



Central Coast Council
Supplementary Business Paper
Extraordinary Council Meeting
01 June 2021





COMMUNITY STRATEGIC PLAN 2018-2028

ONE – CENTRAL COAST IS THE COMMUNITY STRATEGIC PLAN (CSP) FOR THE CENTRAL COAST LOCAL GOVERNMENT AREA

ONE – CENTRAL COAST DEFINES THE COMMUNITY'S VISION AND IS OUR ROADMAP FOR THE FUTURE

ONE – CENTRAL COAST BRINGS TOGETHER EXTENSIVE COMMUNITY FEEDBACK TO SET KEY DIRECTIONS AND PRIORITIES

One - Central Coast will shape and inform Council's business activities, future plans, services and expenditure. Where actions are the responsibility of other organisations, sectors and groups to deliver, Council will work with key partners to advocate on behalf of our community.

Ultimately, every one of us who live on the Central Coast has an opportunity and responsibility to create a sustainable future from which we can all benefit. Working together we can make a difference.

RESPONSIBLE

WE'RE A RESPONSIBLE COUNCIL AND COMMUNITY, COMMITTED TO BUILDING STRONG RELATIONSHIPS AND DELIVERING A GREAT CUSTOMER EXPERIENCE IN ALL OUR INTERACTIONS. We value transparent and meaningful

communication and use community feedback to drive strategic decision making and expenditure, particularly around the delivery of essential infrastructure projects that increase the safety, liveability and sustainability of our region. We're taking a strategic approach to ensure our planning and development processes are sustainable and accessible and are designed to preserve the unique character of the coast.



Good governance and great partnerships

G2 Communicate openly and honestly with the community to build a relationship based on transparency, understanding, trust and respect

There are 5 themes, 12 focus areas and 48 objectives

COMMUNITY STRATEGIC PLAN 2018-2028 FRAMEWORK

All council reports contained within the Business Paper are now aligned to the Community Strategic Plan. Each report will contain a cross reference to a Theme, Focus Area and Objective within the framework of the Plan.



Theme

Focus Area

Objective

Meeting Notice

**The Extraordinary Council Meeting
of Central Coast Council
will be held Remotely - Online,
on Tuesday 1 June 2021 at 6.30pm,
for the transaction of the business listed below:**

2 REPORTS

2.1	Administrator's Minute - Council's response to Auditor General's Local Government Report.....	4
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David Farmer
Chief Executive Officer

AMENDED ITEM



Item No: 2.1
Title: Administrator's Minute - Council's response to Auditor General's Local Government Report
Department: Administrator

1 June 2021 Extraordinary Council Meeting

Reference: F2021/00034 - D14664708

Author: Rik Hart, Administrator

Recommendation

I formally move:

- 1 That Council notes the response to the Auditor General's findings in their Report on Local Government 2020, released on 27 May 2021.**
- 2 That Council supports the recommendation for Office of Local Government to clarify the legal framework relating to restrictions of water, sewerage and drainage funds.**
- 3 That Council commits to implement regular financial reporting, and places on the record future reporting will occur monthly and be presented at Council Meetings and online.**

Background

The Audit Office of New South Wales released its *Report on Local Government 2020* on 27 May 2020. The report outlines results of the local government sector council financial statement audits for the year ended 30 June 2020.

Unqualified audit opinions were issued for 127 councils, 9 county councils and 13 joint organisation audits in 2019-20. A qualified audit opinion was issued for Central Coast Council.

Councils were impacted by recent emergency events, including bushfires and the COVID-19 pandemic. The financial implications from these events varied across councils. Councils adapted systems, processes and controls to enable staff to work flexibly.

Auditor General's Report Highlights for Central Coast Council

A qualified opinion was issued for Central Coast Council (the Council) relating to two matters:

2.1 Administrator's Minute - Council's response to Auditor General's Local Government Report (contd)

- Council did not conduct the required revaluation to support the valuation of roads.
- Council disclosed a prior period error relating to restrictions of monies collected for its water, sewer, and drainage operations. Based on the NSW Crown Solicitor's advice, that treatment should be considered a change to a voluntary accounting policy, rather than a prior period error.

Considering the above, the Auditor General made the following recommendation:

The Office of Local Government should clarify the legal framework relating to restrictions of water, sewerage and drainage funds (restricted reserves) by either seeking an amendment to the relevant legislation or by issuing a policy instrument to remove ambiguity from the current framework.

Council's Response

It is my view that Council should take the opportunity to place on the record its response to the two matters raised in the Auditor General's qualified opinion.

There is no question Central Coast Council deserves a qualified report given our current financial situation. However, the Auditor Office, in its report made some factually incorrect statements and assumptions that in my opinion require correction and further context.

Revaluation

Council conducted an internal, desktop assessment of roads, bridges and footpaths to determine whether there had been any significant changes in fair value since the last formal revaluation as at 30 June 2015. This assessment was submitted to the Audit Office however they were not satisfied with the methodology that Council used. As a result, Council has commissioned formal external revaluation of its roads, bridges and footpaths to be included in the 30 June 2021 financial statements.

Restricted Funds

Up until the Council merger in May 2016, both Gosford City Council and Wyong Shire Council (who were both water authorities under the Water Management Act 2000) had historically accounted for unrestricted water and sewer cash as restricted as per the Local Government Act 1993.

Upon merger, the above accounting treatment was changed by creating a voluntary accounting policy reported in the 12 May 2016 financial statements for both Councils. This change was not supported by a formal accounting position paper or a legal opinion. In 2017 the audit of the merged entity was taken up by the Auditor General and this voluntary policy accounting treatment was continued but no legal opinion was sought until Council requested

a formal legal opinion in December 2020. This was then followed by the Auditor General obtaining a Crown Solicitor opinion in February 2021.

It is important to note that the change in voluntary policy treatment upon merger amounted to a reclassification of over \$88 million of water and sewer funds as unrestricted cash for council. This appears to be a material change to be made without a formal accounting position paper or legal opinion.

The notes to the 2016 financial statements identified that the result of the voluntary change in accounting policy was to improve the unrestricted current ratio, which is a key ratio determining whether the merged councils were 'Fit for the Future'.

Governance

Council detailed to the Audit Office that the voluntary accounting policy that led to the use of externally restricted water and sewer funds was not subject to rigorous internal diligence and did not rest on legal advice (whether internal or external).

There is no evidence that Council 'argued' for the change in accounting policy. For that reason, Council is surprised that, when taking over in 2017, the Audit Office did not more heavily scrutinise the governance decisions that underpinned that earlier decision of Council. Particularly since the audit opinion for 2016 offered a disclaimer of opinion because there was insufficient appropriate audit evidence to provide a basis for an audit opinion.

