



Appendix 11 – NSW Crown Solicitor's advice



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Audit of council entities

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Prepared for: AUD018 Auditor-General of NSW
Date: 31 August 2017
Client ref: Steven Martin
CSO ref: 201702268 T08 Sally Johnston/Lea Armstrong

1. Summary of advice

- 1.1 You seek my advice as to the Auditor-General's obligations with regard to auditing of "council entities" pursuant to the *Local Government Act 1993* ("the Act"). Pursuant to s. 415(4), a council's auditor (who is the Auditor-General: s 422) must, in auditing the financial reports of a council, audit the financial reports of any council entity and report on same as part of the report on the council. You have proposed an interpretation of this provision for my comment.
- 1.2 In my view, it is clear that the obligation to audit a council entity in s. 415(4) forms a part of the audit of the council. As to what such "audit" involves, the preferable interpretation must take account of both the lack of any obligation in the Act for council entities to prepare financial reports, and the functions and powers of the Auditor-General in relation to the audit of such entities in the Act. Whilst the Auditor-General's audit functions in relation to councils in Div. 3 of Pt. 3 of Ch. 13 are extended to council entities, the accounting and financial reporting obligations of councils generally in Divs. 1 and 2 of that Part are not so extended. Given the diverse range of bodies which may constitute a "council entity", whether or not such an entity has prepared a financial report will depend on statutory obligations elsewhere arising and, in my view, where no financial report of a council entity exists, the obligation to audit that entity in s. 415(4) does not arise. Where the obligation does arise, it may necessarily be limited by the nature of the council entity in question and the financial reports which it does prepare.
- 1.3 For those reasons, to the extent that your proposed construction of the duty in s. 415(4) is that the Auditor-General (as the council auditor) is required to perform "those audit procedures on a council entity considered necessary to form an opinion on the council's consolidated general purpose financial report", I think that is a reasonable and open interpretation of the duty, where it arises.
- 1.4 Insofar as your proposed construction of the duty in s. 415(4) also suggests that "any matters as appropriate in respect of a council entity are included in the report on the conduct of the audit of the council's financial report required pursuant to s. 417(1) of the Act", I agree to the extent that the duty in s. 415(4) is discharged by the auditor reporting on the council entity audit in the auditor's report on the council, which is a reference to the two reports to be issued under s. 417(1).
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

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2. Background

- 2.1 By operation of the *Local Government Amendment (Governance and Planning) Bill 2016*, the Act was amended and ss. 415(4) and (5) were inserted. Section 415(4) relates to auditing of a "council entity" and s. 415(5) defines such entities. Your request for advice arises in the context where this provision has come into effect but no audits have yet been completed pursuant to it.
- 2.2 I note that conferences to discuss the background, issues and question for advice have been conducted between your officers and my officers on 21 July 2017 and 11 August 2017.

3. Advice sought

- 3.1 By letter dated 26 July 2017, you seek my advice as to whether:

"In acquitting my responsibility under the Act, is it reasonable to interpret that I will satisfy my obligations under the Act if, when auditing the financial report of a council, I perform those audit procedures on any Council Entity considered necessary to form an opinion on the council's consolidated general purpose financial report and include any matters I consider appropriate in respect of Council Entities in my report on the conduct of the audit of the council's financial report required under s. 417(1) of the Act?"

4. Advice

- 4.1 Chapter 13 of the Act is entitled "How are councils made accountable for their actions?", with Pt. 3 addressing "Financial management" and Div. 2 of that Part "Accounting records, financial reports and auditing". Section 415 provides:

"415 Auditing of financial reports

- (1) A council's auditor must audit the council's financial reports as soon as practicable (having regard to the requirements of section 416 (1)) after they are referred for audit.
- (2) A council's financial reports must be audited in accordance with the requirements of:
 - (a) the publications issued by the Australian Accounting Research Foundation, on behalf of the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants in Australia, under the titles *Statements of Auditing Standards* and *Statements of Auditing Practice*, as in force for the time being, subject to the regulations, and
 - (b) such other standards as may be prescribed by the regulations.

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- (3) The regulations may prescribe matters that an auditor must consider and provide comment on in auditing a council's financial reports.
- (4) In auditing the financial reports of the council, a council's auditor must also audit the financial reports of any council entity and report on that audit as part of the report on the council by the auditor.
- (5) In this Part:
council entity means:
 - (a) a partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated) that a council has formed or participated in forming or has acquired a controlling interest in, other than an entity of a class prescribed by the regulations, or
 - (b) any other entity of a class prescribed by the regulations."

