# Appendix two – NSW Crown Solicitor's advice

**Sensitive: Legal**

Crown Solicitor's Office

NSW GOVERNMENT

## ADVICE

### USE OF RESTRICTED FUNDS COLLECTED BY A COUNCIL

#### Executive summary

1. You seek my advice concerning the application of certain monies paid to local councils under the *Environmental Planning and Assessment Act 1979* ("the *EPA Act*") and the *Local Government Act 1993* ("the *LG Act*").

***Question 1: Application of development contributions where DCP repealed***

2. I have addressed the three scenarios set out in your instructions at [29]-[31] (Scenario 1), [32]-[36] (Scenario 2), and [37]-[39] (Scenario 3).

3. In each case, my answer in respect of the scenario in question is governed by my view (attended by not insubstantial doubt) that:

   (a) contributions under a repealed Development Contributions Plan ("DCP") may ordinarily be expended under a subsequent DCP by which it is repealed; and

   (b) absent any clear indication to the contrary in the DCP itself, the subsequent DCP should be construed as permitting this outcome.

***Question 2: Transition of funds between development plans***

4. I do not think that a practice involving transfer of funds collected under s. 7.3 of the *EPA Act* to a council's internal reserves would give rise to non-compliance with the *EPA Act*, if the funds concerned are not in fact expended.

***Question 3: Expenditure of money charged for domestic waste management services***

5. Funds collected for domestic waste management services by a council may, in principle, be spent on advertising concerning, and information related to, domestic waste management. However, whether such expenditure is permissible will ultimately depend on an assessment of the particular advertising or information.

6. On the other hand, there is no ready basis for characterising expenditure for non-domestic waste management rebates as being within the purposive limitation identified by s. 409(2) of the *LG Act*. There are nonetheless two scenarios where the application of funds collected for domestic waste management services might be applied for that purpose:

   (a) where it is expended on the basis of an internal loan within the council pending its expenditure on domestic waste management services, and the loan is approved by the Minister; or

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(b) where the charge for domestic waste management services under which the money was obtained has been discontinued, the purpose of that charge has been achieved or is no longer required to be achieved, *and* the procedural requirements of s. 410(2) have been satisfied.

## Analysis

### Question 1: Application of development contributions where DCP repealed

7. You ask me to advise on the ability of a local council to apply funds collected under the *EPA Act* in accordance with a DCP in several scenarios involving the repeal of that DCP.

8. It is convenient to consider the overall operation of the DCP regime in relevant respects, before addressing the individual scenarios. In considering those scenarios, I have assumed, in each case, that the council has repealed an existing DCP by making a subsequent DCP in accordance with either cl. 215 of the *Environmental Planning and Assessment Regulation 2021* ("the *EPA Regulation*") or its immediate predecessor.[1]

#### *Development contributions under the EPA Act*

9. Division 7.1 of the *EPA Act* provides for the imposition of development contributions in connection with development consents. A consent authority, including a local council,[2] may impose a condition on a development consent requiring, relevantly:

   (a) under s. 7.11(1)(b) – the payment of a monetary contribution, where the consent authority is satisfied that development for which consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area. That contribution may be imposed to require "a reasonable… contribution for the provision, extension or augmentation of the public amenities and public services concerned" (per s. 7.11(2));

   (b) under s. 7.11(3) – the payment of a monetary contribution towards recoupment of the cost of providing public amenities or public services, where the development will benefit from the provision of those amenities and services, and they were provided by the consent authority within the area in preparation for, or to facilitate the carrying out of development in the area; or

   (c) under s. 7.12(1) – a levy of the percentage (authorised by a contributions plan) of the proposed cost of carrying out the development. Money paid under s. 7.12(1) is, subject to any relevant provisions of the applicable contributions plan, "to be applied towards the provision, extension or augmentation of public amenities or public services (or towards recouping the cost of their provision, extension or augmentation)" (per s. 7.12(3)).

[1] Clause 32 of the *Environmental Planning and Assessment Regulation 2000*

[2] See generally, s. 4.5 of the *EPA Act*

10. A consent authority that is a council may impose conditions requiring payments and levies as set out above *only* if it is a condition of a kind allowed by, and is determined in accordance with, a contributions plan, subject to any applicable Ministerial direction (s. 7.13(1)). Sections 7.18 and 7.19 provide for the making of contributions plans.

