Reserve Trust Management – General advice

30 January 2017

To Debra Just, Willoughby City Council

From Debra Townsend, King & Wood Mallesons

1 Summary of advice

We are of the same view as expressed in our previous advice of 13 April 2015 regarding a councillors' personal liability in respect of management of Crown Reserves where the Council is the reserve trust manager. It is the Council as a legal entity separate to the Councillors which is the manager. The Council, a separate legal entity from both the Reserve Trust and the Councillors, is jointly and severally liable with the reserve trust for any claims made against a reserve trust it manages.

There are extremely limited circumstances in which a cause of action against individual councillors could arise in respect of the management of a Reserve Trust. The proposed amendments to the Crown lands legislation will not affect this position.

Where there is a conflict between the general interests of Council and the specific interests of a Reserve Trust, the Council may be unable to continue to function as reserve trust manager. If this is the case, the Council may need to consider resigning from the position of trust manager.

2 Can individual Councillors be held personally liable for acts of a Reserve Trust?

Individual councillors are not appointed as reserve trust managers and therefore are not personally liable under the Crown Lands Act 1989 ("**CLA89**") for actions of the Council performed in its capacity as manager of a Reserve Trust. The Council, a separate legal entity, is jointly and severally liable under the CLA89 for its actions performed in its capacity as trust manager.

Individual councillors cannot be held directly liable for decisions made or actions taken by the Council unless there is a mechanism to authorise liability to them outside of the CLA89. It is the Local Government Act 1993 ("**LG Act**") which governs the relationship between a council and its councillors. The only provisions which contemplate personal financial liability resting with Councillors are the surcharging provisions referred to in our April 2015 advice. For there to be any capacity for the Chief Executive of the Department of Local Government to surcharge councillors, there would have to have been:

- expenditure by the council in contravention of the LG Act or other law;
- a deficiency or loss by the Council as a consequence of the negligence or misconduct of the councillors; or
- a failure by the councillors to bring money into account which ought to have been brought into account.

As indicated in our April 2015 advice, those provisions have not been used so far as we can determine.

Section 731 of the LG Act provides some protection from liability for councillors where something is done by the Council in good faith for the purpose of executing the Council's statutory functions. "Good faith" in the context of this provision can be broadly defined as something done honestly.

The provision will not provide protection from liability where an action was undertaken in breach of the legislation under which the action was taken or if the council is not empowered by the relevant legislation to take the action complained of (***Board of Fire Commissioners (NSW) v Ardouin*** [1961] HCA 71; ***Hudson v Vanderheld*** (1968) 118 CLR 171; ***Garrett v Freeman*** [2006] NSWCCA 278).

It is important to bear in mind that there must first be some cause of action against individual Councillors before section 731 becomes at all relevant. Vague notions of "liability" cannot be usefully explored further in the absence of an identified cause of action. Councillors generally act by voting at meetings and not all Councillors vote in the same way. Our research has not revealed any instance of individual Councillors being held personally liable for actions undertaken by a Council, regardless of which way they voted.

3 Can the Council be held liable as a corporate entity for acts of a Reserve Trust?

When the Council acts in its capacity as trust manager, the Council is jointly and severally liable with that Reserve Trust for any liability incurred by the Reserve Trust (CLA89 s 121(2)). This means that a third party who has a claim against a Reserve Trust may pursue either the Trust itself or the Council for the whole amount of the claim. Accordingly, the Council may be financially liable for liabilities it incurs on behalf of the Reserve Trust. Although Council could seek to recover the amount of a claim from the Reserve Trust, Council would have to cover any shortfall if the Trust funds are not sufficient to cover the claim.

That being said, should there be a claim against the Council arising in its capacity as trust manager, we note that Council is responsible for taking out insurance with respect to reserve trust property and activities.

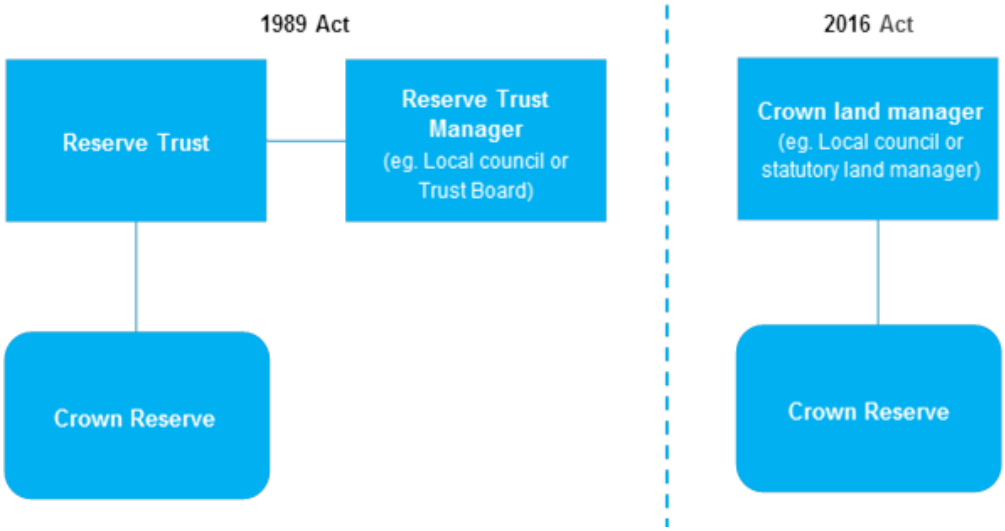
4 Will the liability of Council and Councillors be affected by amendments to the Crown lands legislation?

