member Councils and must meet some of the provisions under the 2020 Act that apply to councils. RLCs publish their own annual report and develop a four-year Library Plan, which outlines strategic objectives.

The introduction of the 2020 Act requires RLCs to transition to a Beneficial Enterprise structure within ten (10) years from 1 July 2020.

At its Board meeting on 6 June 2021, the ERL Board discussed the proposal to transition to a beneficial enterprise under the 2020 Act. The Board resolved as follows:

"That the Eastern Regional Libraries (ERL) Board, having considered this report:

1. Authorises the Chief Executive to write to our Member Councils:

(a) Recommending:

(i) Eastern Regional Libraries Corporation be wound up in accordance with section 330(4) of the Local Government Act 2020,

(ii) A beneficial enterprise is established in accordance with section 110, Local Government Act 2020.

(iii) The Member's current equity based on their initial contributions be transferred to the new entity:

- Knox 36.39%
- Maroondah 24.89%
- Yarra Ranges 38.72%

(b) Requesting that each of our Member Councils write to the CEO Eastern Regional Libraries by 30th July 2021 confirming that it is prepared to proceed on the basis of the recommendations at 1. a), subject to each of the Member Councils signing off on the constitution of the new entity in due course.”

At Council Forum 17 August 2021, the following recommendation was presented:

“Yarra Ranges Council Chief Executive Officer will exercise delegation to write to the Chief Executive Officer Eastern Regional Libraries agreeing to the proposal to wind up Eastern Regional Library Corporation and provide in principle support to progress to the establishment of a New Library Co (NLC) under section 110 of the 2020 Act.

Further, that:

- 1. Council engage appropriate legal services to undertake a review of the NLC and prepare a risk assessment in accordance with section 111 of the 2020 Act.*
- 2. Subject to the legal review, and officer’s consideration of proposed future arrangements, prepare a report for consideration of Council to endorse participation in the NLC in accordance with section 110 of the 2020 Act.”*

At its Board meeting on 9 March 2022, ERL presented the draft constitution and transition plan and proposed the following recommendation:

That the Board:

- a) Approves the Constitution for consideration by our Member Councils.*
- b) Requests our Member Councils to:*
 - i. consent to be Members of Your library; and*
 - ii. appoint their Board Members as the initial directors.*

Legal services were engaged by officers to undertake a review of the NLC, and officers have undertaken an assessment of the future arrangement, in particular Council’s financial contribution and the role of Directors under a beneficial enterprise arrangement.

At Council Forum 17 May 2022, the following recommendation was made:

1. Call for nominations for Council representatives on the Board of a new enterprise and to provide offline briefings on request; and
2. Prepare a report to a future Council meeting seeking endorsement to progress with the establishment of a Beneficial Enterprise Agreement

Key issues

1. LGA 2020 - beneficial enterprises

Following the introduction of the Local Government Act 2020 there is, a requirement for Regional Library Corporations (RLCs) to be wound up in accordance with section 330(4) and a beneficial enterprise established in accordance with section 110. Current service levels and organisational structure will be maintained in the new entity.

Council engaged legal services to undertake a review of the proposed NLC in accordance with section 111 of the 2020 Act.

Legal services reviewed the draft constitution (attachment one), ERLC risk assessment (attachment two) and draft transfer of business agreement (attachment three) for the new entity provided by ERLC.

Following in italics is an excerpt from the legal services response:

We have reviewed the documentation and are satisfied that the arrangement will accord with section 110 of the Local Government Act 2020. Council will of course need to comply with section 111 which we have considered by reference to the documentation. We are satisfied that what is proposed, will meet the requirements of section 111.

Additional advice

We also provide the following advice:

- The role and structure of Your Library Ltd will be very similar to the current structure under the Local Government Act 1989;*
- The timeframe for implementing the transition has been set out in the consultants' documentation in a user friendly manner.*

Further advice was sought on the following items with regards a company limited by guarantee.