11. Section 7.3 addresses the manner in which a consent authority, including a council, is to hold and apply certain monies collected under Div. 7.1:

> "**7.3 Provisions relating to money etc contributed under this Division (other than Subdivision 4)** (cf previous s 93E)
>
> (1) A consent authority or planning authority is to hold any monetary contribution or levy that is paid under this Division (other than Subdivision 4) in accordance with the conditions of a development consent or with a planning agreement **for the purpose for which the payment was required, and apply the money towards that purpose within a reasonable time.**
>
> (2) However, money paid under this Division (other than Subdivision 4) for different purposes in accordance with the conditions of development consents may be pooled and applied progressively for those purposes, subject to the requirements of any relevant contributions plan or ministerial direction under this Division (other than Subdivision 4)
>
> …
>
> (4) A reference in this section to a monetary contribution or levy includes a reference to any additional amount earned from its investment."
>
> (my emphasis)

12. The effect of s. 7.3 is that monetary contributions and levies collected under ss 7.11 and 7.12 must be held and applied by a council for a public purpose, being the purpose for which their payment was required.[3] The extent of that purposive limitation and, more particularly, the manner in which it is conditioned by the terms of the DCP under which the contribution or levy was collected, are central to addressing the questions you have raised.

13. The current *EPA Act* arrangements whereby imposition of a condition requiring the payment of a contribution or levy itself requires authorisation under a DCP commenced on 1 July 1993,[4] and were considered in some detail in *Frevcourt v Wingecarribee Shire Council* (2005) 139 LGERA 140. I note at the outset that the scheme of the *EPA Act* and sundry regulations considered in *Frevcourt* was identical in material respects to the present scheme, notwithstanding some subsequent amendments and the renumbering of the constituent provisions of the *EPA Act*.

14. The appellants in *Frevcourt* relevantly contended that the respondent council was obliged to repay contributions made under a DCP on the basis that the council had

[3] *Frevcourt v Wingecarribee Shore Council* (2005) 139 LGERA 140 at 150 per Beazley JA, Ipp and McColl JJA agreeing, considering s. 93E (now s. 7.3)

[4] Following the commencement of the *Environmental Planning and Assessment (Contributions Plan) Amendment Act 1991*; discussed in *Frevcourt* at 155.

abandoned the works for which the contributions were first required.[5] In support of this position, they advanced a restrictive construction of ss 93E and 94 (predecessors of ss 7.3 and 7.11). On the appellants' argument, a council was unable to abandon works specified in a DCP;[6] was limited to varying those works by making a new DCP, and only if the new works related to works specified in the plan under which the initial contributions were collected;[7] and was unable to "carry across" contributions made under a DCP into an amended or substituted plan.[8]

15. The lead judgement in *Frevcourt* was delivered by Beazley JA (Ipp and McColl JJA agreeing).[9] In rejecting the appellants' contentions, her Honour described the "overall thrust" of the DCP scheme as being that: [10]

> "[A] council must expend s. 94 contributions on the amenities for which the contributions were required. This is subject to any amendment of the Contributions Plan".

16. Her Honour continued:[11]

> "Given the absence of any restriction in the type or extent of amendments that may be made, **I am of the opinion that a council can amend a plan so as to alter both the extent and type of public amenity or service that is reasonably required by the development and apply existing s 94 funds to those amenities or services**.
>
> In my opinion, and it follows from what I have said, a council's entitlement to amend a Contributions Plan encompasses a right to reduce the scope of works specified in a Contributions Plan, even if this means that some works stipulated in the original Contributions Plan are no longer to be carried out. **I should add that as this case is concerned with a reduction in the scope of roadworks, and not with the substitution of different works, it is not necessary to reach a final conclusion on whether a Council can amend the type of amenity or service so as to substitute different work and use existing s 94 contributions for that different purpose**. I would further add that if the right to amend did not encompass the ability to eliminate or abandon (or indeed to substitute different amenities), a Council arguably would be limited to being able to make minimal changes of the detail of the work originally proposed. Amendments of that type would, in my view, be variations of a type in respect of which a council has a continuing discretion in any event. In this regard, I agree with the trial judge that a limited discretion remains after the 1 July 1993 amendments." (citations omitted)
>
> (my emphasis)

17. There is an apparent tension between the two highlighted passages in the foregoing quote, insofar as the first suggests her Honour formed a definitive conclusion that a council enjoys a broad latitude to apply existing contributions to amenities of a "different extent or type" through amendment of a DCP, while the second indicates that no

[5] At 158

[6] Ibid

[7] At 159

[8] Ibid

[9] At 166

[10] At 159

[11] Ibid

conclusion was intended on the question of substitution. However, her Honour subsequently characterised her conclusion as being that:[12]

> "[T]he power to amend a Contributions Plan involves the ability to use funds (initially required for a particular amenity or service) for the amenity or service substituted, changed or varied in the amended Plan".

