Appendix two – Advice from the Crown Solicitor

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ADVICE

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COUNCIL USE OF LOCAL INFRASTRUCTURE CONTRIBUTIONS

Executive summary

1. You seek my advice regarding the use of local infrastructure contributions collected by local councils under the *Environmental Planning and Assessment Act 1979* ("the *EPA Act*").

Question 1 – application of monies collected under ss. 7.11 and 7.12 of the EPA Act

2. Contributions received by a council under s. 7.11 of the *EPA Act* and levies imposed under s. 7.12 (collectively, "ss. 7.11 and 7.12 monies") must only be expended for the purpose for which the payment was required, subject to the ability to pool monies under s. 7.3(2).

3. These monies may nonetheless be invested pending expenditure. However, the following practices do not amount to an "investment":

   (a) expenditure on general operations, with a later, notional "return" to the pool of ss. 7.11 and 7.12 monies; and

   (b) "internal loans" within a council.

Question 2 – use of pooled contribution funds

4. While it is attended by considerable doubt, I prefer the view that:

   (a) section 7.11 and 7.12 funds which are "pooled" under s. 7.3(3) may only be expended on items identified in the works schedule in a relevant contributions plan;

   (b) where a contributions plan is silent as to whether pooled s. 7.11 and 7.12 monies may be pooled and applied progressively, such pooling is precluded;

   (c) where a contributions plan permits the pooling of ss. 7.11 and 7.12 monies, those monies may not be used to fund works under another contributions plan, unless this is permitted by a Ministerial direction made under s. 7.17 of the *EPA Act*.

Note

5. My advice on questions 1, 2(a) and 2(c) was previously provided on 16 July 2020. This advice consolidates that previous advice, along with my answer to the subsequently-raised question 2(c).

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Date: 5 August 2020

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202001931 D2020/606872

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Analysis

Question 1 – Whether councils permitted to use money collected under ss. 7.11 and 7.12 for purpose other than that for which it collected

6. The financial management of local councils is addressed in Pt 3 of Ch.13 of the *Local Government Act 1993* ("the *LG Act*"). Relevantly, for present purposes:

   (a) 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 under s. 411 (s. 409(1)).

   (b) Money and property held in the council's consolidated fund may be applied towards any purpose allowed by the *LG Act* or any other Act (s. 409(2)). However, money "that is subject to the provision of [the *LG Act*] or any other Act (being provisions that state that the money may be used only for a specific purpose) may only be used for that purpose" (s. 409(3)(b)).

   (c) A council may invest money that is not, for the time being, required by the council for any other purpose, but only in a form of investment notified by order of the Minister administering the *LG Act* published in the Gazette (s. 625(1) and (2)).

7. 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,[1] 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)).

8. Section 7.3 provides:

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

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> "**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."

9. The effect of s. 7.3 is that monetary contributions made under ss. 7.11 and 7.12 must be held and applied by a council for a public purpose, as required by the relevant provisions of the *EPA Act* (*Frevcourt v Wingecarribee Shore Council* (2005) 139 LGERA 140 at 150 per Beazley JA, Ipp and McColl JJA agreeing, considering the predecessor to ss. 7.13 and 93E). Such monies must therefore be spent for the purpose for which payment was required, subject to the provision for pooling in s. 7.3(2).

10. While these monies might be characterised as being held subject to what is sometimes termed a "trust for statutory purposes" (*Toadolla Co Pty Ltd v Dumaresq Shire Council* (1992) 78 LGERA 261 at 267 per Pearlman J; *Engadine Area Traffic v Sutherland County Council* (2004) 134 LGERA 75 at 83 per Pain J), they are not held subject to a trust as it is understood at general law (*Frevcourt* at 150). Moreover, even if the monies are held subject to the former species of "trust", I do not think that they are monies which must be held in a council's trust fund under s. 411 of the *LG Act*. Amongst other matters, and as observed in *Frevcourt* (at 148-150) and *Engadine* (at 82, 83), the *Environmental Planning and Assessment (Contributions Plans) Amendment Act 1991* expressly amended s. 94(3) of the *EPA Act*, predecessor to s. 7.3(2), to remove the qualification that such monies are held "in trust", for the purpose (disclosed in the second reading speech for the relevant Bill) of enabling councils to hold these monetary contributions in their general fund rather than in a separate trust.