Furthermore as reported in the statement by management in the 2016 Financial Statements, Council's then CEO Rob Noble and responsible accounting officer Stephen Naven, were unable to fully attest to the completeness and accuracy of the balances contained within the income statement and classifications of equity within the financial reports. Moreover, a full analysis of externally restricted cash balances had not been undertaken to allow management to assert that the balance is correctly stated in accordance with the relevant legal obligation that gave rise to the required restriction.

Council has no record that a position paper supporting any change to the accounting policy was prepared or considered. Any such change to an accounting practice ordinarily requires Council and senior staff (Chief Financial Officer) to sign off, and this did not occur. The Chief Executive Officer at the time has confirmed to me that he was totally unaware of any such accounting policy had been put in place.

I am surprised that the Auditor General or the Audit Risk Improvement Committee (ARIC) did not pick this up, noting it occurred for four consecutive years.

Legal Professional Privilege

Council generally takes a conservative approach to the protection of legal professional privilege. However, now that the Audit Office report has been finalised, Council considers it

2.1 Administrator's Minute - Council's response to Auditor General's Local Government Report (contd)

appropriate to release its advice received from Clayton Utz, as a response to the Crown Solicitor's Office advice obtained by the Audit Office.

It is noteworthy that Clayton Utz does not consider there was any ambiguity to the legislative position, and that there was no legal basis for the accounting policy adopted by Council in relation to the Water and Sewer funds.

Based on this legal advice, and that there was no formal process for them noting the voluntary change policy, Council determined it was a prior period error.




Looking Forward

Until any legislative ambiguity is resolved Council will tie itself to the Clayton Utz advice regarding the treatment of water and sewer funds as restricted.

Office of Local Government has recommended that local councils no longer have to report on their unrestricted cash position, and I believe removing this requirement could result in more councils breaching their use of both internally and externally restricted funds. In my opinion, it would be sensible for all councils to report on a quarterly basis on their unrestricted and internally and externally restricted funds and that the Auditor General, as part of their audit of councils in the future audit the balance of those funds at year end.

The Central Coast Council will be reporting on a monthly basis Profit and Loss Statement and cashflows both via the internet and Council Meetings.

Attachments

- | | | |
|---|---|-----------|
| 1  | CU Advice - Letter to E Hock 12.04.21 | D14664631 |
| 2  | Mr Rob Noble Statement – Financial Statements 2016 | D14664636 |
| 3  | Advice from Crown Solicitor's Office - 13 February 2021 | D14664642 |

CLAYTON UTZ

Email

12 April 2021

Edward Hock
General Counsel
Central Coast Council
PO Box 20
WYONG NSW 2259

Edward.Hock@centralcoast.nsw.gov.au

Dear Edward

Central Coast Council: Sewer and Water Funds

We refer to the email from Emma Roberts dated 8 December 2020 and our subsequent discussions regarding advice received from PricewaterhouseCoopers (**PwC**) in 2016 that resulted in a voluntary change of accounting policy for the treatment of the water and sewer funds.

1. Background

- 1.1 We have been provided with a copy of an email dated 4 December 2020 from Natalia Cowley (acting CFO). By way of this email and our discussions, we are instructed that:
- (a) prior to May 2016, it was the practice of the former Gosford and Wyong Council's to exclude funds levied for water and sewer services from the consolidated unrestricted cash;
 - (b) in or around 2016, Gosford and Wyong Councils purportedly received advice from PwC that water and sewer funds were properly characterised as unrestricted cash;
 - (c) acting on this advice, Gosford and Wyong Councils implemented a voluntary change in accounting policies, noted in their respective financial statements for 2016, that reclassified sewer and water servicing charges as unrestricted cash;
 - (d) the PwC audit reports dated 30 June 2015 and 12 May 2016 for Wyong Council show an increase to the unrestricted cash balances from \$7 million in June 2015 to \$29 million in May 2016; and
 - (e) this voluntary accounting policy was carried over to the newly amalgamated Central Coast Council.
- 1.2 The *Administrator's 30 Day Interim Report* dated 2 December 2020 identifies that the "Water Fund Externally Restricted Reserves" and the "Sewer Fund Externally Restricted Reserves" were both understated by a total of \$129.5 million for 2018/19, giving the impression that this was instead unrestricted cash available to fund operating expenses.¹

¹ Page 5.

CLAYTON UTZ

Edward Hock, Central Coast Council

12 April 2021

2. Request for advice

- 2.1 In December 2020, we were asked to advise on whether water supply or sewerage service charges levied by a Council under the *Water Management Act 2003 (WM Act)* are restricted funds under the *Local Government Act 1993 (LG Act)* and whether the water and sewer funds are properly characterised as internally or externally restricted funds.
- 2.2 By email dated 7 April 2021, you provided us with a copy of the Crown Solicitors' Office Advice dated 13 February 2021 (**Crown Solicitors Advice**). Amongst other things, the Crown Solicitors Advice addressed whether money received by Council in its capacity as a water supply authority under the WM Act is considered "externally restricted funds" under section 409(3) of the LG Act.
- 2.3 You have asked us to consider the implications of the Crown Solicitors Advice on our draft advice.
- 2.4 Our final advice is set out below.

3. Summary advice

- 3.1 It is clear from our review of the legislative provisions, statutory guidelines and extrinsic materials that money received by Council as a result of water and sewerage service levies are externally restricted funds that must be held in an approved bank account or investment until they are used for the purpose for which they are levied.
- 3.2 There are only two exceptions to the reservation of water and sewer funds for the purpose for which they were levied:
- (a) where the Minister for Local Government has approved an internal loan; or
 - (b) where the Minister for Water, Property and Housing² has approved Council's use of a return on capital invested payment (dividend) of those funds for a non-restricted purpose.

4. Legislative framework

Water and sewerage service charges are externally restricted funds

- 4.1 Central Coast Council is a water supply authority under the WM Act.³
- 4.2 Water supply authorities are authorised to levy service charges for certain limited purposes set out in the exhaustive list at section 310 of the WM Act, in accordance with Division 6 of

² The *Best-Practice Management of Water Supply and Sewerage Guidelines* dated August 2007 refer to approval from the Minister for Energy and Utilities, which we understand to now be within the remit of the Minister for Water, Property and Housing.

³ City of Gosford Council and Wyong Council are water supply authorities pursuant to section 285 and Schedule 3 of the WM Act. References to former councils are taken to be to the new Central Coast Council (section 6 of the *Local Government (Council Amalgamations) Proclamation 2016*). Further, clause 117(2) of the *Water Management (General) Regulation 2018 (WM Regulation)* states that "Central Coast Council has and may exercise all of the functions of a water supply authority."