Reading these statements together, the safer approach is to treat her Honour's statement that the right to amend a DCP extends to *reducing or altering* the scope of works as part of the judgement's *ratio*, while treating her comments concerning the ability to *substitute* works by way of amendment as *obiter*.

18. Beazley JA disposed of the appellants' contention on the basis that (inter alia) the council legitimately altered the scope of works for which contributions had been made pursuant to an amendment to the relevant DCP, such that no breach of the *EPA Act* giving rise to a putative right of recovery had arisen. Her Honour nonetheless proceeded to consider (in *obiter*) the appellants' argument that, in the event of a breach of the Act, they were entitled to a refund of the relevant contribution. In holding that no power arose under the *EPA Act* to repay contributions previously made,[13] several points of her Honour's reasoning are worth noting for present purposes:

    (a) Where a DCP is repealed without replacement after contributions have been made, there is no breach of the *EPA Act* involved in a council continuing to hold contributions previously made.[14] At the same time, while there is no longer a public purpose for which monies are held in event of the repeal of a DCP without replacement, a contributor has no right analogous to that of the beneficiary of a trust for recovery purposes, although the prospect of recovery based on a general law monies had and received claim cannot be excluded.[15]

    (b) As contributions are able to be combined as a part of a fund and expended progressively on different amenities provided for under a DCP,[16] significant difficulties would arise in separating and identifying individual contributors' rights to the corpus.[17]

    (c) In light of these difficulties, it may be that the only remedy available to a party in the event of a breach of the Act would be a right to compel the council to use funds for the purposes for which they had been paid, albeit that proposition would itself create difficulties in the event that a surplus of monies remained after all amenities covered by a DCP were paid for.[18]

[12] At 162

[13] While this conclusion is strictly obiter, it was subsequently endorsed by the Court of Appeal (again, in *obiter*) in *Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177.

[14] At 162

[15] Ibid

[16] A position now made explicit in s. 7.3(2).

[17] At 162

[18] Ibid

19. *Frevcourt* remains the leading authority to date with respect the latitude enjoyed by councils in applying monies collected under conditions authorised by DCPs. It stands clearly for the proposition that a consent authority may alter the scope of work for which a contribution was provided by amending a DCP. As appellate level *obiter*, the conclusion that existing contributions may be applied to new or substituted works following amendment of DCP should also be afforded considerable weight, and I do not discern any clear reason, as a matter of construction of the *EPA Act* and sundry regulations, to depart from that view.

20. That does not, however, answer the question of how monies collected under one plan are to be treated if a plan is repealed *in toto*, or repealed and replaced. That issue has not been addressed in any subsequent authority I have been able to identify.

21. It is not a matter that is addressed in any provision of Div. 7.1 of the *EPA Act*. Nor is it expressly addressed in Pt 9 of the *EPA Regulation 2021*, which deals with (amongst matters) the making of contributions plan, or (based on my review) under any predecessor regulation. Relevantly, with respect to the constituent provisions of Pt 9:

    (a) in setting out the content of a contributions plan, cl. 212 does not require a plan to explicitly address whether the plan extends to funds carried over from a prior plan;

    (b) in stipulating the records to be kept in relation to DCPs, Div. 4 makes reference to records relevant to expenditure of any "carry over" of funds from a previous plan;

22. Nor does Pt 9 make express provision for DCPs to include savings and transitional provisions addressed to the consequences of amendments or repeals. It is, however, of some significance for present purposes that cl. 215 of the *EPA Regulation* contemplates that (i) the amendment of plan will occur by way of the making of a subsequent plan, subject to limited exceptions,[19] and (ii) the repeal of a plan will occur by way of the making of a subsequent plan, or by notice.[20]

23. It follows that neither the *EPA Act* and the *EPA Regulation*, nor present authorities, provide explicit or substantial guidance as to the extent to which a DCP may enable the carrying-over and application of contributions previously collected under a repealed plan. Nor, by extension, do they provide significant assistance in determining whether a specific DCP is to be interpreted as permitting this practice.