"Council entity"

- 4.2 In considering the scope of the duty in s. 415(4), it is first necessary to understand the nature of a "council entity", to which that duty relates. A "council entity" is defined for purposes of Pt. 3 of Ch. 13 of the Act in s. 415(5), as extracted above. There are currently no regulations made pursuant to s. 415(5)(a) or (b). In my view, the ordinary meaning and effect of the definition in s. 415(5)(a) is that a wide and diverse range of bodies may constitute a "council entity".
- 4.3 The definition operates by reference to factual matters. First, whether the entity in question is a "partnership, trust, corporation, joint venture, syndicate" or other type of body, and second, whether the council has "formed or participated in forming" or acquired a "controlling interest" in that body, both of which are questions of fact. To that end, I note that the phrase "controlling interest" is used in other relevant statutory regimes, particularly taxation contexts¹. Whether a council has a "controlling interest" in relation to some other entity will usually be a factual test adapted to the particular type and nature of the entity in question. In the context of audit of financial statements, the Auditor-General would typically refer to Australian Accounting Standards AASB 10 'Consolidated Financial Statements' for guidance on what constitutes a "control".
- 4.4 It is clear that a "council entity" is potentially a very broad concept. There are a diverse range of entities which may constitute council entities, from unincorporated bodies or associations to large corporations. In turn, these bodies may be subject to different legislative regimes which impact upon their financial management, record keeping and

¹ See, for example, the *Payroll Tax Act 2007*. In the companies context, the phrase has a generally settled meaning of control of a majority of voting power at meetings of the board of management/meeting of directors, power to appoint more than 50% of the members of a board of management/directors, or direct or indirect exercise of control of more than 50% of the voting power attached to voting shares or a class of voting shares issued by a company (as applicable).

auditing. For example, no relevant statutory provisions may exist in relation to a small unincorporated body and such a body may not keep or generate financial statements etc. By contrast, a corporation may be subject to the provisions in the *Corporations Act 2001 (Cth)* which include record keeping and accounting obligations consistent with the standards made by the Australian Accounting Standards Board. This diversity in the potential range of bodies constituting "council entities" has implications for the practical operation of s. 415(4), as discussed below.

- 4.5 I also note that a comparable concept, although not expressly defined as a "council entity", is referred to in s. 358 of the Act. That section provides:

"358 Restrictions on formation of corporations and other entities

- (1) A council must not form or participate in the formation of a corporation or other entity, or acquire a controlling interest in a corporation or other entity, except:
- (a) with the consent of the Minister and subject to such conditions, if any, as the Minister may specify, or
 - (b) as provided by this Act.
- ...
- (4) In this section, *entity* means any partnership, trust, joint venture, syndicate or other body (whether or not incorporated), but does not include any such entity that is of a class prescribed by the regulations as not being within this definition."

- 4.6 In my view, s. 358 (particularly s. 358(1) and (4)), adopt the same concepts as those in s. 415(5), namely "formation or participation in formation" and acquiring a "controlling interest" in relation to a corporation or "entity". In that way, the sections are equivalent in material elements and should be understood as encompassing the same entities. Indeed, in my view, one practical way of identifying which entities constitute "council entities" for purposes of s. 415(5) would be to consider those entities which have been subject to Ministerial review pursuant to s. 358. Having said that, it is not my view that an entity does not constitute a "council entity" for purposes of s. 415 merely because it has not been subject to review pursuant to s. 358 (for example, in the situation where there has been non-compliance with the requirement for Ministerial approval in s. 358).

Nature of obligation in s. 415(4)

- 4.7 I note that the Auditor-General is the auditor for a council: s. 422(1). In that capacity, the duty imposed on the Auditor-General pursuant to s. 415(4) is that:

"In auditing the financial reports of the council, a council's auditor must also audit the financial reports of any council entity and report on that audit as part of the report on the council by the auditor."