A transfer of assets should Council exit the arrangement or should the NLC wind up is allowed under the following conditions. The transfer of assets back to Council is for the purpose of:

- another library corporation or beneficial enterprise established for the purposes of providing library services;*
- its own beneficial enterprise (either on its own or with another partner) established for the purposes of providing library services.*

Other payments, directly or indirectly, made by the NLC to Council in good faith is permissible in line with the constitution if the funds are:

- a contribution towards a grant or project in furtherance of the Objects and Purposes of the Company;*

- *in furtherance of the Objects and Purposes of the Company.*

2. Directors of a beneficial enterprise:

In line with the draft constitution section 18.1, each member council is required to appoint two Board members (Directors) to the Your Library Ltd Board. In keeping with Council's past practice, appointed Board representatives will be Councillors. Two councillor representatives have subsequently been appointed.

Legal Services have provided the following advice and recommendation regarding the role and obligations of Directors within a beneficial enterprise model:

“The most significant difference between ERLC and Your Library Ltd is the obligations that the Councillors will have as directors under the Commonwealth Corporations Act 2001. A director and any Council officer of the corporation will commit an offence if they are reckless or dishonest and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation, or for a proper purpose.

A director also commits an offence if they use their position dishonestly with the intention of directly or indirectly gaining an advantage for themselves, or someone else or causing detriment to the corporation, or recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage or in causing detriment to the corporation.

Unlike the Local Government Act 2020 which provides a maximum jail penalty of 5 years for misuse of position, the Commonwealth Corporations Act 2001 provides a maximum jail level offence of 15 years.

A director must disclose a material personal interest to the other directors and not participate in any discussion or voting about the subject matter of the personal interest. Councillors and officers must therefore understand the difference between the conflict-of-interest provisions under the Local Government Act 2020 and the Commonwealth Corporations Act 2001. Unfortunately, the Commonwealth Corporations Act 2001 does not define a material conflict-of-interest or a personal interest.

It is recommended that subsequently appointed Councillors and Council staff receive a one hour training session on their obligations immediately prior to commencement.”

3. Review of financial contribution

ERLC provided budget reports for 2021-22 and 2022-23, details of Council's annual contributions since 2016-17 following introduction of annual increases in line with rate capping, the list of services, locations and operational items that the funds contribute to and financial implications and risks.

Council's officers conducted a high-level review of this information and found that projections and assumptions appear financially sound.

Reporting requirements will be strengthened in a beneficial enterprise arrangement with a requirement, as set out in the Constitution and Transfer of Business Agreement, to ensure the member councils can achieve their reporting requirements and timelines in accordance with the LGA 2020.

Options considered

Additional options that were considered and rejected included:

- Ceasing library services at Council. Library services are a critical service for community and have clear outcomes which contribute to the strategic objectives of the Council Plan; and
- Operating library services directly through Council. A 2019 Victorian Auditor General (VAGO) Council Libraries report found sharing services makes libraries more efficient, enabling them to deliver more services to the community with fewer resources. VAGO data analysis shows that, overall, regional library corporations and co-operative models deliver core library services more efficiently than most standalone libraries. Taking responsibility for operating libraries directly would likely result in additional costs to Council.

Recommended option and justification

- Participate in a co-operative model by transitioning to a new arrangement with Your Library Ltd as a company limited by guarantee. This results in cost and service efficiencies with the likelihood of growing and continually improving library services for the local community.

FINANCIAL ANALYSIS

Council contributes funds to ERLC to deliver its library service. Since 2016-17, member councils agreed to an annual increase in line with the rate cap. In 2021-2022 Council's contribution is \$3,842,305 increasing to \$3,909,546 in 2022-23 in line with the 1.75% rate cap. Rate cap increases have been provided for in the Long-Term Financial Plan.

The transition to a beneficial enterprise under the 2020 Act will be funded by ERLC and does not carry additional financial implications for Council.

ERLC accumulated a surplus over 26 years of operation and a distribution of funds was made to each member council in 2021. This is evidence of the healthy financial position of the corporation. Whilst the matter of the distribution of surplus funds is independent of any winding up of ERLC and transition to the new entity, it is noted that following the distribution, Council's equity percentage increases under the new arrangement from 38.72% to 42.79%. Whilst Council's equity share increases, annual contributions will remain in line with rate cap increases.