24. However, on balance, and while it is attended by not insubstantial doubt, I prefer the view that, in principle:

    (a) contributions under a repealed DCP may be expended under a subsequent DCP by which it is repealed; and

    (b) absent any clear indication to the contrary in the DCP itself, the subsequent DCP should be construed as permitting this outcome.

[19] Clause 215(1) and (5)

[20] Clause 215(2)

25. I reach this view on the following bases:

*(a)* Consistent with the position adopted in *Frevcourt*, the better view is that a DCP may be amended so as to alter the works for which contributions collected under the plan may be expended.

*(b)* Insofar as both may be effected by the making of a subsequent plan, cl. 215 of the *EPA Regulation* does not draw a material distinction between the amendment of a plan, on the one hand, and the repeal of a plan, on the other.

*(c)* In these circumstances, there is some difficulty in drawing a distinction of substance between the two outcomes. In both cases, the *EPA Regulation* appears to proceed on the basis that the later plan will supersede the earlier one, with revisions to authorised works as a council may consider appropriate.

*(d)* To construe the Act and Regulation as precluding a "carry over" in the event of repeal and substitution would give rise to complexities of the kind discussed in *obiter* in *Frevcourt* with respect to consequential obligations with respect to monies collected to date. It is apparent from the terms of s. 7.3 of the *EPA Act* and the reasoning in *Frevcourt* that the expenditure of collected funds remains subject to the obligation to hold expend them for a limited purpose.[21] At the same time, however, no power to repay funds arises under the Act. To read the Act and Regulation as precluding this practice would effectively create a financial lacuna, leaving a body of funds "frozen" without clear legal direction as to their ultimate disposition.

*(e)* More broadly, authorities concerning the scope of a council's obligation to expend contributions for the purposes for which they are collected under different iterations of the contributions regime have acknowledged that councils must necessarily enjoy some latitude and discretion with respect to contributions expenditure to address changes in infrastructure priorities.[22] It appears to me to be consistent with that underlying premise to allow councils some discretion with respect to the allocation of existing contributions in the event of the repeal of a DCP, by permitting a carry over of funds and their application to revised programs of works, at the same time avoiding difficulties associated with the "freezing" of funds to the extent possible.

*(f)* In the absence of any requirement under the *EPA Regulation* for a subsequent DCP to address expenditure of funds under the DCP it is repealing, I do not think that there are compelling grounds for construing a subsequent DCP as precluding carry-over expenditure unless it provides for this explicitly. It would instead be consistent with the scope of the power under which the DCP is made to proceed on the basis that such a carry-over is impliedly permitted.

[21] The fundamental limitation on the expenditure of contributions imposed by s. 7.3 and its predecessors (that is, that the funds must be held and expended only for the purposes for which they were collected, whatever the precise ambit of that concept) has been consistently emphasised in authorities concerning the various iterations of the contributions scheme under the *EPA Act*: see, for example, *Levadetes v Hawkesbury Shire Council* (1988) 67 LRA 190 at 195; *Idameneo (No 9) Pty Ltd v Great Lakes Shire Council* (1990) 70 LGRA 26 at 30-31.

[22] *Denham Pty Ltd v Manly Council* (1995) 89 LGERA 108 at 114-115; *Frevcourt* at 160

26. That in-principle view is subject to the general caveat that it would still be necessary to demonstrate some connection between the development for which the contribution was made, on the one hand, and the requirement for the amenity or service on which it was expended, on the other. That flows from the bases on which contributions are levied under ss 7.11 and 7.12, and the framing of the scope of the amendment power in the passage from *Frevcourt* quoted at [16] above. This being said, I note that the statutory provision for pooling of funds under s. 7.3(2) creates considerable difficulty in identifying a direct connection between any given amount of levy and particular work it is ultimately expended upon. As a result, it seems to me that, as a matter of practice, not insubstantial weight needs to be accorded to a DCP as a measure of the connection between the body of contributions collected by a council and the matters on which they may ultimately be expended.[23]

27. In reaching this general position, I nonetheless note that the question would benefit greatly from clarification by way of amendment of the *EPA Act* and/or its sundry regulations.