11. It follows that a local council must hold ss. 7.11 and 7.12 monies in its consolidated fund subject to the limitations imposed by s. 7.3 of the *EPA Act*. The effect of these limitations is reflected in s. 409(3)(b) of the *LG Act*, which acknowledges that such money may only be "used" for those purposes, as opposed to any other purpose permitted by the *LG Act.*

12. It is nonetheless open to a local council to invest ss. 7.11 and 7.12 monies pending their application for a permitted purpose in accordance with s. 625 of the *LG Act*. The possibility of such investment is expressly acknowledged by s. 7.3(4) of the *EPA Act* (quoted above).

13. Each of the *LG Act* and the *EPA Act* draws a distinction between the "use" or "application" of funds, on the one hand, and "investment", on the other, without specifically defining the latter

concept. The term "invest" and related parts of speech in each relevant provision will therefore bear its ordinary and natural meaning, having regard to the context in which it appears and the purpose of those provisions (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384). In this regard, I can see no reason to treat the term as having different meanings in the *LG Act* and *EPA Act*, respectively.

14. The ordinary meaning of the terms "invest" and "investment" have been considered in a number of decided cases, typically concerning investments of trust monies. For example, in the oft-quoted decision *In re Wragg* [1919] 2 Ch 58, Lawrence J approached the meaning of those terms as follows (at 64-65):

> "Without attempting to give an exhaustive definition of the words 'invest' and 'investment', I think that the verb 'to invest' when used in an investment clause may safely be said to include as one of its meanings 'to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of income which it will yield...'"

15. Similarly, *In the Will of Sheriff, In the Will of Lawson* (1971) 2 NSWLR 438, Helsham J indicated (at 442) that:

> "Investment of trust funds will ordinarily mean the laying out of trust moneys in acquisition of property with the object or purpose of obtaining some return by way of income or pecuniary return for the benefit of those ultimately entitled. In its dictionary meaning the word "invest" in relation to its monetary context is, in the revised third edition of the Shorter Oxford Dictionary, given a primary meaning as follows: 'To employ (money) in the purchase of anything from which interest or profit is expected.' There is added a colloquial meaning: 'to lay out money.'"

16. Notwithstanding that ss. 7.11 and 7.12 monies are not held subject to a trust at general law, they are analogous in the sense of being held subject to a requirement for their disposition for particular purposes. As is the case with trusts, the holder's power of investment enables monies not required for the time being to be to be applied in way that both preserves those monies (the capital) on the account of the holder, while also generating a financial return to the pool of funds, which is itself referable to that application of money. The discussion of the ordinary meaning of that term in the cited cases is therefore instructive as to the meaning of the terms "invest" and "investment" as they appear in the *EPA Act* and the *LG Act*.

17. These cases do also suggest that investment does not have a fixed meaning, and may be more or less expansive depending on the context in which it is used. In terms of the meaning that the word "invest" may bear, the *Macquarie Dictionary* defines the term to mean, relevantly, "to put (money) to use, by purchase or expenditure, in something offering profitable returns", suggesting that "investments" may not be limited to the purchase of property and securities, but may also extend to the application of money for other income-baring purposes (such as deposit in an interest-bearing bank account).

18. Taking these matters into account, there appear to me to be four important features of "investing" and "investments" of money, for present purposes:

(a) Investment of money within the meaning of the *EPA Act* and the *LG Act* contemplates the application of capital for a purpose which generates a return in the form of income or some other increase in value of the amount.

