

Revenue Raising - Recent Challenges & Strategies

A presentation to the LGFP 2019 CFO and
Finance Managers Forum

by

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Queensland local governments, LGAQ and JLT (as manager of LGM Queensland) represent over 90% of our client base

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About Tim Fynes-Clinton

- Worked at King & Company since 1986
- Admitted as a solicitor in 1991
- Became partner (and executive partner) on 1 June 1998
- Specialise in: -
 - Industrial/Workplace Relations
 - Rating and revenue strategies;
 - Councillors roles and responsibilities;
 - Contracts and tendering strategies and
 - Governance issues for Councils, generally

Overview

- The Mt Isa water decision explained
- Electronic issue of rates notices
- Levying utility charges for land contained within community title schemes

The Mt Isa water decision explained

- The Mount Isa Irish Association Friendly Society Ltd v Mount Isa City Council [2017] QSC 316 – decision of Daubney J of the Supreme Court of Queensland (18 December 2017)
 - Council's utility charges for water declared invalid
- Mount Isa City Council v The Mount Isa Irish Association Friendly Society Ltd [2018] QCA 222 – decision of Sofronoff P, Gotterson JA and Philippides JA of the Qld Court of Appeal (18 September 2018)
 - Appeal against decision of Daubney J allowed, Council's utility charges for water confirmed as valid

The Mt Isa water decision explained

Council's water utility charge: -

- \$202.00 per unit
- Different numbers of units were assigned to property in accordance with a schedule of land classifications set out in the Revenue Statement
- 1 unit = 112.5 kilolitres of water
- Additional charge of \$2.60 per kilolitre for water consumed, in excess of the allocated allowance
- Ratepayer had two assessments, 446 units (= \$90,092) allocated to assessment 1 and 41 units (= \$8,282) allocated to assessment 2
- Each assessment had its own water meter

The Mt Isa water decision explained

Local Government Regulation, section 101

- (1) The utility charges for a water service must be charged—
 - (a) wholly according to the water used; or
 - (b) partly according to the water used, using a 2-part charge.

- (2) The utility charges for the water used must be worked out on the basis of—
 - (a) if the water used is not measured by a water meter—
... or

 - (b) if the water used is measured by a water meter—
 - (i) an amount for each unit, or part of a unit, of water that is used; or

 - (ii) a fixed amount plus an amount for each unit, or part of a unit, of water that is used over a stated quantity.

The Mt Isa water decision explained

Ratepayer's challenge (supported by Daubney J): -

- Charges were not in accordance with s 101(1)(a); that is, they were not “wholly according to the water used”
- The charge was not a 2-part charge (as referred to in section 101(1)(b)), as defined by section 41(4)
- The Council relies on section 101(2)(b)(ii) as the justification for the charge
- Section 101(2)(b)(ii) only applies to 2-part charges

The Mt Isa water decision explained

Court of Appeal's decision: -

- Section 101(2) is intended to complement section 101(1) by specifying how utility charges are to be levied according to the water used for both alternatives in s 101(1)
- In the case of charging wholly according to water used (section 101(1)(a)), all of the options provided by section 101(2) are available
- In the case of a 2-part charge (section 101(1)(b)), the section 101(2) options are only available to the variable component of the 2-part charge.

The Mt Isa water decision explained

Court of Appeal's decision (continued):-

- There is no conflict between section 101(1) and section 101(2), particularly section 101(2)(b)(ii).
- Section 101(2)(b)(ii) sets out one of two methods by which utility charges for water may be worked out when water usage is measured by a water meter. The fixed amount to which this provision refers is a fixed monetary amount which entitles the consumer to use up to a fixed volume of water.
- Section 101(2)(b)(ii) is not restricted to 2-part charges, only.

The Mt Isa water decision explained

As clarified by the Court of Appeal:-

- If water consumption is measured by a water meter, you can charge for water: -
 - Wholly according to water used (as measured by that meter) in accordance with section 101(2)(b); or
 - Partly with a fixed amount and partly with an amount for water used (i.e. a “2-part charge”), with the water used component being charged in accordance with section 101(2)(b), or

- If water consumption is not measured by a water meter, you should only charge for water wholly according to the water used - based on the estimated average water usage (section 101(2)(a)(i)) or another method that is appropriate to decide a consumer’s likely usage (section 101(2)(a)(ii)) .

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018 - Council would like to issue electronic rate notices to its ratepayers pursuant to section 108 of the Regulation.
- Questions:
 - Where one owner elects to receive an electronic rates notice, does Council still have to send a paper notice to the remaining owner?
 - If yes, can Council otherwise dispense of its responsibility to send a paper notice?

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018
- Response:
 - By section 106(b) of the Regulation, Council must give a rate notice to the entity who is recorded in Council's land record as the owner of the land on which the rates are levied.
 - Section 108(1) of the Regulation enables Council to give a person a rate notice electronically if, relevantly, the person has given consent to the notice being given electronically.
 - Section 127 of the Regulation provides that the current owner of the land is liable to pay rates and charges. If more than one person owns the land, all the owners are jointly and severally liable to pay the rates and charges.

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018
- Response (continued):
 - It is essential that each co-owner receives notice of the rates payable for Council to be able to pursue each one individually.
 - No problem arises where both co-owners have notified to Council a common address for delivery of notices.
 - Where the co-owners have notified different addresses for service, sending a rate notice to one co-owner does not constitute proper service on another co-owner for whom Council's land record notes a different address.