Council received a further distribution of \$100,000 in respect of the upgrade of the Belgrave Library.

See table below:

			\$,000	%
Member Councils' initial contributions to ERLC				
Knox			\$1,342	36.39%
Maroondah			\$918	24.89%
Yarra Ranges			\$1,429	38.72%
Total Member Councils' initial contributions to ERL			\$3,689	100.00%

Accumulated surpluses to 30 June 2021 \$10,257

Total Equity as at 30 June 2021 \$13,946

Member Councils' share of Total Equity @ 30 June 2021		Less Distribution	Adj Total Equity	Revised % Equity*
Knox	\$5,075	\$2,000	\$3,075	38.70%
Maroondah	\$3,471	\$2,000	\$1,471	18.51%
Yarra Ranges	\$5,400	\$2,000	\$3,400	42.79%
Revised Equity as at 30 June 2021	\$13,946	\$6,000	\$7,946	100.00%

*The revised percentage equity will be the % distribution of assets available to the Member Councils on withdrawal or dissolution.

APPLICABLE PLANS AND POLICIES

This report contributes to the following strategic objective(s) in the Council Plan:

Library services support Council's strategic objectives:

- Connected and Healthy Communities;
- Quality Infrastructure and Liveable Places;
- Protected and Enhanced Natural Environment; and
- Vibrant Economy, Agriculture and Tourism.

RELEVANT LAW

The *Local Government Act 2020* requires Regional Library Corporations to be wound up in accordance with section 330(4) and a beneficial enterprise established in accordance with section 110 and Council to comply with section 111.

SUSTAINABILITY IMPLICATIONS

1. Economic - There are no known economic impacts arising from the recommendation in this report.
2. Social - There are no known social impacts arising from the recommendation in this report.
3. Environmental - There are no known environmental impacts arising from the recommendation in this report

COMMUNITY ENGAGEMENT

Not applicable

COLLABORATION, INNOVATION AND CONTINUOUS IMPROVEMENT

The information within this report is based on discussions with:

- ERLC management;
- Other areas across Council including Financial Services, Risk and Governance;
- Other proposed member councils Knox City Council and Maroondah City Council; and
- External legal consultants.

RISK ASSESSMENT

A risk assessment (attachment two) has been completed which identifies strategic risks associated with the change in company structure to comply with the Act.

Legal Services reviewed the risk assessment and provided the following advice:

The risk assessment was conducted both from the perspective of Eastern Regional Libraries Corporation, and Council's obligations under the Act.

Risk	Likelihood	Mitigation
Risk to financial viability of new NLC	Very low	<ul style="list-style-type: none">• Risk assessment completed by ERLC• External legal services review of new entity documentation and associated risks

		<ul style="list-style-type: none"> • Strong history of ERLC financial performance and healthy financial position • Councillor representation on new NLC Board
Underperforming operation	Very low	<ul style="list-style-type: none"> • Risk assessment completed by ERLC • External legal services review of new entity documentation and associated risks • History of ERLC operating success • Councillor representation on new NLC Board
Reputational damage to Council	Very low	<ul style="list-style-type: none"> • Risk assessment completed ERLC • External legal services review of new entity documentation and associated risks • Strong historical performance of ERLC • Councillor representation on new NLC Board

Further, a 2019 Victorian Auditor General (VAGO) Council Libraries report found sharing services makes libraries more efficient, enabling them to deliver more services to the community with fewer resources. VAGO data analysis shows that, overall, regional library corporations and co-operative models deliver core library services more efficiently than most standalone libraries.

CONFLICTS OF INTEREST

No officers and/or delegates acting on behalf of the Council through the Instrument of Delegation and involved in the preparation and/or authorisation of this report have any general or material conflict of interest as defined within the *Local Government Act 2020*.

ATTACHMENTS TO THE REPORT

1. Your Library Ltd – DRAFT Constitution – 17 March 2022
2. Risk Assessment – Transitioning to a Beneficial Enterprises
3. Your Library Agreement – Your Library Ltd