(b) It involves the investor (that is, the council) holding some form of asset referable to the monies so invested. This distinguishes it from ordinary expenditure (in the sense of "use" or "application", as referred to in s. 7.3 of the *EPA Act* and s. 409 of the *LG Act*).

(c) The increase in value or income is referable to that asset.

(d) Investment is *by* the local council holding the money. It must therefore involve a return to the local council as the investor.

19. I now turn to the two specific examples of "investment" identified in your instructions:

(a) "Self-investment" in general operations earning a return

20. I understand that there are (or have been) several practices amongst local councils involving the "self-investment" of s. 7.11 and 7.12 funds. In general terms, I understand these to involve:

(a) expenditure of those funds on general council operations, such that monies are "temporarily" expended out of the pool of s. 7.11 and 7.12 funds held by the council in question, followed by

(b) a subsequent repayment of an equivalent amount of money to the pool of ss. 7.11 and 7.12 funds, along with an additional amount or amounts paid by the council in question as a "return" on the "self-investment".

21. I do not regard these practices as involving an "investment" of funds for the purposes of either the *LG Act* or the *EPA Act*. Relevantly:

(a) The council has expended the money, and does not retain the money or any asset referable to it.

(b) On my instructions, there is no income or increase in value that is directly referable to application of the money.

(c) There is no return to council in the form of income or profit generated by that capital. The "return" instead appears to be a mere accounting allocation of the council's money from one body of funds it holds to another (namely, the pool of ss. 7.11 and 7.12 monies which it holds under statute).

I do not think that it matters that, from an accounting or perspective, this arrangement might result in an increase in hypothecated ss. 7.11 and 7.12 monies. Investment involves a return to the investor – in this case, the council – and not merely a notional "return" to one particular set of accounts amongst several that the "investor" holds.

22. Assuming that the expenditure of funds is not for a purpose permitted by s. 7.3 of the *EPA Act*, such a practice instead involves an impermissible expenditure of funds which is precluded by that section.

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23. For completeness, I note that I have reviewed the Ministerial Investment Order of 12 January 2011 ("the Order") made under s. 625 of the *LG Act*. These practices do not fall within any of the five categories of investment that a council is able to undertake by virtue of that order.

(b) Internal loans for works and services

24. The concept of a council "lending" money to itself creates a conceptual difficulty, as a monetary loan ordinarily involves the provision of money by one person to another, with the possibility of a financial return to the lender. An "internal loan" of this kind by a council would instead appear to involve providing money from one body of council funds (ss. 7.11 and 7.12 monies) to a second for expenditure on works and services, on the premise that the "loan" would be repaid to the first body of funds (potentially with interest).

25. There is therefore no relevant return to the council from the application of the funds, such that it amounts to an investment of ss. 7.11 and 7.12 monies for the purposes of either the *EPA Act* or the *LG Act*. It is instead an expenditure of those funds, and impermissible unless done for a purpose identified in s. 7.3.

26. I nonetheless note that the Order permits councils to invest in "any debentures or securities issued by a council" (at para. (d)). I do not think that this addresses loans of the present kind. Relevantly:

    (a) I doubt, in principle, that an entity may issue a security or debenture to itself; and

    (b) in any event, I take para. (d) to refer to debentures and securities issued by *other* councils, consistent with the proposition that under s. 625 of the *LG Act*, an investment must involve a return to the investing party (which could not be the case with any "self-issued" securities or debentures).

Question 2 – Permitted use of pooled funds

27. It is convenient for me to answer sub-question (b) first.

(b) Position where council's contributions plan does not specifically authorise pooling of funds

28. Section 7.3(2) of the *EPA Act* (cited at [8] above) permits the pooling by a consent authority of ss. 7.11 contributions and 7.12 levies imposed for different purposes, and their "progressive application" for those purposes. Such pooling is "*subject to* the requirements of any relevant contributions plan or Ministerial direction [under Div.7.1]".