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018
- Response (continued):
 - In relation to consent to receive rates notices electronically ...
 - At common law, consent may be express or implied. However, consent may not be implied if an individual's intent is ambiguous or there is reasonable doubt about the individual's intention. Further, consent must be given voluntarily.

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018
- Response (continued):
 - In relation to consent (continued)
 - Section 11 of the Electronic Transactions (Queensland) Act 2001 (similar to section 108(1) of the Regulation): -

A person required to give information in writing under a State law (which includes giving a notice under such law) may give the information by an electronic communication provided that:

- (a) at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and
- (b) the person to whom the information is required to be given consents to the information being given by an electronic communication.

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018
- Response (continued):
 - In relation to consent (continued)
 - The Dictionary to the Electronic Transactions (Queensland) Act 2001 defines consent as including: -

“consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with.”

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018
- In summary:
 - Section 108(1) of the Regulation requires each owner to specifically, unequivocally and voluntarily consent to receiving rate notices electronically.
 - Council cannot dispense of its responsibility to send paper rate notices to an owner, unless that owner validly consents to receiving electronic rate notices under section 108 of the Regulation.

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018 lead to 8 further questions
 1. Does Legal Opinion LO14/18 apply consistently to all delivery modes of a rate notice (such as, BPay View and mailed notices)?
 2. How does Legal Opinion LO14/18 apply to a ratepayer's request to change an electronic communication address made via a telephone call to a Council?
 3. What are the specific legislative provisions which support Legal Opinion LO14/18 and the different modes of giving a rate notice?

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018 lead to 8 further questions (continued)
- 4. Does Legal Opinion LO14/18 affect other units of administration within a Council, for example, in Development Assessment, are development approvals to be sent to all owners?
- 5. In instances where a Council includes in a rate notice, for the purpose of recovery, amounts for unpaid invoices (e.g. costs incurred by the Council pursuant to Local Government Act 2009 (LGA) section 142, unpaid infrastructure charges, etc.), should the Council send counterpart invoices to all co owners individually prior to transferring the amount to the rate notice?

Electronic issue of rates notices

- LGAQ Legal Opinion 14/18 dated 21 November 2018 lead to 8 further questions (continued)
- 6. How do Councils negate or mitigate the risk of acting on instructions received from one co owner purporting to act on behalf of all co owners? What are the fundamental requirements to correctly providing a rate notice to owner/s?
- 7. If a Council only delivers rate notices electronically to one co owner without having express consent from all co owners, is the Council restricted from initiating legal action for overdue rates or charges under Local Government Regulation 2012 (LGR) section 134 against all co owners?

Electronic issue of rates notices

➤ LGAQ Legal Opinion 14/18 dated 21 November 2018 lead to 8 further questions (continued)

8. If a Council only delivers rate notices electronically to one co owner without having express consent from all co owners, is the Council restricted from initiating sale of land action under LGR sections 138 147 if rates and charges remain overdue for the qualifying period?

Electronic issue of rates notices

- LGAQ Legal Opinion 05/19 dated 28 March 2019 answered these 8 further questions
- Responses to questions 2 and 6 – Mitigating risk
 - Identifying requestor
 - Audio recording of telephone calls (with requestor's consent)
 - Obtaining independent evidence of co-owner's consent
 - Obtaining warranty from requestor that they have co-owner's consent

Levying utility charge for water for land contained with community title schemes

➤ Facts:

- CTS Scheme comprised of 311 lots + common property
- The CTS Scheme is served by a 150mm water connection at the scheme land boundary
- Consumption by individual lots within the scheme is not separately metered
- Instead, aggregate consumption of the scheme (i.e. all the lots and common property) measured by the 150mm connection water supply meter, is billed to the body corporate
- Body Corporate recovers a contribution from each lot owner

Levying utility charge for water for land contained with community title schemes

➤ Facts (continued):

- The CTS is not levied a 150mm water access charge
- Each of the 311 scheme lots is levied a 20mm access charge

Issue:

Can Council charge the body corporate of this CTS a community titles scheme a water access charge calculated by reference to the size of the meter measuring the bulk supply to the scheme land?

Levying utility charge for water for land contained with community title schemes

- A combination of sections 195 and 196 of the Body Corporate and Community Management Act 1997, and sections 41, 99, and 101 of the Local Government Regulation 2012, distils to the following propositions concerning water charging to community title schemes for which supply to individual lots and the common property is not measured by Council owned sub- meters: -
 - Council may levy each lot owner an access charge for supply to its lot;

Levying utility charge for water for land contained with community title schemes

- Propositions (continued): -
 - Council may not levy the body corporate an access charge for supply to the common property;
 - Absent an alternative arrangement with the body corporate, Council must levy each individual lot owner directly for a portion of the volumetric consumption measured by the bulk meter at the scheme land boundary;

Levying utility charge for water for land contained with community title schemes

➤ Propositions (continued): -

- If Council enters an alternative arrangement pursuant to section 196(4) of the Body Corporate and Community Management Act 1997:
 - Council must levy the body corporate the charge for all consumption, leaving the body corporate to recover contributions “internally” from its members; and
 - Council cannot levy consumption charges against the lot owners, i.e. it can't double dip.

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Time for
questions/discussion/ideas?