CLAYTON UTZ

Edward Hock, Central Coast Council

12 April 2021

Chapter 6 of the WM Act and Division 7 of Part 9 of the WM Regulation. Section 310 authorises levies for water and sewerage services.

- 4.3 Our view is that money levied under Chapter 6 of the WM Act is therefore money of the category described in section 409(3)(a) of the LG Act. It is not money received in trust, but must be held in the consolidated fund and may only be used for the purpose for which it is levied.

(2) Money and property held in the council's consolidated fund may be applied towards any purpose allowed by this or any other Act.

(3) However -

(a) money that has been received as a result of the levying of a special rate or charge may not be used otherwise than for the purpose for which the rate or charge was levied...

- 4.4 The terms "externally restricted funds", "internally restricted funds" and "unrestricted funds" are not defined by the legislation. "Externally restricted funds" are restricted in purpose by legislation, whereas "internally restricted funds" are unrestricted funds that are allocated to a certain purpose by Council resolution.
- 4.5 Council is obliged to maintain accounting records in accordance with the *Government Code of Accounting Practice and Financial Reporting* (clause 206 of the *Local Government (General) Regulation 2005*). The Code requires the disclosure of externally restricted, internally restricted and unrestricted funds and clearly identifies the sewer and water funds as externally restricted funds.

Holding externally restricted funds

- 4.6 Externally restricted funds, such as money received from water and sewerage levies, must be held in "an account with a bank, building society or credit union" or in an "authorised investment" (section 409(4)).
- 4.7 Authorised investments are detailed in the Minister's notices published in the Government Gazette under section 625.

Ministerial approval for limited ulterior uses

- 4.8 There are only two ways that Council can use externally restricted funds levied for sewerage or water services for purposes other than which they were levied:
- (a) by way of internal loan, with approval of the Minister for Local Government. The Minister must impose conditions as to the time for repayment and any interest to be paid (section 410(3) and (4)); or
 - (b) by use of any capital return of investment (dividends) earned on the water and sewerage funds, with approval of the Minister for Water, Property and Housing (section 409(5)-(8)).
- 4.9 The legislative mechanism for Councils, including a water supply authority under the WM Act, to deduct dividends earned on the water and sewerage funds to use at its discretion commenced on 1 November 2003.

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- 4.10 This mechanism is tightly regulated and requires compliance with the *Best-Practice Management of Water Supply and Sewerage Guidelines* published under section 409(6) in August 2007 by the then Department of Water and Energy,⁴ with the concurrence of the Minister for Local Government (**Guidelines**). Under the Guidelines, Council must submit statements of compliance, financial performance and independent audit reports to the Department before the Minister can grant approval to use the dividends for an ulterior purpose. The Minister can direct a Council to comply with the Guidelines.
- 4.11 The purpose of this mechanism and the Guidelines is to promote Councils to operate their water and sewerage services as sustainable businesses adhering to integrated water cycle management practices as outlined in the Guidelines.
- 4.12 The following extract of the second reading speech for the *Local Government Amendment (National Competition Policy Review) Bill 2003*, clearly confirms parliament's intention for the sewer and water funds to be treated as externally restricted funds by Council. It states:

*[Section 409] also imposes the restriction that money that has been received as a result of the levying of a special rate charge may not be used for a purpose other than the purpose for which it was levied. **This applies to charges including water supply and sewerage charges.** The Minister may, however, allow an "internal loan" if the money is not immediately required for the purpose for which it was received. **These restrictions are based on the responsibilities that a council has in its use of public funds; namely, to ensure accountability, that the community receives best value for its money, and the best possible management of public assets held in trust for the community...***

*Councils that operate category 1 businesses, in particular, are required by the National Competition Policy Agreement to include a return on capital invested; in other words, a dividend. This mirrors imperatives in the private sector. Category 1 businesses are those having an annual sales turnover or gross operating income of \$2 million or more. **There is some question as to whether the Act currently allows councils to deal with these requirements through the transfer of dividend payments between council funds, from restricted use funds to unrestricted use general funds.** There are conflicting interpretations of the scope of section 409, and legislative amendment is proposed to clarify the situation...*

*The bill also inserts subsections (5), (6) and (7) in section 409 **to define the proper relationship between restricted funds held under section 409 and a council's general funds**, including the circumstances in which dividends may be paid by the council business activity. Under the amendment contained in this bill, a council may choose to deduct from the money which is restricted in its use for the purpose of water supply or sewerage services, an amount in the nature of a dividend, and to apply that money to any purpose under the Act or any other Act; that is, the dividend payment becomes available for use at council's discretion. **However, it is critical to the operation of the provision that the transfer of such payments is regulated properly.** Therefore, the Minister for Energy and Utilities, with my concurrence, will publish guidelines relating to the management of the provision of water supply and sewerage services. A council must comply with those guidelines before any deduction from the restricted use funds is made, and must report its compliance by resolution of council in an open meeting. If a council is found not to have complied with those guidelines, the Minister for Energy and*

⁴ Now within the portfolio of the Department of Industry and Environment.

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Utilities may, with my concurrence, direct the council to comply with the guidelines before any further deduction is made. (Emphasis added).

5. Crown Solicitors Advice

- 5.1 We have considered the Crown Solicitors Advice and notwithstanding that advice, maintain the position that section 409(3)(a) applies to the funds Council levies under the WM Act.
- 5.2 The Crown Solicitor concludes that the above position is "not without doubt", arising from the contrary view "that section 409(3)(a) is confined to special rates and charges levied under the LG Act." Unlike section 409(3)(b), section 409(3)(a) does not include the express words "money that is subject to the provisions of this or any other Act."
- 5.3 In our view, any doubt on the application of section 409(3) to funds levied under the WM Act was clarified by the insertion of subsections (5) to (8) in 2003,⁵ which are expressly stated at section 409(8) "to extend to a council that is a water supply authority within the meaning of the WM Act." Section 409(5) to (8) would have no work to do for funds levied by water supply authority if the position was taken that sewer and water funds levied under the WM Act were not caught by subsections (3) and (4). The tight regulation of the use of dividends for ulterior purposes arises from the premise that the use of those funds is restricted in the first instance.
- 5.4 There is a large body of case law to support the proposition that an amending Act may reveal/declare the true meaning of an earlier Act, particularly where the words of an earlier statute are ambiguous, including:
- Where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute.⁶*
- 5.5 For completeness, we note that the Crown Solicitors Advice also considers whether funds levied by Council as a water supply authority under the WM Act fall within the scope of section 409(3)(b). The Crown Solicitor concludes that it did not locate "any provisions in the WM Act which expressly restrict the way that money collected under the WM Act can be spent."
- 5.6 Section 409(3)(b) states:
- money that is subject to the provisions of this or any other Act (**being provisions that state that the money may be used only for a specific purpose**) may be used only for that purpose. (Emphasis added).*
- 5.7 Our view is that Council is only authorised to levy funds for certain limited purposes under the WM Act and therefore, the use of those funds for an ulterior purpose would necessarily render the levying of those funds unlawful. In that way, the WM Act creates its own restriction on the use of funds levied for the purpose of sewer and water services, to those services only. We agree with the Crown Solicitor that the difficulty arises in the fact that the provisions in the WM Act do not explicitly state that the money may be used only for a specific purpose.