- 4.8 The duty in s. 415(4) arises and falls upon the Auditor-General in her capacity as the council's auditor. The Act does not appoint the Auditor-General (or any other person) as the independent statutory auditor of a council entity. Indeed, a council entity may have its own auditor. Rather, a duty to "audit the financial reports" of the council entity arises in the Auditor-General in her capacity as the *council's* auditor.
- 4.9 That being said, a duty to "audit the financial reports" of a body, in this case a council entity, is ordinarily the duty of that body's auditor. So too I understand that an "audit of a financial report" usually entails an auditor issuing an opinion on that financial report, *qua* auditor of the body. There is a clear tension in s. 415(4) between the fact that the Auditor-General is not the auditor of the council entity and yet is required to "audit" its financial report.
- 4.10 As a result, the scope and nature of the duty to "audit" the financial reports of a council entity pursuant to s. 415(4) is open to doubt. Nonetheless, I think the following points can be made about the preferable interpretation of that duty.
- 4.11 I note that "audit" is not a defined term in the Act (although pursuant to s. 421A it "includes examination and inspection"), nor does it have a clearly settled meaning in law generally. Rather, legislation typically sets the framework for auditing in relation to particular bodies. For example, the Auditor-General's role in auditing councils is detailed in s. 417, which provides for matters such as inclusions in the auditor's financial report and matters on which the opinion or statement of the Auditor-General is required.
- 4.12 It is clear, from the introductory words of s. 415(4) "*in auditing* the financial reports of the *council...*" (emphasis added), that the "audit" of the financial reports of a council entity forms part of the process of, or is a corollary to, the audit of the council. However, it is presumably not equivalent to the audit of the council, which is addressed in ss. 415(1)-(3), or the terms of s. 415(4) would be rendered otiose. For example, it must presumably go beyond the audit of financial transactions between the council and council entity which would already be encompassed by the terms of the audit of the council pursuant to ss. 415(1)-(3).
- 4.13 The apparent purpose of s. 415(4) is to provide that council entities must be considered or examined in conducting the audit of a council. As noted in the second reading speech for the amending bill² which introduced the now s. 415(4) and (5):

"The bill... support(s) the financial transparency of councils... under the amendments introduced by the bill, councils will become subject to oversight by the Auditor-General for their general audits and those of their subsidiary entities..."³

² *Local Government Amendment (Governance and Planning) Bill 2016*.

³ NSW Legislative Assembly, *Hansard*, 22 June 2016, Second Reading speech, Mr Paul Toole (Minister for Local Government).

("Subsidiary entities" apparently being used to refer to "council entities".)

- 4.14 In that way, the provision mirrors the requirement in s. 358 for Ministerial approval for council establishment of, or involvement in, such entities, by providing for ongoing oversight of the relationship between the council and the council entity, at least in a financial sense. However, as noted above, exactly what the additional obligation introduced by s. 415(4) is, and how it is to be fulfilled, is unclear and beset with practical difficulties.
- 4.15 Significantly, ss. 423 and 424 support the audit obligation in s. 415(4) by extending to "council entities" as well as councils: see s. 423(6) and 424(3). Pursuant to s. 423, the Auditor-General (or a person authorised by the Auditor-General) is entitled at all reasonable times to full and free access to a council's (or council entity's) accounting records and other records necessary in order to carry out her functions. She may direct persons to produce books, record or other documents in their custody or control, to appear personally and produce such documents, to answer any relevant question, to provide any necessary authorities to gain access to such documents, and to make copies or take extracts from such documents for the purposes of an audit or inspection carried out under the Act.
- 4.16 Pursuant to s. 424, the Auditor-General (or a person authorised by the Auditor-General) may direct an authorised deposit-taking institution or the person in charge of a council (or council entity) account in such an institution to give her a statement of the account or certificate as to the balance of the account and produce to her any relevant book, record or other document in its custody or control. The effect of these provisions is that the Auditor-General's functions and powers under Div. 3 ("Auditors") of Pt. 3 of Ch. 13 of the Act are extended to apply to council entities in the same way they apply to councils. This may suggest an equivalent "audit" function is intended in relation to council entities, as applies to councils.
- 4.17 However, the provisions of Div. 1 ("Funds") and Div. 2 ("Accounting records, financial reports and auditing") of Pt. 3 of Ch. 13 of the Act are not uniformly extended to encompass council entities in the same way as they apply to councils. Of particular significance, ss. 412 and 413, which provide that a council must keep accounting records and prepare financial reports respectively, do not extend to council entities.
- 4.18 For this reason, there is no obligation pursuant to the Act for council entities to prepare financial reports, equivalent to that which applies to councils. To some extent, financial information about council entities may be included in the council's financial reports, which must be prepared in accordance with s. 413. That includes a requirement in s. 413(3)(a) that the financial statement be prepared in accordance with the publications in force issued by the Australian Accounting Standards Board, and would pick up controlled entities pursuant to those standards. Such controlled entities would

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presumably also be "council entities" for purposes of s. 415(5) (although only a subset of the range of entities which may be council entities). However, it is for the council to determine appropriate compliance with s. 413 (although the Auditor-General may review this as part of her audit and report under s. 417). Even if, by that means, financial information about council entities is captured in the council's financial report, in my view, this has little application in terms of the s. 415(4) obligation. That is because the s. 415(4) "audit" obligation applies to "financial reports *of the council entity*" (emphasis added) and not the council's financial reports *per se*.