29. The term "subject to" is commonly used in legislative drafting to indicate which provision takes precedence in the event of a conflict (*C&J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905 at 911 per Megarry J; see also, *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513 at 580-1 per Gaudron J; and *Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430 at 433). On this orthodox construction, to say that a thing which may be done under one provision ("Provision A") is "subject to" another ("Provision B") does not

automatically mean that that thing may only be done under Provision A where Provision B permits or authorises it to be done. That requirement would need to arise elsewhere – for example, under the Division, the regulations, or a relevant contributions plan itself.

30. Neither Div. 7.1, nor regulations made under the *EPA Act*, expressly provide that a council (as a consent authority) may only pool ss. 7.11 or 7.12 funds when authorised to do so by a contributions plan. The Division nonetheless contemplates a contributions plan regulating Council collection and use of such contributions in several respects:

    (a) Per s. 7.13(1), a council may only impose a condition requiring a contribution under ss. 7.11 or 7.12 where it is of a kind "allowed by, and is determined in accordance with, a contributions plan".

    (b) In the case of s. 7.11, the contribution must be "a reasonable… contribution for the provision, extension of augmentation of the public amenities and public services concerned" (per subs. (2)). There is therefore an implied connection between the purpose of collection of funds, which may only occur, in the case of a council, under a contributions plan, and their application.

    (c) In the case of s. 7.12, the application of money levied under that section is expressly "subject to any relevant provisions of the contributions plan" (subs. (3)).

31. Division 7.1 therefore makes it clear that the ability of a council to impose contributions and levies will depend on what is permissible under a contributions plan, and that a contributions plan may affect their subsequent application by the council (including with respect to pooling). However, I do not think that these matters themselves rise, by implication, to making the authority of a contributions plan a prerequisite to subsequent pooling of those funds.

32. However, cl. 27 of the *Environmental Planning and Assessment Regulation 2000* ("the *EPA Regulation*") relevantly provides:

> "**27** **What particulars must a contributions plan contain?** (cf clause 26 of EP&A Regulation 1994)
>
> (1) A contributions plan must include particulars of the following—
>
> …
>
> (h) a map showing the specific public amenities and services proposed to be provided by the council, supported by a works schedule that contains an estimate of their cost and staging (whether by reference to dates or thresholds),
>
> (i) if the plan authorises monetary section 7.11 contributions or section 7.12 levies paid for different purposes to be pooled and applied progressively for those purposes, the priorities for the expenditure of the contributions or levies, particularised by reference to the works schedule.
>
> …
>
> (3) A contributions plan must not contain a provision that authorises monetary section 7.11 contributions or section 7.12 levies paid for different purposes to be pooled and applied progressively for those purposes unless the council is satisfied that the pooling and progressive application of the money paid will not unreasonably

> prejudice the carrying into effect, within a reasonable time, of the purposes for which the money was originally paid..."
>
> (My emphasis)

33. The underlined passages of cl. 27 accordingly assume that a contributions plan will address whether the pooling of levies and contributions is "authorised". In circumstances where:

    (a) a contributions plan is a prerequisite to a council requiring payment of contributions or levies in the first place,

    (b) the plan is to be prepared and approved "subject to an in accordance with the regulations" (s. 7.18(1)), and those regulations may make provision for and with respect to their subject matter (s. 7.18(3)), and

    (c) the regulations contemplate that a plan will provide that a plan "must" contain express reference to expenditure priorities for pooled funds, where authorised, and that a council will actively turn its mind to whether pooling is permitted before authorising it in the plan,

    it seems to me that a given plan would need to be interpreted in light of these requirements, on the basis that it is presumed to comply with them. Accordingly, were the plan to be silent as to whether pooling is permitted, the better interpretation would be that it impliedly prohibits pooling.

34. This view is nonetheless subject to considerable doubt, resting as it does on implications drawn from the way in which the regulations contemplate that a valid contributions plan will be drafted.