⁵ By way of the *Local Government Amendment (National Competition Policy Review) Act 2003*.

⁶ *Ormond Investment Co v Betts* [1928] AC 143, 164, as cited in *Deputy Federal Commissioner of Taxation (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610, 625-5 (Dixon, Evatt and McTiernan JJ).

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Edward Hock, Central Coast Council

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5.8 It is not necessary to resolve this difficulty, owing to our conclusion that sewer and water funds levied by Council under the WM Act fall under section 409(3)(a).

5.9 In conclusion, we agree with the Crown Solicitor that section 409(3)(a) should be read in its full generality, and find the matters raised supporting the contrary view unpersuasive. Our view is that the preferred interpretation is that money levied by Council under the WM Act is restricted cash under section 409(3)(a).

6. Conclusion

6.1 Contrary to the purported advice of PwC and the voluntary change in accounting policies that occurred in or around May 2016, the legislation, guidelines and extrinsic material are clear that water supply and sewer service charges levied under the WM Act are restricted funds under section 409(3) of the LG Act and are required to be held in approved bank accounts or investments and used only for the purposes for which they are levied, except where Ministerial approval is given for an internal loan or for the use of dividends.

6.2 Sewer and water funds are referred to within the Code as "externally restricted funds". We understand that this is because they are levied for a specific purpose under legislation and not as a result of a Council resolution.

Please contact us if you would like to discuss this advice with us.

Yours sincerely



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Our ref 224/14605/81010314

Financial Statements 2016

Statement

pursuant to s. 413(2)(c) of the Local Government Act 1993

The following balances presented in the General Purpose Financial Report for the former Gosford City Council for the period from 1 July 2015 to 12 May 2016 have been prepared in accordance with:

- the *Local Government Act 1993* and the *Local Government (General) Regulation 2005*;
- the Australian Accounting Standards and professional pronouncements;
- the *Local Government Code of Accounting Practice and Financial Reporting - Update No. 24(b)*
- Cash and Cash Equivalents
- Investments
- Receivables
- Inventories
- Other
- Infrastructure, property, plant and equipment
- Payables
- Borrowings
- Provisions

Management is able to make the above representation on the basis that each of the above summarised Balance Sheet balances (and their underlying general ledger trial balance accounts) have been reconciled to objective external evidence, and/or have been substantively verified by events after balance date, and/or have been independently valued.

Due to control issues identified during the preparation of the Financial Reports, (the ability of a limited number of officers and vendors to script changes, deletions or additions into the financial tables contained within the financial system without any audit control reporting or audit trail), Council is unable to fully attest to the completeness and accuracy of the balances contained within the Income Statement and classifications of equity within the Financial Reports. Further, any inaccuracy related to these balances is most likely to be related to classification of the income or expense items, or the validity of expenses. The Civica Authority Enterprise Software Suite for Local Government was implemented in 1994.

However, the absence of any apparent control reporting and capacity to detect unauthorised changes to financial records results in Council being unable to attest fully to the accuracy and completeness of the following balances:

- Individual Revenue accounts and Total Revenue balance
- Individual Expense accounts and Total Expense balance
- 2014-15 Opening Retained Earnings
- 2015-16 Closing Retained Earnings

The Externally Restricted Cash Balances as presented in Note 6(c) of the attached Financial Reports have been reconciled to the sub-ledger. However, a full analysis has not been undertaken on the transactions (revenue and expense) pertaining to each balance to allow management to assert that the balance is correctly stated in accordance with the relevant legal obligation that gave rise to the required restriction (and the resulting obligation to expend on the required purpose).

We are not aware of any other matter that would render these statements false or misleading in any way.

Signed in accordance with a resolution of Central Coast Council made on 13 March 2017

Mr Ian Reynolds
Administrator



Mr Rob Noble
Chief Executive Officer



Mr Stephen Naven
Responsible Accounting Officer

Attachment 2

Sensitive: Legal

ADVICE

**Crown
Solicitor's
Office**

LOCAL GOVERNMENT RATES AND CHARGES

Executive summary

Question 1 Special rates and charges

1. The reference in s. 409(3)(a) of the *Local Government Act 1993* ("the *LG Act*") to a "special rate or charge" is a reference to a special rate or a 'charge' and not to a special rate or a 'special charge'.
2. I have identified, in the body of this advice, sections of the *LG Act* which provide for the making of charges and special rates.

Question 2 Central Coast Council

3. Money received pursuant to provisions of the *Water Management Act 2000* ("the *WM Act*") is received by the Central Coast Council in its capacity as a water supply authority ("WSA") under that Act.
4. Section 409(3)(b) of the *LG Act* may apply to monies collected pursuant to the *WM Act*, if the conditions in that paragraph are satisfied. Although not without doubt, I prefer a view that s. 409(3)(a) of the *LG Act* could also apply to such monies.
5. As a general proposition, monies received by the Central Coast Council as a result of charges levied in its capacity as a water supply authority under the *WM Act* should be held in the council's consolidated fund as "externally restricted funds" to be used only for purposes associated with the exercise of the council's functions as a water supply authority under the *WM Act* or purposes authorised under the *LG Act* (such as the payment of dividends under s.409(5) of the *LG Act*).
6. I have not located any provisions in the *WM Act* which expressly restrict the way that money collected under that Act may be spent.

Background

7. You seek my advice as to interpretation of provisions of the *LG Act* and the *WM Act*. I understand these to be questions of general application, although Question 2 relates to Central Coast Council specifically and has arisen in the broader context of that Council being under administration (though I am instructed no further as to any specific facts or circumstances).

Prepared for: AUD018 Auditor General of NSW
Client ref: Liz Basey D2030574
Author: Sally Johnston/Karen Smith

Date: 13 February 2021

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Analysis

Question 1 Special rates and charges

1.1 Do the provisions in s. 409(3) of the LG Act extend to 'any charges' levied by the council or only to 'special charges' levied by a council?