Proposed amendments to Crown lands legislation

The Crown Land Management Act 2016 (NSW) ("**2016 Act**") was assented to on 14 November 2016. The 2016 Act will commence on a day to be proclaimed. No firm date has been set for the commencement of the 2016 Act. However, the Department of Industry (Lands) has stated that it is targeting commencement in "early 2018".

Once commenced, the 2016 act will repeal the 1989 Act and aims to consolidate and modernise the legislation relating to the management of Crown land.

Under the 2016 Act, Crown reserves will be directly managed by "Crown land managers".



On commencement of the 2016 Act, all reserve trusts will be abolished. Where the reserve trust's affairs were managed by a local council, the council is taken to have been appointed as a Crown land manager of the former trust land. The reserve must then be managed in accordance with the provisions of the 2016 Act. Under the 2016 Act, if a Council is appointed as a manager of a Crown reserve it must manage the land as if it were community land under the Local Government Act 1979 (NSW).

Councils must ensure that a plan of management is adopted as soon as practicable within three years of the proclamation of the 2016 Act. This may be done by amending an existing plans of management to align with the 2016 Act or by adopting a new plan of management. If an existing plan is amended public hearings regarding the plan of management are not required.

Anticipated changes to Crown lands legislation and liability

Under the 2016 Act, all rights, liabilities and assets of any Reserve Trust managed by Council will be transferred to the Council. Although this will effect a transfer of liabilities into the Council's own name, there is no net change in exposure in the sense that Council is jointly and severally liable under the current legislation.

Information published by the Department of Industry in relation to the new legislation indicates a desire to more frequently vest land in councils. This will have potentially broad ranging impacts on those councils which agree to vesting since they will become the owner of the land as compared the current role as trust manager (for example, native title responsibility and loss of the capacity to resign from the trust manager position). We do not understand the Council to be currently seeking specific advice on these matters.

5 How should Council resolve a conflict between its general interests and the interests of a Reserve Trust?

Reserve Trusts are "*charged with the care, control and management*" of the relevant Reserve. The affairs of the Reserve Trust are to be managed by the reserve trust manager.

The legislation does not specifically deal with how conflicts between the Council's general interests and the interests of a Reserve Trust should be resolved. It is expected that in the majority of cases no such conflict will arise as given joint liability, there is likely to be a coincidence of interests.

The Reserve Trust Handbook (published by the Department of Primary Industries) offers some guidance on how such conflicts should be approached. The Handbook emphasises transparency and consultation (where appropriate):

> The reserve and its funds must be used and managed in the best interests of the reserve and the people of New South Wales, not solely in the interests of the major reserve users … or corporate trust manager …
>
> A trust board will from time to time need to consider matters which may particularly benefit a major user or organisation … or the activities of the corporate manager. Decisions on such matters should only be made when the … corporation has had the opportunity to consider all aspects for and against the proposal in detail. The reasons for adopting or not adopting the proposal should be recorded in the minutes of that decision and held in the reserve trust records. If a proposal is particularly contentious, the reserve trust manager should consult its local Crown Lands office before making a decision. The reserve trust manager should also consider whether broader consultation with the wider community, the local council or other interested parties is appropriate before coming to a decision …
>
> It should always be borne in mind that the proper maintenance and use of the reserve is the most important matter for the reserve trust manager.

In summary, the Council's general interests are not irrelevant to the making of decisions on behalf of a Reserve Trust, but those interests must be genuinely considered and balanced in the context of competing interests.

If no appropriate resolution to the conflict could be reached, the matter should be referred back to the Minister who could, for example, appoint a second separate reserve trust manager to deal with the matter where the conflict arose or could decide to remove the council from the position of reserve trust manager. If the Minister did not act, the council would retain the option of resigning its position as trust manager.

6 Resignation as Trust Manager

A reserve trust manager may vacate its office by writing to the Minister for Lands and Water (CLA89 s 96). No ministerial approval or acceptance is required. Resignation is a unilateral act by the Council.

The position is more restrictive under the 2016 Act, which provides that a Crown land manager may end its appointment by writing to the Minister (2016 Act s 3.12). However, under the new legislation a local council land manager cannot resign without the Minster's consent.

The CLA89 is silent on the implications of resigning as a trust manager. In our opinion, a former trust manager would retain responsibility for any liabilities accrued in the name of the reserve trust during their tenure as manager.

7 Limitations to advice

In preparing this advice we have sought to update Council in respect of general advice we gave in relation to reserve trusts in April 2015 in light of changes in legislation.

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