(a) Whether pooled funds restricted to financing items identified in the council's contributions plan

35. Nothing in Div. 7.1 expressly limits the expenditure of pooled funds to items identified in the council's contributions plan. Clause 27(1) of the *EPA Regulation* nonetheless requires a contributions plan to:

    (a) identify the specific amenities and services proposed by a council, supported by a works schedule that contains an estimate of their cost and staging (para. (h)); and

    (b) identify the "priorities" for expenditure of pooled ss. 7.11 and 7.12 monies, those priorities being particularised by reference to the works schedule (para. (i)).

36. It should be borne in mind that cl. 27 specifies the contents of a contribution plan, which would in turn regulate expenditure of pooled funds, rather than directly regulating the use of those funds. The paragraphs cited above do not expressly provide that a contributions plan must be drafted as an exhaustive statement of the works on which pooled monies may be spent or, more broadly, that pooled monies may only be expended on works identified in the plan. Furthermore, while a contributions plan must identify "priorities" for the expenditure of pooled funds, this language has an aspirational, rather than a directory, flavour.

37. Against this, the Regulation requires a degree of particularisation of works in a contributions plan, and, in turn, ties priorities to the application of funds to particular works. This is against a background whereby (for the reasons stated previously) the authority to pool funds must derive from a contributions plan itself, and pooling is an exception which allows ss. 7.11 and 7.12 monies to be used for purposes other than those for which they were received. These matters suggest that it may nonetheless be appropriate to read a contributions plan as an exhaustive statement of the matters on which pooled funds may be expended, on the basis that:

    (a) it is intended to closely regulate this practice, such that

    (b) "priorities" for expenditure of pooled funds tied to particular items in a works schedule connotes an exhaustive set of priorities.

38. These matters are finely balanced. However, in light of the need for expenditure of pooled funds to be particularised by reference to a works schedule, I lean towards the view a contributions plan should be construed on the basis that it limits expenditure of pooled funds to items particularised in the works schedule. This view is, again, subject to considerable doubt.

(c) Whether councils may pool funds across multiple contributions plans

39. You ask whether, where a council has more than one contributions plan in place, funds may be pooled such that they can be spent under different contributions plans. You have identified the example of a council which has different contributions plans for different geographical parts of a local government area.

40. The pooling of ss. 7.11 and 7.12 monies is subject to the requirements of "any relevant contributions plan" (per s. 7.3(2)). While for the reasons stated previously, a contributions plan is not a prerequisite to pooling of these monies, the fact that:

    (a) these monies cannot be levied in the absence of an applicable contributions plan;

    (b) that contributions plan should be read as then precluding their pooling, unless pooling is specifically authorised; and

    (c) where pooling is authorised, expenditure of pooled funds is limited to items particularised in the works schedule;

    does not appear to leave any room under a given contributions plan for pooled funds which it regulates to be spent under a second plan. This view is nonetheless attended by same caveats expressed in respect of questions 2(a) and (b).

41. The Minister administering the *EPA Act* may nonetheless direct a consent authority (including a council) as to "how money paid under [Div. 7.1] for different purposes in accordance with the conditions of development consents is to be pooled and applied progressively for those purposes" (s. 7.17(1)(g)). A consent authority must comply with the direction in accordance with its terms (s. 7.17(2)).

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42. Pooling of ss. 7.11 and 7.12 monies is subject to any relevant contributions plan *or* ministerial direction (per s. 7.3(2)). While the Division does not establish an express hierarchy in respect of the regulation of pooling, I nonetheless think it clear that as a contributions plan emanates from a council,2 and the council must itself comply with a direction concerning pooling, the terms of a direction concerning pooling would prevail over the contributions plan to the extent of any inconsistency.

43. Accordingly, were a direction given under s. 7.17 to require or authorise pooling of ss. 7.11 and 7.12 monies across contributions plans, such pooling would be permissible, notwithstanding the restrictions that would otherwise apply by virtue of the applicable contributions plan.

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2 Or councils - sees. 7.18(1).