8. Chapter 13 of the *LG Act* is titled "How are councils made accountable for their actions?" and Part 3 of that Chapter "Financial management". Division 1 ("Funds"), provides at s. 408 that a council must have two separate funds: a consolidated fund and a trust fund (as to which, see s. 411). Section 409 provides for the consolidated fund as follows:

"409 The consolidated fund

- (1) 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.
- (2) Money and property held in the council's consolidated fund may be applied towards any purpose allowed by this or any other Act.
- (3) However—
 - (a) money that has been received as a result of the levying of a special rate or charge may not be used otherwise than for the purpose for which the rate or charge was levied, and
 - (b) money that is subject to the provisions of this or any other Act (being provisions that state that the money may be used only for a specific purpose) may be used only for that purpose, and
 - (c) money that has been received from the Government or from a public authority by way of a specific purpose advance or grant may not, except with the consent of the Government or public authority, be used otherwise than for that specific purpose.
 - (d) (Repealed)
- (4) Pending its expenditure for the purpose for which it is held, money of the kind referred to in subsection (3)(a), (b) or (c) may not be held otherwise than in an account with a bank, building society or credit union or in an investment in which such money is, by or under this or any other Act, authorised to be invested.
- (5) Despite subsections (3) and (4), a council may—
 - (a) deduct, from the money required by subsection (3) to be used only for the specific purpose of water supply or sewerage services, an amount in the nature of a return on capital invested payment (dividend), and
 - (b) apply that amount towards any purpose allowed for the expenditure of money by councils by this Act or any other Act.
- (6) The Minister for Water, Property and Housing, with the concurrence of the Minister administering this Act—
 - (a) is to cause guidelines to be prepared and published in the Gazette relating to the management of the provision of water supply and sewerage services by councils, and
 - (b) may, if of the opinion that a council has not substantially complied with the guidelines, direct the council to comply with any particular aspect of the guidelines before making any further deduction under subsection (5).
- (7) Before making a deduction under subsection (5), a council must—
 - (a) comply with the guidelines published under subsection (6) and any direction given under that subsection, and

Sensitive: Legal

Sensitive: Legal



(b) indicate in an open meeting of the council that the guidelines and any such direction have been complied with in relation to the making of the deduction.

(8) Subsections (5)–(7) extend to a council that is a water supply authority within the meaning of the *Water Management Act 2000*.

(9) This section does not affect the requirements of the *Fire and Emergency Services Levy Act 2017* with respect to the payment of collection instalments to the Treasurer.

9. You instruct me that the provisions in subsection (3), which are the focus of your question for advice, are known colloquially as "externally restricted funds". The question for my advice is whether the reference in s. 409(3)(a) to a "special rate or charge" should be interpreted as 'a special rate or *(any)* charge' or as a 'special rate or *special* charge'.
10. The task of statutory construction is to determine the meaning of the text of the statute whilst, at the same time, having regard to its context and purpose: see generally *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14] and the *Interpretation Act 1987* s. 33. Section 409(3) addresses the use, or 'spending', of monies that are associated with a "specific purpose". The provisions of subparagraphs (a)–(c) are all concerned with the spending of monies for the purpose, also referred to as the specific purpose, for which they are received or kept.
11. In the context of that purpose, of restricting expenditure of monies to the purpose for which that money was received, the meaning of the reference to a "special rate" is clear, because of the nature of such a rate. A special rate is a rate for or towards the cost of any works, services, facilities or activities of the council, other than domestic waste management services: see s. 495. That work, service, facility or activity would constitute the purpose of the special rate for purposes of s. 409(3).
12. It is also clear, when considering the statutory scheme, that a "special rate" is a standalone concept in the *LG Act*. There are, throughout the *LG Act*, other references to "special rates": see especially s. 492, which provides that councils can make ordinary *or* special rates, and s. 495 ("making and levying of special rates"). Broadly speaking, ordinary rates are levied annually on rateable land by reference to the categorisation of that land (see generally ss. 493, 494 and Part 3 of Chapter 15); whilst (as noted) special rates go "for or towards meeting the cost of any works, services, facilities or activities provided or undertaken, or proposed to be provided or undertaken... other than domestic waste management services" (at s. 495).
13. By contrast, there is no reference to or concept of a 'special charge' elsewhere in the *LG Act*. Many provisions of the Act refer to 'charges'. These all relate to the provision of a service. For example, a charge may be made pursuant to s. 501 for services specified therein, which are to be provided by the council. The making and levying of annual charges for domestic waste management services, for stormwater management services and for coastal protection services are provided at ss. 496, 496A and 496B. Other provisions addressing charges are found generally in Chapter 15, especially in Part 3A (Charges), in Part 4 (Making of rates and charges) and in Part 5 (Levying of rates and charges). In particular, s. 539 is instructive in that it sets out the criteria relevant to determining the amount of a charge. Each of the criteria (albeit non exhaustive) referred to in s. 539(1) to which the council may have regard in setting the amount of the charge are referable to

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the "service" to which the charge relates: for example, the cost of providing the service, the area of land to which the service is provided, the frequency of the service etc. In that way, the section underscores that the charge must be linked directly to the provision of a service.

14. One instance of a 'charge' under the *LG Act* that less obviously evidences this link between provision of a service and a charge is s. 611. Section 611 provides for the making of a charge in relation to the possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure which pertains to a public place. In that instance, it is harder to identify a service and therefore the purpose for which that money is received, to employ the language of s. 409(3)(a). It seems to me arguable that the charge is for the purpose of the person's enjoyment of the benefit of possession, occupation or enjoyment of the rail etc. and therefore concerned with the maintenance or similar of that enjoyment. Alternatively, it may be an exceptional charge. Section 611(2) provides that the annual charge may be made, levied and recorded in accordance with the *LG Act* "as if it were a rate" but is not to be regarded as such for the purposes of calculating the council's general income. There are also specific and bespoke provisions about avenues of appeal for an aggrieved person to challenge the amount of the charge. To the extent that it might be necessary, I think that in the context of a large scheme such as the *LG Act*, the sui generis features of this section can set aside in settling a preferable construction of the terms of s. 409(3)(a).
15. I also note that at s. 543, there is a requirement that each form of rate and each charge have its own name. This section is organised in three subsections: for an "ordinary rate", a "special rate" and for "a charge". Again, that tells against the suggestion that there is a fourth category or a concept of a 'special charge' in the *LG Act*.
16. Considered against this background, it seems clear that a charge must relate to a service, and indeed be named and its amount determined by reference to that service. So too a special rate is for a work, service, facility or activity (see s. 495). By contrast, an ordinary rate is paid by reference to a parcel of rateable land. When so understood, s. 409(3)(a) is sensible when it is read on its plain terms as "a special rate" or a "charge". It makes sense to speak of both those types of council income by reference to their specific purpose. A charge under the *LG Act* is not a means of revenue raising for general purposes and appropriations. Rather, a charge under that Act is by its nature associated with a purpose. For this reason, it would be unnecessary to refer to a 'special charge', in the way that it is necessary to refer to a "special rate" which is associated with a purpose as distinct from an ordinary rate which is not associated with such a purpose.
17. I find further support for this construction in s. 503, which addresses the relationship between rates and charges. It provides that:

"503 What is the relationship between rates and charges?