- 4.19 As noted in my discussion above about the diverse range of bodies potentially encompassed by the definition of "council entity", whether or not a council entity has prepared such a financial report will depend upon the nature of the entity and whether it is required to do so pursuant to other statutory regimes. In my view, that necessarily limits the operation of s. 415(4) to only those council entities which have such obligations elsewhere arising or which voluntarily prepare such reports, given the plain words of s. 415(4), that the audit is of "...the *financial reports* of any council entity..." (emphasis added).
- 4.20 In addition, it may limit the Auditor-General's ability to perform audit functions in relation to those financial reports, even where they do exist, depending upon the framework in which they have been prepared. As there is no means to compel a council entity to prepare a financial report in a particular manner pursuant to the Act, in my view the obligation in s. 415(4) upon the Auditor-General to audit the financial reports of a council entity can only extend to that which is reasonably possible having regard to the particular entity. It may be that, in practice, the Auditor-General can only comment on the limitations which apply to her audit.
- 4.21 In summary, it is clear that, whilst there is a diverse range of bodies which may constitute a "council entity", the obligation in s. 415(4) only arises in relation to "financial reports" and so only applies in relation to council entities which do prepare such financial reports. As to the nature of the duty to audit those financial reports, there are indications that s. 415(4) was intended to impose a duty of auditing of council entities which goes beyond that which would flow from proper auditing of the council in accordance with s. 415(2), and yet the scope of that duty is necessarily limited by the statutory context, functions and powers which are available to support it. The statutory language of s. 415(4) in my view reveals an intention to impose a duty on the council auditor in his or her capacity as council auditor (not as auditor of the council entity), and in the context of performing his or her audit of the council. That is, it is not an equivalent duty to that imposed in relation to the council, for which the Auditor-General is the auditor. Rather, the audit of the financial reports of the council entity must form, in some way, a component or part of the audit of the council.

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- 4.22 It is, in a practical sense, difficult to articulate precisely what that "audit" duty involves in the context of s. 415(4), beyond noting these features which point to it being less than equivalent to the role of an external auditor of the council entity (or equivalent to the audit of the council itself) and yet more than what would already be encompassed by the audit of the council pursuant to s. 415(1)-(3). What can be said is that the audit of the financial reports of a council entity should be conducted to the fullest extent necessary and possible to provide a report on that audit in the council report, in light of the audit functions and powers which the Auditor-General acquires in relation to both councils and council entities pursuant to Div. 3 of Pt. 3 of Ch. 13, especially ss. 423 and 424, as outlined above.

Conclusion re: proposed interpretation

- 4.23 Given the uncertainties about the scope of the duty in s. 415(4), outlined above, in my view your proposed construction of the duty is both reasonable and open. That is, your suggestion that the duty in s. 415(4) is that the Auditor-General (as the council auditor) is required to perform "those audit procedures on a council entity considered necessary to form an opinion on the council's consolidated general purpose financial report", is a clearly arguable interpretation of the duty, where it arises. I note that, strictly, I would prefer to phrase it as "those audit procedures necessary to form an opinion on the council's financial reports", but given that the report required pursuant to s. 417(1) of the Act is a report as to the council's general purpose financial report, I do not disagree with your phrasing. I also observe that, whilst an "audit of the financial reports" of a body may in other contexts generally be understood to require the issuing of an opinion by the auditor, in my view, the statutory context and fact that the Auditor-General performs the function in s. 415(4) in her capacity as auditor of the council, make it arguable that the duty can be discharged through performing "audit procedures" rather than necessarily requiring the issuance of an opinion by the auditor.
- 4.24 To the extent that your proposed construction of the duty in s. 415(4) also suggests that "any matters as appropriate in respect of a council entity are included in the report on the conduct of the audit of the council's financial report required pursuant to s. 417(1) of the Act", I agree that the duty in s. 415(4) is discharged by the auditor reporting on the council entity audit in the report on the council. The reference in section s. 415(4) to "the report on the council by the auditor" is, in my view, a reference to either of the two reports made under s. 417(1).

Comment: possible means to resolve uncertainty

- 4.25 The relevant provisions of the Act contain several powers for matters to be prescribed by regulation, which could assist to resolve the uncertainty and practical difficulties surrounding the operation of s. 415(4). The preparation and promulgation of regulations is a matter on which Parliamentary Counsel's advice should be sought, but I note the powers of regulation contained in s. 415(5)(a) and (b) as a potential means to clarify or limit the scope of the definition of "council entity", and the power in s. 415(3)

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to regulate what matters an auditor must consider and provide comment on in auditing a council's financial reports, which could in turn assist to clarify the scope of the audit required pursuant to s. 415(4), given that such audit is performed as part of the audit of the council financial reports.

Signed:



Lea Armstrong
Crown Solicitor

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