28. I now turn to the three scenarios identified in your instructions.

### *Scenario 1*

29. You have identified a scenario where:

    (a) a council repeals a previous DCP, and adopts a new DCP; and

    (b) the new DCP is silent as to how funds collected under the repealed plan should be applied.

30. You ask whether, in this scenario:

    (a) the remaining funds collected under the repealed DCP can be used for any purpose determined by the council, or whether they remain restricted under s. 7.3; and

    (b) if they remain restricted under s. 7.3 – those funds can be applied towards any public purpose, a similar public purpose to that identified in the repealed plan, or in accordance with the new plan?

31. Consistent with my reasoning above, I prefer the view that the expenditure of the funds collected under the repealed DCP would remain restricted by s. 7.3, but those funds could be applied in accordance with the new DCP.

[23] In this context, I note that the imposition of a condition requiring a contribution is itself subject to a test of validity, and must meet criteria of (amongst matters) being reasonable for the provision, extension or augmentation of identified public services or amenities, and being fairly and reasonably related to the development concerned (*Lake Macquarie City Council v Hammersmith Management Pty Ltd* [2003] NSWCA 313 at [52]). There is a degree of tension between the relative stringency attending the purposes for which a contribution may be collected, on the one hand, and the conclusion that a DCP may nonetheless substantially alter the purpose of expenditure, on the other. However, for the reasons cited at [25], I lean towards the view that the *EPA Act* should be taken to allow some latitude in determining expenditure post-collection through the DCP-making process.

### *Scenario 2*

32. You have identified a scenario where:

    (a) a council repeals a previous DCP, and adopts a new DCP; and

    (b) the new DCP includes a clause that specifies that funds collected under the repealed plan will be applied towards a particular purpose, such as the council's delivery program. The programs in the delivery program may or may not be identified specifically in the new DCP.

33. You ask whether, in this scenario:

    (a) the remaining funds collected under the repealed DCP can be used towards the adopted delivery program, even where they are not programs included in the repealed or new contributions plan;

    (b) if so – whether they are still restricted by s. 7.3; or

    (c) if not – how those funds may be used.

34. Consistent with my reasoning above, I prefer the view that the expenditure of the funds collected under the repealed DCP would remain restricted by s. 7.3, but those funds could be applied in accordance with the new DCP.

35. It is not clear to me that a DCP which contemplates the application of contributions to works not specified in the DCP itself would be strictly consistent with the *EPA Regulation*. Clause 212(1) requires a DCP to include fairly specific identification of the public amenities and services to be provided by a council (para. (f)), a works schedule containing an estimate of the cost and staging of those amenities and services (para. (g)), and the priorities for expenditure of pooled funds, by reference to that works schedule (para. (h)). It is difficult to see how that level of specificity could appear when the DCP merely cross-refers to a program of works specified in another document, and those works may or may not themselves be identified in the DCP.

36. This notwithstanding, there appear to me to be grounds (based on the way in which the situation is described) for saying that the works not specified in the DCP itself are, at least, incorporated by reference as services and amenities it is contemplated will be funded under the plan. In these circumstances, and while it is subject to an appreciable level of doubt, I prefer the view that the carried-over funds could be applied to fund the works specified in the delivery program.

### *Scenario 3*

37. You have identified a scenario where:

    (a) a council repeals a previous DCP, and adopts a new DCP; and

    (b) the new DCP provides that funds collected under the previous DCP will be applied under the new DCP.

38. You ask whether, in this scenario:

    (a) the remaining funds collected under the repealed DCP can be used under the new DCP, even where expenditure is not for programs included in the repealed DCP; and

    (b) if not – how those funds may be used.

39. Consistent with my reasoning above, in this scenario, the funds collected under the repealed DCP may be applied under the new DCP. That position is made clearest, in this case, by the terms of the new DCP.

### Question 2: Transition of funds between development plans

40. You ask whether, if funds collected in the scenarios discussed in Question 1 remain restricted by s. 7.3 and are transferred to a council's internal reserves, but are not spent, non-compliance with the *EPA Act* would result if they were subsequently transferred back.

41. Consistent with the foregoing discussion, the obligations imposed by s. 7.3 are to "hold" and "apply" contributions for a specific statutory purpose. Where those funds continue to be held by the council as part of its general monetary reserves and are not expended for any purpose, I do not think they could be said to have been "applied" within the meaning of s. 7.3.