 - (1) A charge may be made:
 - (a) in addition to an ordinary rate, and
 - (b) in addition to *or instead of* a special rate.

(emphasis added)

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18. In this section, the Act provides that a charge can be made "instead of" a special rate. Again, this suggests to me that the concept of a 'special charge' has no work to do in the legislative scheme of the *LG Act*, rather there are ordinary rates, special rates and charges, and it would be appropriate to speak of a "special rate" and a "charge" interchangeably, as occurs in s. 409(3)(a) and the phrase "special rate or charge".

19. Another consideration is that a construction of the words "special rate or charge" which promotes a harmonious interpretation of the same words and phrases throughout the legislation should be preferred: that is, words are assumed to be used consistently in the legislation (although this is readily rebutted, and, it should be noted, more frequently rebutted in large and extensively amended legislation such as the *LG Act*¹). This principle can extend to interpretation of a phrase or expression: see, for example, the discussion as to interpretation of the phrase "property offence" in *McMillan v Pryce* (1997) 115 NTR 19 at 23. I have therefore considered the use of the expression "special rate or charge" as it appears in other provisions of the *LG Act*.

20. For example, s. 410 also applies to money that has been received by a council as a result of the levying of a "special rate or charge". Section 410 provides that where a special rate or charge has been discontinued and the purpose achieved, or no longer required to be achieved, any remaining money may be used by the council for other purposes providing that certain conditions specified in subsection (2) are met. It also provides that money which is not yet required for the purpose for which it was received may be lent (by way of internal loan) for use by the council for another purpose, if that purpose is approved by the Minister: see subsections (3) and (4).

21. Indeed, in s. 410(1) the reference is to "a special rate or *a* charge" (emphasis added), though subsection (2) refers to the "special rate or charge". Whilst this is far from determinative, it does indicate that the phrase "special rate or charge" is used interchangeably with "special rate or *a* charge" in at least one other provision of the Act, and so is supportive of my preferred construction.

22. The other places in the *LG Act* where the expression "special rate or charge" appears are in Division 2 ("Special rates and charges relating to water supply, sewerage and drainage") of Part 5 ("Levying of rates and charges") of Chapter 15 ("How are councils financed?"): see especially ss. 551, 552, 553, 553A. The phrase also appears in s. 565 ("capital contributions instead of payment of special rates or charges"). I find nothing in these sections which suggests that my preferred construction should be displaced, and that it was intended that the reference was to some concept of a 'special charge'.

23. Finally, I note an additional question about the interpretation of s. 409(3)(a), whether the reference to "special rate or charge" should be construed as a reference to a special rate or charge raised pursuant to the *LG Act*, or pursuant to the *LG Act* or any other Act. I will return to this question at [2.2] below.

¹ See generally Pearce, D., *Statutory Interpretation in Australia* (9th ed, 2019), Reed International Books Australia at [4.9].

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1.2 If s. 409(3) is read as 'special charge', which sections of the LG Act provide for the making of special, as distinct from general, charges?

24. In light of my answer to question 1.1., this question does not arise.

1.3 If s. 409(3) is read as 'any charge', which sections of the LG Act provide for the making of such charges?

25. The making of rates and charges is addressed in Chapter 15 ("How are councils financed?"). Part 1 of that Chapter sets out general provisions about the making of rates and charges. In particular, s. 501 provides for the making of charges as follows:

"501 For what services can a council impose an annual charge?

(1) A council may make an annual charge for any of the following services provided, or proposed to be provided, on an annual basis by the council—

- water supply services
- sewerage services
- drainage services
- waste management services (other than domestic waste management services)
- any services prescribed by the regulations.

(2) A council may make a single charge for two or more such services.

(3) An annual charge may be levied on each parcel of rateable land for which the service is provided or proposed to be provided."

26. For the purposes of s. 501(1), the regulations currently prescribe emergency services within the area of the Blue Mountains City Council: see cl. 125 *Local Government (General) Regulation 2005*.

27. Other provisions which provide for the levying of charges are:

- (a) Sections 496, 496A and 496B which provide for the making of charges for domestic waste management services, stormwater management services and coastal protection services respectively,
- (b) Section 552 which provides for the making of charges relating to water supply, sewerage and drainage,
- (c) Section 553B(2) which provides for the making of a charge in relation to coastal protection services, and
- (d) Section 611 which provides for the making of a charge in relation to the possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure which pertains to a public place.

28. Other provisions relevant to the making of charges are in Part 3A (charges), Part 4 (making of rates and charges) and Part 5 (levying of rates and charges) of Chapter 15, which address matters such as the form of a charge, naming charges, and the priority of charges on land over other encumbrances on the land. Other parts of Chapter 15 address matters such as liability to pay charges and concessions for pensioners.

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1.4 Which sections of the LG Act provide for the making of 'special rates'?

29. As noted above, it is generally relevant to consider Chapter 15 as to the making of rates and charges. The making of special rates is provided for in s. 495, as follows:

"495 Making and levying of special rates

(1) A council may make a special rate for or towards meeting the cost of any works, services, facilities or activities provided or undertaken, or proposed to be provided or undertaken, by the council within the whole or any part of the council's area, other than domestic waste management services.

(2) The special rate is to be levied on such rateable land in the council's area as, in the council's opinion—

- (a) benefits or will benefit from the works, services, facilities or activities, or
- (b) contributes or will contribute to the need for the works, services, facilities or activities, or
- (c) has or will have access to the works, services, facilities or activities.

Note—

Under section 495, a council could, for example make and levy—

- different special rates for different kinds of works, services, facilities or activities
- different special rates for the same kind of work, service, facility or activity in different parts of its area
- different special rates for the same work in different parts of its area.

The amount of special rate will be determined according to the council's assessment of the relationship between the cost or estimated cost of the work, service, facility or activity and the degree of benefit afforded to the ratepayer by providing or undertaking the work, service, facility or activity."

30. Division 2 of Part 5 also provides for the making of special rates or charges relating to water supply, sewerage and drainage (see s. 552 for the making of the special rate).

Question 2 Central Coast Council

2.1 With regards to Central Coast Council established as a water supply authority under the WMA, who receives money collected under the WMA? It is the Central Coast Council (the Council) in its capacity as a water supply authority, or is it some other separate entity such as the Central Coast Council Water Supply Authority (CCCWSA)?

31. The *WMA Act* provides for water supply authorities in s. 285 and Schedule 3. Gosford City Council and Wyong Council are each named as a water supply authority ("WSA"): see Part 2 of Schedule 3.
32. As you are aware, but for sake of completeness, I note that in 2016, pursuant to s. 4 and Schedule 3 of the *Local Government (Council Amalgamations) Proclamation 2016*, Gosford City Council and Wyong Council were amalgamated and renamed Central Coast Council. Section 6 of the Proclamation provides:

"6 References to former areas and councils

A reference in any Act or instrument to:

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- (a) a former council whose former area is incorporated in one new area by this Proclamation, or to a predecessor of the former council, is taken to be a reference to the new council, or
 - (b) a former area that is incorporated in one new area by this Proclamation, or to a predecessor of the former area, is taken to be a reference to that part of the new area that consists of the former area or the predecessor area incorporated in the new area."
33. Section 53(1) of the *Interpretation Act* also applies where the name of a body or office is altered by statute. It provides:
- "(1) If an Act or statutory rule alters the name of a body or office:
 - (a) the body or office continues in existence under its new name so that its identity is not affected, and
 - (b) a reference in any Act or instrument, or in any other document, to the body or office under its former name shall, except in relation to matters that occurred before the alteration took place, be read as a reference to the body or office under its new name."
34. Accordingly, the reference to the former Gosford City and Wyong Councils in the *WM Act* is to be read as a reference to Central Coast Council, which retains its status as a WSA. See also the *Water Management (General) Regulation 2018* ("the *WM Regulation*"), at cl. 117(2), by which Central Coast Council has and may exercise all the functions of a WSA.
35. As such, the Central Coast Council is both a council and a WSA. The Central Coast Council is constituted under the *LG Act* (s. 219) and is given the status of a WSA under the *WM Act*. There is not a separate legal entity such as the 'Central Coast Council Water Supply Authority'. The *LG Act* regulates the operations of the Council as a council, whilst the *WM Act* regulates the operations of the Council as a WSA.
36. In relation to any specific function, operation or activity of the Central Coast Council it will be important to identify in what capacity it acts. For example, in levying a charge or rate, it will be a question of statutory construction whether it is a council or a WSA which has the relevant power to levy that charge or rate, and that in turn will determine whether the Central Coast Council may act in its capacity as a council or as a WSA in so doing. In some cases, such as in relation to drainage services or the construction of water management works, both the *LG Act* and *WM Act* may make provision. It will be necessary to construe those Acts to determine which provisions apply.
37. I have not located any provisions of the *WM Act* which provide a statutory basis for a council (in its capacity as a council) to raise monies. However, the *WM Act* does contain financing provisions for WSAs in Division 6, Part 2 ("Water supply authorities") of Chapter 5. A WSA may levy service charges within its area of operations for the services listed in s. 310(1) and impose other fees and charges in accordance with the regulations. There are extensive provisions about such service charges and other charges in Division 7 of Part 9 of the *WM Regulation*. None of these arise specifically for my advice. Rather, the premise of the question for my advice is merely that money is collected pursuant to the *WM Act*.

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38. It seems reasonable therefore to assume that money received pursuant to provisions of the *WM Act* will almost certainly be received by the Central Coast Council in its capacity as a water supply authority under that Act.

2.2 Following on from the answer to question 2.1 above, is the money received under the WMA considered 'externally restricted funds' under s. 409(3) of the LG Act?

39. Whilst not without doubt, I prefer the view that money received under the *WM Act* is within the scope of s. 409(3) of the *LG Act*. The Central Coast Council is, as noted above, a WSA under the *WM Act* and specifically it is a statutory body named in Part 2 of Schedule 3 of that Act as such. Per s. 287(2) of the *WM Act*, it therefore "becomes a water supply authority but still has its other functions". That is, it retains its character as a council under the *LG Act*.
40. In my view, monies received by the Central Coast Council pursuant to the *WM Act* are within scope of s. 409(1) and (2) of the *LG Act*, being "money and property received by a council", which is required to be held in the council's consolidated fund. I am supported in this view in relation to the Central Coast Council because the *WM Act* and *WM Regulation* do not make provision for what is to be done with charges levied, as in s. 409(1) *LG Act*. The question then arises whether subsection (3) also applies to such money. Subsection (3) is comprised of three paragraphs, as extracted above. Despite the use of the conjunctive 'and' between each paragraph, it is plain on their terms in my view that each of these paragraphs operates independently in the sense that each contains a condition and then a requirement which follows if that condition is met.
41. It does not appear that paragraph (c), being for "money that has been received from the Government or from a public authority by way of a specific purpose advance or grant..." arises on the terms of the question, and so I will set that aside, although I would be happy to consider it in more detail on your further instructions.
42. I also think it is clear that paragraph (b) could apply, being for money "that is subject to the provisions of this or any other Act...". "Any other Act" would encompass the *WM Act*, so that if provisions of the *WM Act* state that the money may be used only for a specific purpose, then s. 409(3)(b) would apply to provide that it may only be used for that purpose.
43. It is less clear whether paragraph (a) applies in relation to monies received pursuant to the *WM Act*. The question is whether "money that has been received as a result of the levying of a special rate or charge" means money levied under the *LG Act*, or money levied under that or any other Act. Although not without doubt, I prefer the view that s. 409(3)(a) should be read in its full generality and not confined as relating only to special rates or charges levied under the *LG Act*.
44. Although express reference is made in s. 409(2) to a purpose allowed "by this or any other Act" and similarly s. 409(3)(b) refers to money subject to provisions of "this or any other Act" (as noted above), I do not think that the omission of such express reference in s. 409(3)(a) should be taken to confine the operation of that provision only to the *LG Act*. In my view, s. 409(3)(a) is intended to apply to monies held in the consolidated fund by virtue of subsection (1), with both sections applying to monies "received" by the council. As noted above, in my view s. 409(1) applies to all

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money received by a council under the *LG Act* or any other Act, and s. 409(3)(a) should have a corresponding scope. Thus, both sections refer, in my view, to the same concept of money received under 'this or any other Act'.