42. In terms of how such funds are to be held, cl. 218(1) of the *EPA Regulation* requires a council to keep accounting records that allow development contributions or development levies received in the form of money, and any addition amounts earned from the investment of that money, to be distinguished from all other money held by the council. In *Frevcourt*, Beazley JA observed (in respect of materially identical predecessor to cl. 218(1)) that the regulations did not require a council to hold contributions in a separate fund, but rather to ensure that they were distinguished as an accounting matter.[24]

43. That approach suggests that a council has some discretion as to how contributions are banked pending expenditure, provided that they continue to be accounted for as restricted funds and cannot be said to have been expended for an extraneous purpose.[25] Assuming that this is the case, there does not appear to me to be a basis for saying that a council would breach its obligation to "hold" funds under s. 7.3 in the event that it temporarily transferred funds to its internal reserves in the manner suggested.

[24] At 156

[25] I note, in this context, that monies held under s. 7.3 are not subject to a trust obligation at general law (*Frevcourt* at 150). They are not accordingly subject to obligations with respect to the segregation of trust monies that attach to a "true" trust.

## Question 3: Expenditure of money charged for domestic waste management services

44. You ask whether funds collected for domestic waste management services by a council may be spent on:

    (a) advertising and promotion of, and information concerning or related to, domestic waste management; or

    (b) providing ratepayers with COVID-19 hardship rebates for non-domestic waste rates.

45. Chapter 15 of the *LG Act* is entitled "How are councils financed?". The means by which a council may obtain income are broadly summarised in s. 491, and then prescribed with a greater degree of specificity in the body of the Chapter. Those sources of income include both "rates" and "charges" (as adverted to in s. 491). Relevantly, for present purposes:

    (a) A council must make and levy an "ordinary rate" for each year on all rateable land in its area (s. 494(1)), subject to other provisions of the Chapter.

    (b) A council must also make and levy an annual charge for the provision of "domestic waste management services" for each parcel of land for which the service is available (s. 496(1)).[26] "Domestic waste management services" are "services comprising the periodic collection of domestic waste for individual parcels of land rateable land and services that are associated with those services" (per the Dictionary to the Act").

46. Within Ch. 15, a council's ability to *raise* income for domestic waste management services is constrained by s. 504 (cited in my instructions), which provides:

> "**504 Domestic waste management services**
>
> (1) A council must not apply income from an ordinary rate towards the cost of providing domestic waste management services.
>
> (1A) Subsection (1) does not prevent income from an ordinary rate from being lent (by way of internal loan) for use by the council in meeting the cost of providing domestic waste management services.
>
> (2) Income to be applied by a council towards the cost of providing domestic waste management services must be obtained from the making and levying of annual charges or the imposition of charges for the actual use of the service, or both.
>
> (3) Income obtained from charges for domestic waste management must be calculated so as to not exceed the reasonable cost to the council of providing those services."

[26] A charge levied under s. 496 may be made according to the actual use of domestic waste management services (per s. 502), and/or may be made in addition to an ordinary rate, or in addition to or instead of a "special rate", subject to exceptions (s. 503). The calculation of annual charges for domestic waste management services (amongst other charges and rates) is constrained by Pt 2 ("Limit of annual income from rates and charges").

47. The constraints imposed by s. 504 are not directed, in their terms, to the purpose for which funds collected by way of a charge collected for domestic waste management may be applied. Instead, the section:

    (a) prescribes the manner in which income collected for that purpose is to be obtained and calculated (subs (2) and (3)), regulating the manner of exercise of the charging functions conferred by s. 496; and

    (b) limits the extent to which funds collected from an ordinary rate may be applied for the purpose of funding those services (subs. (1), subject to the qualification in subs. (1A)).

48. Funds collected by way of charges for domestic waste management are nonetheless subject to the general provisions of the Act concerning financial management and, in particular, those of Ch. 13 ("How are councils made accountable for their actions?"). Relevantly, under Pt 3 ("Financial management"):

    (a) A council must have both a consolidated fund and a trust fund (s. 408).

    (b) All money and property received by a council must be held in the council's consolidated fund, unless it is required to be held in the council's trust fund (s. 409(1)).

    (c) While money held in the consolidated fund may be applied towards any purpose allowed by legislation (s. 409(2)), that is subject to the specific limitation that money received as a result of the levying of (relevantly) a "charge" may not be used otherwise than for the purpose for which it was levied (s. 409(3)(a)).