45. I note that this interpretation should also, in my view, be applied to s. 410(1), which provides for alternative use of money raised by special rates or charges and refers, in almost identical language to s. 409(3)(a), to "money that has been received by a council as a result of the levying of a special rate or a charge". In my view, there would similarly be no reason to imply a restriction or to read down the full generality of this section to confine it to money levied under the *LG Act*. Indeed, I think s. 410(1) is intended to address the situation where monies received by a council in its consolidated account are no longer required for the purpose for which they were levied, and the purpose of that section in ensuring that monies are not left in the council's consolidated account unable to be used suggests that the section should be read in its full generality.
46. However, the contrary view that s. 409(3)(a) is confined to special rates and charges levied under the *LG Act*, is not without merit. In particular, I have considered that the concept of a "special rate" is a creature of the *LG Act* and a term with a clear meaning in the context of that Act specifically. Whilst this is not also true of the concept of a "charge", for which many provisions in other Acts provide, I am not sure that a charge in any other Act would necessarily be associated with use for a specific purpose, in the way that paragraph (a) assumes and which I consider applies in the context of the *LG Act*. For example, it may be difficult in some cases to ascertain the purpose for which a charge is levied under the *WM Act*. In my view, although again this is not without doubt, the purpose for which a charge was levied might be found in the provisions as to the basis for levying charges, the assessment of those charges and the functions of the WSA which the charge supports (see, for example, s. 310(2) of the *WM Act*). I have also considered whether other provisions of the *LG Act* relating to special rates or charges apply to charges levied under other Acts, and found these of little assistance, although some provisions expressly refer to charges levied under "this Act" or "this Act and the regulations": see e.g. s. 496B, which suggests that such a restriction should not be read into a provision such as s. 409(3)(a) which is silent on that point. Equally, but contrary, the lack of express reference to "any other Act" in s. 409(3)(a) can be instead seen as a deliberate omission, in light of the use of those words elsewhere in the section (see subsections (2), (3)(b), (4) and (5)(b)). Such equivocal and contrary indicators incline me not to restrict the full generality of s. 409(3)(a) on its own terms.
47. I have also considered the effect of cl. 223 of the *WM Regulation*, which provides:

"223 Central Coast Council

 - (1) The provisions of the *Local Government Act 1993* (and the regulations under that Act) that apply to the reduction and postponement of rates and charges under that Act apply to the reduction and postponement of service charges and other charges levied or imposed by Central Coast Council under the *Water Management Act 2000*.
 - (2) Subclause (1) does not extend to the requirement, under section 581 of the *Local Government Act 1993*, for councils to be reimbursed for a proportion of amounts written off under that Act."

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48. This provision has the effect of applying certain provisions of the *LG Act* to charges which are levied under the *WM Act*. For their part, the provisions of the *LG Act* referred to (Part 8 of Chapter 15) do not contain any express reference to their application under the *LG Act* or any other Act. In that way, it might be said to suggest that those provisions of the *LG Act* would not otherwise apply to charges levied under the *WM Act*, but for the operation of cl. 223 of the *WM Regulation*. However, in my view this provision is neither directly applicable nor persuasive enough indication to read the words of s. 409(3)(a) without their full generality.
49. Finally, I note that I have also considered the effect of s. 409(8), which was introduced in 2003, and provides:
- “(8) Subsections (5)–(7) extend to a council that is a water supply authority within the meaning of the *Water Management Act 2000*.”
50. In my view, subsection (8) proceeds from the position that s. 409(3) applies to money which has been received by a council in its capacity as a water supply authority, that is, received pursuant to provisions of the *WM Act*. Otherwise, in applying the exception in subsections (5)–(7), subsection (8) would have no work to do. Subsection (8) was introduced by the *Local Government Amendment (National Competition Policy Review) Bill 2003*, and in his second reading speech for that Bill Mr Tripodi (Parliamentary Secretary) said² –
- “There are conflicting interpretations of the scope of section 409, and legislative amendment is proposed to clarify the situation... [s. 409(3)(d) to be omitted]. The bill also proposes the insertion of subsections (5) to (7) into section 409 of the Act to define the proper relationship between restricted funds held under section 409 and a council's general funds, including the circumstances in which dividends may be paid by a council business activity.
- Under the amendments contained in the bill, a council may choose to deduct from the money which is restricted in its use for the purpose of water supply or sewerage services, an amount in the nature of a dividend, and to apply that money to any purpose under the Act or any other Act. That is, the dividend payment becomes available for use at council's discretion...
- A further amendment relates to the ability of councils which are water supply authorities under the *Water Management Act 2000* to also pay a dividend. The *Water Management Act* does not specifically constrain councils which are water supply authorities from paying a dividend. Nevertheless this ability needs to be put beyond doubt. The bill will specifically provide that the ability to pay a dividend as per the amendments to section 409(5) and the constraints on such a payment under section 409(6) and (7) also apply to local councils which are water supply authorities under the *Water Management Act*.”
51. The effect of this subsection therefore supports me in a view that s. 409(3) does apply to money received pursuant to the *WM Act*. However, it is not persuasive of whether s. 409(3) paragraphs (a) and (b) both apply. Given that in my view it is clear that (b) applies, I have not found subsection (8) particularly helpful in construing the proper scope of s. 409(3)(a).
52. On balance, I prefer the view that s. 409(3)(a) could apply to money received pursuant to the *WM Act*, as that section should be read in its full generality and with a corresponding scope to s. 409(1). Section 409(3)(b) would also apply if the conditions in that paragraph were satisfied.

² Hansard, Legislative Assembly, 28 May 2003.

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2.3 Are there any provisions in the WMA that restrict how the money collected under the WMA can be spent?

53. I have not located any express provisions in the *WM Act* which restrict the way that money collected under the *WM Act* can be spent, in a way which is comparable to the effect of s. 409(3) of the *LG Act*, for example.
54. I would observe, however, that the provisions by which money is collected under the *WM Act* are in themselves restrictive of the way such money can be used. For example, many of the services for which charges can be levied under s. 310(1) of the *WM Act* are services which have been declared to be "government monopoly services" under s. 4 of the *Independent Pricing and Regulatory Tribunal Act 1992* ("the *IPART Act*"): see the *Independent Pricing and Regulatory Tribunal (Water; Sewerage and Drainage Services) Order 1997*. Under s. 11 of the *IPART Act*, IPART has a standing reference to make determinations of the pricing for government monopoly services supplied by government agencies specified in Schedule 1, and Schedule 1 lists "water supply authorities" for that purpose.
55. Therefore, charges which relate to those government monopoly services will be subject to IPART determinations, by which a maximum price or a methodology for fixing the maximum price will be set. I understand these to be based generally on a cost-recovery model. In such a system, it is difficult to envisage that there is very much scope for discretion in the spending of monies collected pursuant to the *WM Act*, as any surplus in one year would presumably be offset against the price determination in the following year. In the absence of a specific question arising for consideration, I will merely observe that in that way, the whole legislative scheme as applying to the Central Coast Council in its capacity as a WSA acts to restrain and control the ways in which it raises money for its operations. I would be happy to provide advice on any further question if you so wish.

A handwritten signature in dark ink that reads 'Karen Smith'.

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