    (d) Pending its expenditure for that purpose, such money may not be held otherwise than in an account with a bank, building society or credit union, or in an investment in which in which such money is authorised to be invested under an Act (s. 409(4)). It may also be lent, by way of "internal loan", for use by council for any other purpose if (and only if) its use for that other purpose is approved by the Minister.

    (e) Section 410(2) provides that:

> "(2) If the special rate or charge has been discontinued and the purpose for which the money was received has been achieved, or is no longer required to be achieved, any remaining money may be used by the council for any other purpose if, and only if—
>
> (a) a proposal to that effect has been included in a draft operational plan for the current year or for a previous year, and
>
> (b) notice of the fact that the proposal was included in the operational plan adopted by the council for that year has been published in a manner that the council is satisfied is likely to bring the notice to the attention of members of the public in the area."

49. In circumstances where the primary limitation on the expenditure on money collected by way of a charge for domestic waste management services – namely, that it not be used otherwise than for the purpose of those services – is expressed in peremptory terms and subject to a limited range of exceptions, the *LG Act* should be approached on the basis

that the expressed exceptions are a complete statement and other exceptions are excluded.[27]

50. As to whether particular expenditure can be characterised as being for the purpose for which the charge is collected – the "provision of domestic waste management services", I note the following:

    (a) "Domestic waste management services" encompass both the services comprising the periodic collection of domestic waste (as defined in the Dictionary) from parcels of land, and services that are "associated with" those services.

    (b) The concept of a "service" is not defined in the *LG Act*, and should take its ordinary meaning understood with regard to the context and purpose of the provisions in which it appears.[28] That context suggests the connotation of the supply of a need to the public.[29]

    (c) Relational terms such as "associated with" carry a broad connotation of connection or relationship between subject matters,[30] the ambit of which is ultimately to be determined from the context in which it appears.[31] In the present case, the words "associated with" periodic collection services appear to connote services bearing a functional connection with those services.

    (d) Reading the applicable provisions together, expenditure will need to be for the "purpose… of the provision of" those services.

    (e) The concept of the "purpose" of should be understood as the object or function for which action (in this case expenditure) is undertaken.

51. I turn to the characterisation of the expenditure described in your instructions.

52. While reasonable minds may differ and there is an element of impression involved, I am of the view that expenditure on advertising concerning, and the dissemination of information related to, domestic waste management is generally something on which such funds may be expended. It may, in a given case, involve an "associated" service insofar as it is a service involving the provision of information which informs beneficiaries of the periodic collection services and thereby assists in the efficacy of its provision. The functional linkage is an appreciably close one. Equally, it could be said funding such advertising or information provision is directed to the end of the provision of periodic collection of domestic waste on similar grounds.

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[27] Reflecting the principle *expressio unius est exclusio alterius*; an express reference to one matter indicates that other matters are excluded (see Pearce, *Statutory Interpretation in Australia* (9th Edition) at [4.43])

[28] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]

[29] Noting the relevant definition of the term in the *Macquarie Dictionary*, albeit as a guide to its range of grammatical meanings (cf *South Western Sydney Local Health District v Gould* [2018] NSWCA 69 at [77]-[79])

[30] See, for example, *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110

[31] See, for example, *Technical Products Pty Ltd v State Government Insurance Office* (1989) 167 CLR 45 at 47

53. Hence, while it will ultimately be a matter of understanding the role played by particular advertising or information, there are grounds for characterising that broad class of expenditure as permissible.

54. On the other hand, there is no ready basis for characterising expenditure for non-domestic waste management rebates as being within the purposive limitation identified by s. 409(2) of the *LG Act*. There is no apparent functional or subject matter-derived connection between that expenditure, on the one hand, and provision of services comprising the periodic collection of domestic waste, on the other.

55. That is not a complete answer to whether charges collected for domestic waste management services may be expended for the that purpose. There are two scenarios where the application of funds for that purpose is possible; namely, where:

    (a) it is expended on the basis of an internal loan within the council pending its expenditure on domestic waste management services, and the loan is approved by the Minister (see [48(d)], above); or

    (b) the charge for domestic waste management services under which the money was obtained has been discontinued, the purpose of that charge has been achieved or is no longer required to be achieved, *and* the procedural requirements of s. 410(2) have been satisfied (see [48(e)] above).

56. Whether either of these situations applies or applied in the context of particular expenditure on rebates will be a question of fact.

Karen Smith
**Crown Solicitor**